



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 290/2019

In the matter between:

DUMISA G. XABA & 40 OTHERS

Applicants

And

EAGLES NEST (PTY) LTD

Respondent

Neutral citation: Dumsani G. Xaba and 40 Others v Eagles Nest (Pty) Ltd
(290/2019) [2020] SZIC 116 (11 September 2020)

Coram: **NSIBANDE S. JP**

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

Heard: 26 November 2019

Delivered: 11 September 2020

JUDGMENT

[1] The applicant, Dumisa Gilbert Xaba and forty of his fellow employees have brought an application against their employer, Eagles Nest (Pty) Limited, the respondent herein, in terms of which they seek an order:

“(i) Declaring that all applicants employed by respondent and continued in employment services beyond three (3) months entered into tacit and indefinite contracts of employment with the respondent and the contract is valid, perpetually.

(ii) Declaring that the unilateral variation of applicants’ tacit and indefinite contracts of employment by respondent, by coercion or undue influencing, or forcing applicants to sign fixed term contracts, be and is hereby declared null and void ab initio.

(iii) Declaring that all fixed term period contracts given to applicants by respondent, after applicants entered into tacit and indefinite contracts of employment with respondent be and are hereby declared null and void ab initio.

(iv) Restraining and interdicting respondent from victimising or dismissing the applicants for joining the trade union, Swaziland Agricultural and Plantation Workers Union (SAPWU) or exercising their rights in terms of the Industrial Relations Act 2000, section 98 100 (1) (a) to (c), or exercising any right conferred by the Act or any law of the Kingdom of Swaziland, or Common Law or International Law.”

[2] The application was opposed by the respondent which filed its reply in which it raised two (2) points *in limine* and further pleaded over on the merits. The parties argued the points *in limine*.

[3] The first point *in limine* is raised in respect of the claims of applicants numbers 14 (Sethabile Dlamini), 15 (Florence Mkhabela); 16 (Warren Lokotfwako); 19 (Futhi Nxumalo); 39 (Mbuso Sibusiso Dlamini); 40 (Nkululeko Maseko); and 41 (Jabulane Zwane) and is that of *lis pendens*. Respondent submitted that the claims of the above mentioned applicants' should not be considered for the reason that:

3.1 Applicant No. 39 (Mbuso Sibusiso Dlamini) has instituted proceedings by filing an application for the determination of an unresolved dispute in this Court under case No. 92/2019;

3.2 Applicants number 14 (Sethabile Dlamini), 15 (Florence Mkhabela) and 19(Futhi Nxumalo), reported disputes before the Conciliation Mediation and Arbitration Commission (CMAC) complaining of unfair dismissal following the non-renewal of their employment contracts;

3.3 Applicant No. 40 has also reported dispute at CMAC in respect of unfair dismissal arising from the non-renewal of his contract of employment;

3.4 Applicant No. 41 (Jabulani Zwane) is in possession of a certificate of unresolved dispute in terms of a dispute he reported at CMAC regarding the non-renewal of his employment contract that he considered to be automatically unfair.

[4] The second point raised *in limine* is with regard to Applicant No. 30, Nathi Sizwe Thwala. The Respondent avers that this Applicant is no longer an employee of the Respondent and consequently cannot claim the declaratory orders and the interdict claimed by the other Applicants who remain the Respondents employees. It was argued that this particular Applicant terminated his employment relationship with the Respondent when he tendered his resignation; that the 30th Applicant must follow the

pre-emptory provisions of part VIII of the **Industrial Relations Act 2000 as amended** if he considers that he was subjected to an unfair labour practice during his employment with the respondent.

[5] **Lis Pendens**

Herbstein and Van Winsen in The Civil Practice of the High Courts and The Supreme Court of Appeal of South Africa Fourth Edition Juta at page 249 state that *“if an action is already pending between parties and the plaintiff brings another action against the same defendant on the same cause of action and in respect of the same subject matter whether in the same or in a different court, it is open to the defendant to take the objection of lis pendens, that is, that another action respecting the identical subject matter has already been instituted, whereupon the court in its discretion may stay the second action pending the decision of the first.”*

[6] With regard to the matter before Court, it is correct that the “cause of action” with regard to applicants numbers 14,15,19,40 and 41 who have either reported disputes at CMAC or have in their possession certificates of unresolved dispute, is the same before Court as it was before CMAC.

