IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 221/2018

In the matter between:

MABONGA PHATHIZWE DLAMINI Applicant

And

FAMILY HEALTH INTERNATIONAL 360 Respondent

Neutral citation: Mabonga Phathizwe Dlamini v Family Health International 360 [2019] *SZIC 71* (16 September 2019)

Coram: **S. NSIBANDE JP**

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

Date Heard: 27 May 2019

Date Delivered: 16 September 2019

RULING

[1] The Applicant has applied to the President that the unresolved dispute between himself and the Respondent be referred to the Conciliation, Mediation and Arbitration Commission (CMAC) for arbitration. The application is opposed by the Respondent.

[2] The unresolved dispute arises out of the dismissal of the Applicant on 20th March 2018 which the Applicant alleges was substantively and procedurally unfair. In terms of the unresolved dispute Applicant claims payment for the remainder of his fixed term contract (being the 17 months) in the total sum of E439 480 (four hundred and thirty nine thousand four hundred and Eighty Emalangeni).

[3] The Applicant alleges his dismissal was substantively unfair because the Respondent presented no evidence to prove the charges he faced. Further, that the dismissal was procedurally unfair because a glaring splitting of charges was allowed by the Chairman of the disciplinary hearing.

[4] The Applicant applies that the dispute be referred to CMAC so that it is finalised expeditiously; that the issue involved is not novel; that CMAC has decided claims in excess of E400 000 before and that this matter therefore can be heard and finalised through arbitration; finally, that the matter ought to be

referred to arbitration because the Respondent, being donor funded can be shut down at any time depending on availability of donors, rendering the claim academic and nugatory.

[5] The Respondent opposed the application on the basis that the matter is not a straight forward one and that disputes of facts will arise in determining whether the Applicant was unfairly dismissed. Further that the amount claimed is substantial and the respondent stands to be prejudiced if the matter is referred to arbitration.

[6] In its heads of argument the Respondent states that the fact that it depends on donor funding does not mean it may close at any time and without following the necessary legal steps. In any event that it can shut down at any time is mere speculation.

[7] I have considered the pleadings in this matter together with the heads of argument filed by the parties. While the Applicant submits that unfair dismissal cases are not novel, two issues arise herein that may make this matter novel. The Applicant claims 17 months salary as the balance of his contract. In other words he says the Court should order that he be paid 17 months salary because those were the months left on his contract when he was dismissed. Firstly, it is disputed that Applicant had seventeen months left on his contract and whether in fact he had a fixed term contract to begin

with. A determination has to be made whether his contract was a fixed term one and of so what the fixed term was. Secondly and most importantly in my view, is the legal question that arises if it is found that the Applicant indeed had a fixed term contract and it had seventeen (17) months left to run. The question is whether the Applicant is entitled to claim for the balance of his contract, or is limited to the claims for unfair dismissed in terms of **Section 16 of the Industrial Relations Act 2000 as amended**. It seems to me that as may be a novel legal issue that requires determination by the Court.

[8] It appears to me that the factual inquiry into to whether there is a fixed term contract or not and the legal enquiry whether the claim is proper in terms of the Act) will have grave consequences. As Dunseith J.P said in **Sydney Mkhabela v Maxi-Prest Tyres Case No. 29/2005** *"Where the circumstances are grave, then fairness may dictate greater formality…"*

[9] The amount of E439 480.00 claimed is quite substantial. Despite the improvement in the quality of CMAC arbitrators **(See: The attitude of the Industrial Court to Labour Appeal Referrals – Nathi Gumede)**, it seems to me it would be more prejudicial to the Respondent to send it to compulsory arbitration from which there is no appeal on an adverse finding of facts in the face of the substantial claim against it. The consideration regarding the amount claimed will differ where one party is forced to go to arbitration against than where the parties agree to arbitration.

[10] I consider as speculation the assertion that the Respondent could close down at anytime because of failure to secure donors. No proper foundation is made for this submission. In any event all organisations whether NGO's or companies or partnership are susceptible to economic difficulties and could close down at anytime.

[11] In the circumstances of this matter I am unable to accede to the application. For the above reasons the application to refer the dispute to arbitrator under the auspices of CMAC is refused. Each party is to pay its own costs.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. M. Ndlangamandla
(MLK Ndlangamandla Attorneys)

For Respondent: Mr. M. Dlamini (Robinson Betram)