



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 112/2019

In the matter between:

SEBENZILE GININDZA & ANOTHER

Applicants

And

SWAZILAND TOURISM AUTHORITY

Respondent

Neutral citation: Sebenzile Ginindza and Another v Swaziland Tourism Authority [2020] (112/2019) SZIC 148 (30 October 2020)

Coram: **NSIBANDE S. JP**

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

Heard: 09 July 2020

Delivered: 11 November 2020

JUDGMENT

- [1] On 29th March 2019 the applicants launched an application for the registration of memorandum of agreement between themselves and the respondent on 31st October 2017. In their notice of motion the applicants described the memorandum of agreement as having been signed at CMAC on 31st October 2017 under CMAC RE SWMZ 210/17.
- [2] The application was opposed by the respondent which raised the following preliminary points of law, without pleading over;
- 2.1 Non-joinder of the Public Enterprise Unit it being alleged that the Public Enterprise Unit was a necessary and/or interested party with a direct and substantial interest in the matter because the matter emanates from the implementation of its circulars No.4 of 2013 and No. 3 of 2016.
- [3] Sometime in September 2019, the applicants filed a notice to amend their notice of motion by deleting prayer 1 thereof and replacing it with the following:

“Registering the arbitration award issued by CMAC in favour of the applicants under CMAC Ref SWMB 448/17 on the 24th July 2018 as an order of the above Honourable Court.”

The respondent objected to the amendment sought on the grounds that it sought to introduce a new cause of action which was materially different from the case the respondent had initially been called to answer. The respondent further objected to the amendment on the ground that the applicants had not tendered the costs of the amendment.

[4] On 18th October the applicant filed an amended notice of motion and a Notice of joinder. The amended notice of motion was filed presumably because the applicants had not been served with the respondent’s notice to oppose same. From the documents before Court, it appears notice of objection to the amendment was served on attorneys who are not on record as representing the applicants.

[5] When the matter came up for argument the applicants’ attorney, Mr Mavuso argued that the filing of the notice of joinder which was served on the Public Enterprise Unit was not a concession that the

Unit ought to be joined. He argued that the Unit does not in fact have a direct and substantial interest in the matter before Court. In its heads, the applicants submitted that the respondent had accepted the arbitration award without challenging it and seeking to have it set aside and was therefore not entitled to raise the issue of joining the PEU to the proceedings when it had not done so before the arbitrator.

[6] The respondent argued that the PEU is a necessary party to the proceedings since applicants challenge PEU Circular No. 3 of 2016 and PEU Circular No. 4 of 2013; that the implementation and/or interpretation of any order of the Court would have certain consequences for the PEU and for that reason they ought to be joined as a necessary party to the proceedings.

[7] The arbitrator award sought to be made an order of Court does not require the interpretation of the aforementioned PEU circulars. According to the arbitration award the applicants are entitled to acting allowances having assumed duties of the Research and Statistics Manager and the Industry Services Manager. In order to establish what is due to the applicants the respondent is expected to develop a remuneration policy to incorporate the said posts and

have, in terms of the arbitration award, been ordered to do so. Once this exercise (of developing the remuneration policy) is finalised the respondent is then expected to remunerate the applicant as per the terms and conditions of service.

[8] In our view the PEU has no substantial interest in the right which is the subject matter of this litigation. From the arbitration award, it appears that the line ministry has approved the implementation of circular No.4 of 2016 and that all that remains is for the respondent to develop a new remuneration policy. That the circulars are mentioned in the arbitration award does not, in our view mean that they need to be interpreted nor that the PEU will be affected by the development of the remuneration policy to the extent that it has a substantial interest in the matter. This matter is distinguishable from that of **Swaziland Revenue Authority Staff Association v Swaziland Revenue Authority Industrial Court Case No. 195/2017** because this Court is not required to interpret any of the circulars mentioned nor does the determination of this matter hinge on policy considerations of the PEU. The respondent simply has to develop the remuneration policy for approval by the line minister after which the pay due to the applicant can be determined and paid

as per the terms and conditions of service. The point on the joinder of the PEU is therefore dismissed.

[9] **AMENDMENT**

As already stated above, the applicants sought to amend prayer 1 of the Notice of Motion. They sought to correct the prayer in which they referred to the arbitration award of 24th July 2018 as a memorandum of agreement of 31st October 2017 and further change the CMAC reference from SWMZ 210/17 to SWMB 448/17.

[10] The respondent appears to have no issue with the amendment itself and does not make any allegation that it is *mala fide*. It appears to be irked by the applicants' failure to tender costs of the amendment.

[11] The applicants are resistant to the issue of costs and point out that the respondent has failed to plead over and that therefore there would be no costs occasioned by the amendments; that in any event.

[12] The Court has a discretion in the area of amendments. This discretion must be exercised judiciously. This Court has, on

numerous occasion agreed with the sentiments of **Watermeyer J in Moolman v Estate Moolman and Another 1927 CPD 27 (a) page 29** that the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which can not be compensated by costs.”

- [13] As already mentioned above, the respondent does not oppose the amendment itself but seeks costs thereof. In terms of **Rule 28(7) of the High Court Rules** states that “*a party giving notice of amendment shall, unless the Court otherwise orders, be liable to pay the costs thereby occasioned to any other party.*”

In, “*otherwise so directing*” the Court must look at the objection to the amendment which must be reasonably and responsibly taken. In *casu*, the respondent has, in our view, no real grounds for objection to the amendment. The amendment is essentially to correct what is a typographic error. The applicant’s refer to the correct document in their founding affidavit and further attach the correct award. In our view the objection to the amendment was unreasonable and unnecessary. In any event according to **Herbstein and Van Winsen**

4th Edition The Civil Practice of the Supreme Court of South Africa at P526, the fact that the opposition was reasonable does not necessarily entitle the opposing party to an order of costs... the discretion of the Court to make an order that is fair to all in the circumstances is unfettered.

[14] In the circumstances we make the following order:

- 1. The point of law with regard to joined of the Public Enterprise Unit is dismissed.**
- 2. The amendment is allowed.**
- 3. The applicants are to file and deliver the amended particulars of claim within 5 days of this order.**
- 4. The Respondent is to file its answering affidavit, if any within 7 days after delivery of the amended notice of motion.**
- 5. Each party is to pay its own costs.**

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT OF ESWATINI

For the Applicant: Mr T. Mavuso (Motsa Mavuso Attorneys)

For the Respondent: Mr Z. Shabangu (Magagula Hlophe Attorneys)