The Applicants complain of unfair dismissal in that their fixed term contracts were not renewed. They allege that terms of their employment were unilaterally and unlawfully varied from indefinite contracts to fixed term contracts.

The authorities are clear that the phrase “**cause of action**” is not used in a narrow sense. As long as the earlier case necessarily involves judicial determination of some question of law or issue of fact, that the later case may seek a determination on then the matter may be taken to be a determination of the same subject matter. *In casu*, the matters before CMAC and those in terms of which certificates of unresolved dispute have already been issued involve a determination of whether the fixed term contracts of the applicants were lawfully entered into. However, these applicants have not instituted proceedings against respondent in this regard in any Court. That they have either reported disputes and/or are in possession of certificates of unresolved dispute cannot be equated to the institution of proceedings. This is because at CMAC and at the stage these matters are in, there is no judicial determination that will be made on their claims. The matters stand to be conciliated on after which certificates of unresolved dispute will be issued, if the matters are not settled. It is only when the applicants institute proceedings in this Court or through arbitration at CMAC that it can be said that the matters are

pending because it is only at this stage that the applicants would have instituted proceedings for the determination of the legal issues they raise. In the circumstances, the point *in limine* as regards applicants number 14,15,19, 40 and 41 is dismissed.

[7] With regard to Applicant No.39, Mbuso Sibusiso Dlamini, it is common cause that he has instituted proceedings in this Court under Case No. 92/2019. The issues for determination in that matter involve a determination of whether the respondent unlawfully and unilaterally changed his indefinite employment contract to a fixed term contract. In our view a determination of that question would render the current application *res judicata*. Consequently, the matter is pending before this Court and the point raised *in limine* is upheld with regard to this particular applicant.

[8] **Jurisdiction**

The second point *in limine* is that Sizwe Thwala, applicant number 30, has *no locu standi* to participate in the current application because he resigned from the employ of the Respondent. The respondent's averment with regard to the resignation of this applicant is unchallenged following that the applicants did not replicate to the respondent's Replies. In the

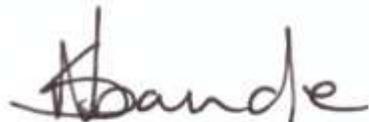
circumstances and regard being had to the documents filed by respondent, we accept that this applicant is no longer an employee of the respondent.

[9] While the applicants' representative is correct in saying that any ex-employee is entitled to bring legal action against his former employer even after resignation, the nature of the claim before court is a determining factor in deciding whether or not he can make such a claim. Applicant seeks three (3) declaratory orders and an interdict against the respondent. A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent. It would not ordinarily be appropriate where one is dealing with events that occurred in the past. Such events, if they give rise to a cause of action, would entitle the litigant to an appropriate remedy. (See in this regard **Nonzima Margaret Rumbu v Nokuzola Doris Mareka and 2 Others High Court of South Africa (ECL Division) Case No. 239/2016**.)

In casu, this applicant's right to the declaratory orders and the interdict would arise from his position as an employee of the respondent. Having terminated the employment relationship he would no longer have a right to such declaratory orders and interdict. The respondent could not

appropriately be interdicted from dismissing a person who is no longer its employee. If the applicant alleges that his resignation arose from the respondent's unfair labour practices he would be entitled to seek the appropriate remedy against the respondent even though he is no longer employed by the respondent. He cannot rightly seek the declaratory orders and interdict as if he remains employed by the respondent. The respondent's point *in limine* succeeds in this regard.

The Members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicants: Mr. S. B. Dlamini (Sibusiso B. Dlamini)

For the Respondent: Mr. K. J. Motsa (Robinson Bertram)

