IN THE INDUSTRIAL COURT OF APPEAL

JUDGMENT

HELD AT MBABANE **Case No. 02/2018**

In the matter between:

THE ATTORNEY GENERAL **1st Appellant**

THE CHAIRMAN OF THE TEACHING SERVICE COMMISSION **2nd Appellant**

And

DUBE BONGIWE & OTHERS **Respondent**

Neutral Citation: *The Attorney General and other v Bongiwe Dube and others (02/2018) [2018] (SZHC 92 3rd May 2018)*

Coram: J Maphanga AJA
J. Magagula AJA
J. Maseko AJA

Date Heard: 23rd April 2018

Date Delivered: 3rd May 2018.

Summary: Appeal against an order registering a default judgment (award) of the Conciliation, Mediation and Arbitration Commission (CMAC); Appellant proceeding on grounds that the judgment debtor/ respondent lacking locus standi in iudicio and other grounds; Appellant having been joined as a necessary party by the Industrial Court in proceedings; certain fundamental irregularities in the proceedings; Order for joinder and ancillary orders of Industrial Court incompetent and unprocedural on account of the Court being functus officio; Assigned error rendering subsequent proceedings leading to the orders appealed against for second registration of the default award whilst the original orders standing also incompetent; Industrial Court judgment and Order ineffectual and set aside; Order of Industrial Court against the Appellants also set aside.

JUDGMENT

[1] This is an appeal against a judgment handed down by the Industrial Court on the 1st December 2017 registering a default award issued by the Conciliation, Mediation and Arbitration Commission (CMAC). At the heart of this appeal lies a dispute with a long tale. The merits or otherwise of this dispute are outlined purely by way

of providing a backdrop and to properly locate the issues herein and as such one cannot essential.

[2] The matter arises out of the cessation by a school, the Herman Grimeiner SOS High School (SOS or the school of a certain ancillary benefits or allowance 'in addition' to their regular salary to the present respondents. The Respondents are all teachers at the school, which until January 2006 was run as a privately controlled and managed by a not-for- profit institution (the Herman Grimeiner SOS Children Village). The Foundation established the school in 1986 as an educational institution to provide primary and secondary education for certain orphaned children on a charitable basis.

[3] From inception, save for the funding of the salary packages for the teachers, which was primary sourced from the Teaching Scheme Commission, the foundation was responsible for the school's financial and operational requirements which included the payments of additional benefits to the teachers paid in the form of an allowance or stipend.

[4] It is common cause that this arrangement endured until 2006 when it is common cause the school experienced funding challenges which were impacted by certain financial constraints. As a result the foundation represented by the SOS Children's Village Association (the entity under which the school and the children's village facilities were run), entered into a formal agreement with the Government of Swaziland represented by the Ministry of Education and the Teaching Service Commission in terms of which the latter took over the operations and management of the High School.

[5] It is also common cause that a core part of this agreement as set out in the terms of the memorandum was the assumption by Government of all the funding obligations for the operation of the school which would include a formal assumption of the financial obligations for the retention and remuneration of the teaching staff in terms of the Teaching Service Commission policies and regulations governing and regulating the employment of teachers.

[6] In actual fact the payment of basic salaries of the Respondent teachers had even prior to the new arrangement the under Agreement been *de facto* funded by Government on the understanding and arrangement that the Association would be responsible for augmenting the payment of additional allowance benefits by way of the payment of a stipend *in lieu* thereof. I take it that whilst this ad hoc arrangement was in place, contractually these teachers were under the control and management of the foundation and its school's division on whom the primary obligation for the payment of remuneration of the teachers lay; albeit assisted or partly aided by Government.

[7] With the advent of the memorandum of agreement and the taking over of the school operation, this arrangement took on a more formal basis constituting a legal assignment of that obligation to the government as an arms-length arrangement.

[8] It is common cause that with all these developments the Respondents were not privy to the Memorandum of Agreement between the Government and the SOS Children's Village and Schools association, nor were they consulted during the negotiation, formulation and finally the conclusion of its terms.

