IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

HELD AT MBABANE

Case No.13/2019

In the matter between:

THE ATTORNEY GENERAL

Applicant

And

BRIAN MAHOMMED

Respond

Neutral Citation: The Attorney General v. Brian Mahommed (13/2019) [2020] SZICA.....(8th May 2020)

Coram : Magagula, AJA

: Tshabalala, AJA

: Langwenya, AJA

Date Heard : 6th April 2020

: 8th May 2020

Summary : ***Industrial court procedure; whether court can deal with the question of prescription after issuance of certificate of unresolved dispute.***

Held: ***1. Prescription can only be raised before issuance of certificate of unresolved dispute.***

2. Thereafter it can only be raised through review proceedings, challenging issuance of the certificate of unresolved dispute.

[1] This is an appeal against a ruling of the Industrial court handed down on the 28th August 2019.

BACKGROUND

[2] On the 20th March 2019 the respondent herein (applicant in the ***court a quo***), launched an application in the Industrial Court seeking orders as follows:

> ***"1. Ordering the 1st Respondent to ensure that the applicant is appointed into a position remunerated under Grade C5.***
>
> ***2. Ordering and directing the Respondents to pay the applicant the difference between Grade C5 and B5 for a period of 8 years being the period the***

applicant acted in the post of communications officer.

3.Declaring the Respondent's actions of making the applicant act on a position for a period of 8 years either without remuneration and/ or confirmation as an unfair Labour Practice.

4.Cost of suit..."

The application was supported by a founding affidavit of the respondent in which he laid down the basis of the claim.

[3] In response to the application the Appellant raised points of law as follows:

(a) **Prescription:**

Under this point respondent contended that the dispute was reported to the Conciliation Mediation and Arbitration Commission (CMAC) on the 16th October 2018 whilst the cause of dispute arose on the 6th July 2015; way after the statutory period of 18 months had lapsed.

b) **Incompetent prayers**

Appellant maintains under this heard that the matter should have been taken to the High Court for review since the Civil Service Commission had ruled that it will

not promote the respondent to the post of Communications Officer. Appellant also maintains that the position into which respondent seeks to be appointed is already occupied and there are no other equivalent vacant posts. The appellant also contended that the respondent lacked qualifications for the post of Communications Officer.

c) **Non – Jointer**

Appellant contends that the current incumbent of the post of Communications Officer in the Ministry of Home Affairs should have been joined since respondent alleges that he is not qualified for the post.

d) **Disputes of fact**

It is disputed that the respondent herein acted for the position in question , if he did it is in dispute whether he acted on part time basis, or on arrangement.

[4] The ***court a quo*** dismissed the first three points and upheld the last one. The court then referred the matter to oral evidence for determination of the following issues;

"3.1 Whether or not the position of Ministerial Communications officer in the Ministry of Home Affairs was in existence as from the year 2010.

3.2 Whether or not the applicant held that position in an acting capacity continuously from 2010

sought either appointment to a position remunerated at Grade C5 or compensation for acting in a similar position for a period of 8 years.

[8] The court *a quo*'s view in this regard is however not supported by the Notice of Motion. In prayer 1 the respondent seeks an order directing the Civil Service Commission to appoint him into a position remunerated at Grade C5. In prayer 2 he seeks to be paid the difference between Grade B5 and C5 for a period of 8 years as acting allowance. In my view the dates in which the cause of action arose in respect of these two claims are different.

[9] Respondent's claim under prayer 1 of the Notice of Motion is based on his contention that he should have been appointed into the position of communications officer in the Ministry of Home Affairs pursuant to a recommendation made to the Civil Service Commission (CSC) by the Principal Secretary of the said Ministry. The CSC responded to the recommendation by memorandum dated 6th July 2015 and declined the recommendation on the basis that the responded did not qualify for the post.

[10] Thereafter the respondent himself lodged a written appeal with CSC. By letter dated 10th August 2015 the CSC dismissed the appeal. This was the final decision of the CSC and it was directed to the respondent. In my view that is the time when the cause of action in respect of prayer 1 arose. That is the

time when it became clear that he was not going to be appointed to the post of communications Officer. It is at this time that he should have sought to be appointed to another position remunerated at Grade C5. This claim was clearly filed way out of time. There is however the question of the stage at which this point should have been raised which is dealt with later on in this judgment.