[9] A contentious twist in the tale arose from the fact that as one of the key terms of this agreement it was agreed between the Association and Government as per clause 25 of the agreement that upon the conclusion of the agreement the school SOS would cease to pay that additional monthly allowance stipend or remuneration to the teachers.

[10] So it is that with advent of the agreement, for a brief spell the school terminated the payment of the stipend allowance with the result that this caused a degree of disquiet and protest from the teachers who, were naturally extremely aggrieved by this decision and the loss of income it wrought as a consequence.

[11] It is common cause that due to the upheaval caused by the cessation of the benefit, the school's parents association subsequently undertook to reinstate and the resume the payment of the benefits from its fund. This situation would continue until January 2014 when it emerged that the school was unable to cope in funding this aspect of the budget and as a result of it again terminated the payments of the stipend.

[12] It is that termination of the allowance payments that gave rise to the reporting of a dispute to CMAC in terms of which a claim for,

a) reinstatement of the payment of the allowances; and
b) payment of arrear outstanding allowance covering the period from the cessation of the stipend was formally brought before the Commission,

was reported.

[13] In the event, the school was cited as the the party on whom liability for the payment of the contractual benefits was lain by the present Respondent.

[14] In the outcome on account of non-appearance or default by the school during the application for conciliation, the matter was referred to arbitration by the presiding officer in terms of Section 81 (7) (b) of the Industrial Relation Act.

[15] In the result a default award was entered against the school in terms of which CMAC determined the school liable in terms of Section 81(9) and (10) of the IRA and granted a default award as follows:

> ***"6.1. The Respondent (SOS High School) is ordered and directed to resuscitate the stipend with effect from January 2014.***
>
> ***6.2. The Respondent (SOS High School) is ordered to pay all accumulated stipend arrears to the Applicant on or before the 30th April 2015.***
>
> ***6.3. No order for costs is made"***

The Essential facts

[16] Having laid out the historical foundation of the matter I now turn to setting out the essential background facts giving rise to this appeal.

[17] Following the grant of the default award, the Respondents pressed ahead to seek the Registration of the award as an order of court before the Industrial Court on the 8th July 2015.

[18] The Court a quo granted the application and pronounced the award an order of the Industrial Court.

[19] What subsequently transpired is that the school launched an application for a rescission with the Executive Director of CMAC in terms of Section 81 (7) of the Industrial Relations Act as amended. Whilst that application was pending it lodged another separate application before the Industrial Court *inter alia*, to stay the execution to the order issued by the Court on the 8th July 2015 registering the default award as an order of Court pending the determination by CMAC of the rescission application.

[20] It is clear that the stay of execution was the primary object of the application before the Industrial Court. I shall not go into the incidental orders sought as ancillary relief before that court as these are not material. The Industrial Court considered and issued a ruling on the application by the school to stay the execution and in so doing issued a reasoned determination on the 20th October 2015.

[21] I do not have a comprehensive record of the proceedings to do with the application for stay of execution but it may be fair to surmise that the interim interdict staying the execution was duly granted by the court with an order or rule nisi.

[22] The ruling has been included in the 1st Appellants Bundle of authorities. Although in its opening statement the Honourable Court adverts to an application for rescission of that Court's order of the 8th July 2015, it is apparent that reference to a "rescission" here was inadvertent as the prayers in the Notice of Application before the Court do not include such relief.

[23] It is necessary to reiterate the prayers sought by the SOS School before the Court a quo in the applicant for the stay. These are set out at page 5 of the judgment of Nkonyane J. as follows:

> ***"1. Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as an urgent one.***
>
> ***2. Condoning the Applicant's non-compliance with the forms time limits and manner of service.[1]***
>
> ***3.***
>
> ***3.1. That an order issue to stay the execution of the Court Order issued by this Honourable Court on the 8th July 2015 pending the determination of the rescission application made to CMAC. An application for rescission of the default award has since been filed with the executive Director of CMAC (annexure A1).***
>
> ***3.2. That the order sought in prayer 3.1 above operate with all interim effect;***
>
> ***3.3.1. That a rule nisi be issued called upon the Respondent on a date to be appointment by this Honourable Court (Siz) to show cause why the following orders should not be made final.***

[1] Page 30 of Appellants paginated bundle of authorities.

3.3.2. Costs of suit if the application is opposed

3.3.3. Further and or alternative relief"

[24] As it happens the application was opposed by the Respondents presently who accordingly filed other answering affidavits contesting it and in the process the Applicants also filed their replying affidavits.

[25] A somewhat perplexing but pertinent development in the proceedings as gleaned from the ruling by the court *a quo* is the reference therein to a "point *in limine* which the court alludes to as having been raised by the Applicants in the proceedings for a stay.

[26] This is elaborated more fully at page 6 of the ruling by Nkonyane J. as follows (at paragraph 9)

> ***"In its founding affidavit the Applicants raised a point in limine; namely, non – joinder.***
>
> ***It was argued on behalf of the Applicant that the Respondents' application was fatally defective for failure to cite the relevant parties. It was argued that the Teaching Service Commission, the Ministry of Education and Training and the Attorney General's office should have been cited as they have a direct and substantial interest in the outcome of the matter".***

[27] That so – called point in limine must have preoccupied the mind of the court so much that it had an undue effect on and thus influenced the Court's regard and appreciation of the nature and purpose of the proceedings. It appears that this caused it to steer considerably from the course and correct bearings of the matter

in terms of the relief and essence of the application presented before the Honourable Court.

[28] In the final outcome, the court makes totally incongruous orders in relation to the relief prayed for in the Appellants Notice. The final orders appear at page 13 and the ruling of the Court as follows:

> ***"a) the point of law relating to non-joinder is upheld.***
> ***b) the rule nisi is hereby confirmed.***
> ***c) the Respondents are granted leave to file a fresh application within fourteen days after the matter is finalised at CMAC.***
> ***d) because of the existing employer/employee relationship the Court will make no order as to costs".***

[28] The remarkable aspects of the orders of the Court a quo in its ruling of the 20th October 2015 are the orders (a) and (c) as relate to:

1. the point of law as pertains to non-joinder; and
2. the order granting the Respondents 'leave to file an application within 14 days after the matter is finalised with CMAC'.

[29] What is remarkable with both these orders is that none of them appear in the prayers for relief before the court and the Respondent has never sought leave to file or institute a fresh application before the court.

[30] These orders warrant comment at this time and I turn to them momentarily.

Point in limine as to non-joinder

[31] This court is at a distinct disadvantage, what with the absence of a contextual record in understanding how the *point in limine* raised by the applicants in an application by the very applicant for an interlocutory interdict *pedente lite* arose and was placed before the court.

[32] Most importantly it is difficult to comprehend this materiality and relevance in the limited scope and object of the application – namely for a stay of execution bearing proceedings of an interlocutory nature.

[33] Perhaps some insight as to the perception of the court *a quo* of the matter may be gleamed from the description by the Honourable Court of the proceedings as 'an application for rescission' as indicated in the opening sentence of the ruling. Clearly an application for rescission it was NOT and in this regard the court was mistaken. I do however consider that the court *a quo* may have been correct in its perception that ultimately the Appellants presently had a direct and substantial interest in the matter concerning the merits of the claims brought before CMAC, however it seems to me to have fundamentally misdirected itself in entertaining the point of law concerning joinder as it was not seized with an application for joinder or non-joinder and as such the order issued upholding the point of law was not competent.

Leave to file a fresh application

[34] What confounds the orders of the Court *a quo* more is the order to the effect that the Respondents be and are granted leave to file a fresh application within 14 days after the matter is finalised with CMAC.

[35] As it is unclear from the order of the court as to what the application the learned judge had in mind, there was a degree of uncertainty as to the import of the order concided by both counsel. In the final analysis Mr. Mavuso, who appeared for the Respondent indicated during his submission before us that he interpreted the order to mean relaunching the Respondents the application for the registration of the order *de novo*; this time having 'joined' by citing and serving the Notice and Motion on the 1st and 2nd Applicants presently.