[11] The claim in prayer 2 of the Notice of Motion is for acting allowance for a period of 8 years i.e from 2010 to 2018. There appears to be no dispute that the respondent was doing the work of a Communications Officer in the Ministry of Home Affairs up until August 2018 when one Mlandvo Dlamini was appointed into the post of communications Officer in the Ministry of Home Affairs. The respondent has attached to his replying affidavit correspondence showing that he was doing this work. In annexure "BM12" he was actually referred to as **"communications officer"** by the officer assigning him to act on the correspondence. It also does not appear to be in dispute that the respondent ceased to do the work of communications Officer in August 2018. This is the time he decided to claim an acting allowance for all the years he had been doing the work of a communications officer. There can be no doubt therefore that the cause of action in relation to prayer 2 arose in August 2018. The claim in this regard was therefore not out of time.

[12] However, in respect of both claims, Mr B. Gamedze who appeared for the respondent before this court contended that irrespective of whether a claim was filed timeously or out of time, the question of prescription could not be dealt with by the Industrial court once a certificate of unresolved dispute had been issued by CMAC. He maintained that the only way of raising prescription at that stage would be to challenge the certificate of unresolved dispute.

[13] In support of his contention Mr Gamedze referred the court to the case of JOHN KUNENE v. THE ATTORNEY GENERAL (02/16) [2016] SZICA 08 (14 October 2016). In this case MCB Maphalala CJ stated at paragraph 31:

> ***".....It is common cause that the respondent acquiesced and did not raise prescription as a preliminary objection during the conciliation process. This clearly paved the way for the issuance of a certificate of unresolved dispute. Similary the certificate was never challenged paving the way for the lodging of an application for determination of an unresolved dispute in terms of the Act."***

[14] From the foregoing it is clear that the question of prescription can only be raised during conciliation or in review proceedings challenging the issuance of the certificate. In the John Kunene case (Supra) the learned Chief Justice further stated at paragraph 35:

" From a reading of the Industrial Relations Act of 2000 as amended, it is apparent that preliminary objections relating to prescription of the cause of action should be raised during conciliation and form part of the record of proceedings. Once the certificate of unresolved dispute is issued, the aggrieved party acquires a right to adjudicate the dispute in court."

[15] In ***casu*** the point on prescription was not raised during conciliation; nor has the certificate been challenged through review proceedings. The point cannot therefore succeed. The point failed in the court *a quo* for different considerations. It must also fail in this court for the above stated reasons.

[16] Under the head of incompetent prayers the appellant contends that the respondent cannot be appointed to the position of communications officer in the Ministry of Home Affairs since that post has since been filled. It is also contended that the respondent lacks qualifications for the position of communication officer. The point that the matter ought to come to the High Court on review and not to the Industrial Court was not pursued by counsel before court.

[17] The above contentions are misdirected since the respondent does not seek to be appointed into the post of communications officer, let alone at the Ministry of Home Affairs. So this

ground was correctly dismissed by the court *a quo* and it also fails even in this court.

[18] Regarding the point on non – jointer of Mlandvo Dlamini, the court *a quo* correctly held that the orders sought will not affect the said individual in any manner. There is therefore reason for citing him in the proceedings. This point must therefore also fail.

[19] The Appellant further maintains that the disputes of fact which were found by the court a quo to exist were reasonably foreseeable. The court a quo found, and in my view correctly so, that the disputes of fact were not foreseeable. A recommendation for his appointment into the post had been made by the Principal Secretary in his Ministry. There was also a memorandum from the cabinet office supporting his appointment into the said position. There is no way he could foresee that his own Principal Secretary would turn around and dispute his eligibility for appointment into the same position. This point must accordingly also fail.

[20] The following order is accordingly made:

20.1 The appeal is dismissal with costs.

20.2 The matter is referred back to the Industrial Court to be dealt with as per directions given by that court.

MAGAGULA AJA

I agree

TSHABALALA AJA

I agree

LANGWENYA AJA