[36] Indeed this was the course in the proceedings that was pursued by the Respondents because on the 12th December 2016 the Respondents launched a fresh application before the Industrial Court in terms of which they once again moved the Court to have the default award issued by CMAC on the 30th March 2015 to be made an order of Court.

[37] For reasons that are not so clear that matter only came to be enrolled for argument before the Industrial Court on the 17th November 2017. The application eventually came to be heard by the Industrial Court presided over by His Lordship Magagula AJA.

[38] That application was opposed by the present appellants. In the judgment the learned Justice Magagula goes into and deals in detail with the merits of the application and thoroughly addresses the parties respective contentions. For reason that will be apparent shortly I find it unnecessary to traverse or comment on these issues here.

[39] The reason is that there are threshold procedural issues that emerge in the conduct of the matter leading to the application presenting before the court *a quo* and the judgment from which this appeal lies, which warrant closer scrutiny.

Res indicata

[40] Upon examination of the history of the matter before the court a quo it becomes crystal clear that the order of the court a quo of the 15th April 2018 in terms of which the CMAC default award (judgment) was made an order of court was never rescinded, set aside or even stayed and as such to date remains valid and effective. That order was not interfered with by the Industrial Court in the subsequent proceedings before Justice Nkonyane when the SOS High School sought the stay of the execution of the said order.

[41] Instead in our respectful view the court compounded the matter by issuing the order directing the affected teachers (the Respondents) to bring a fresh application as they did.

[42] The difficulty posed by that order was that if the court had in mind that the Respondents serve a new Notice of Motion for the registration of the CMAC award such an application was not competent as the court was functus officio; having already registered the CMAC award by way of its order issued on the 8th April 2015; which order still subsisted at the time of the second application.

[43] That in our view constituted a misdirection as the registration of the CMAC award was res judicata. As mentioned earlier that order of the Industrial Court had neither been rescinded or set aside by any court. When the matter came before Justice Nkonyane the Industrial Court did not alter or affect the order of the court and thus left it intact and potent. That rendered the subsequent orders of the court incompetent and ineffectual.

[44] The inherent anomalies in the proceedings were without doubt further transmitted into the proceedings and the judgment of the Industrial Court from which the present appeal lies. The error thus became assigned errors in law this rendered the subsequent proceedings to proceed on a fundamental error.

[45] In out further respectful view the entire proceedings before the Industrial Court in the second application for the registration of the CMAC award became incompetent and ineffectual.

[46] The original order of the court registering the default judgment issued by CMAC on the 30th April 2015 remains valid and effective and therefore stands. In effect the Industrial Court in issuing the second order as per the judgment of the court a quo of the 1st December 2017 was incompetent and for that reason it is liable to be set aside together with the costs award.

[47] By extension given the circumstances presently, stands to reason that there can be no competent appeal against that judgment and for that those technical reasons the present appeal fails.

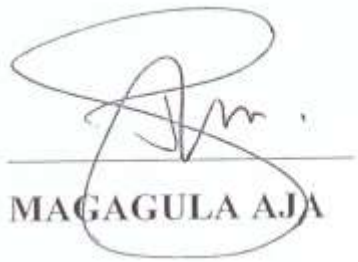
[48] In any event the question remains whether on the merit the grounds of appeal on which this matter has been brought have any merit. In any case in the context and circumstances of this matter it is unnecessary to venture thus far.

[49] The Appellants grievances or concerns could well have been properly ventilated in appropriate proceedings other than the limited preview and scope of an application for a mere registration of a default award as an order of court.

In the event this Court makes the following orders:

1) the Appeal fails
2) the orders of the Industrial Court of 1st December 2017 are set aside
3) I make no order as to costs.

MAPHANGA AJA



MAGAGULA AJA

MASEKO AJA

Appearances:

For the Appellants: Mr. K. Nxumalo

For the Respondents: Mr. T. Mavuso