(6)

IN THE HIGH COURT OF SWAZILAND

CASE NO.624/00

In the matter between:

BEN M. ZWANE **Applicant**

VS

THE DEPUTY PRIME MINISTER **1st Applicant**
THE SWAZILAND GOVERNMENT **2nd Applicant**

CORAM **: MASUKU J.**

FOR APPLICANT **: MR P.R. DUNSEITH**
FOR RESPONDENT **: MS M. VAN DER WALT**

RULING ON POINTS *IN LIMINE*
24/03/00

In this application, which is brought under a Certificate of Urgency, the Applicant prays for *inter alia:-*

1. Waiving the usual requirements of the Rules of Court regarding notice and service of application in view of the urgency.

2. That the interdiction of the Applicant from his office of Clerk of Parliament by the Deputy Prime Minister be set aside.

3. Reinstating the Applicant to his post of Clerk to Parliament with immediate effect.

4. That the Applicant be paid his full salary.

5. Interdicting and restraining the Respondents from any further actions preventing the Applicant from executing his duties as Clerk of Parliament.

6. Declaring the conduct of the Respondents towards the Applicant as amounting to an abuse of power.

7. Costs on an attorney/client scale, but only in the event of this application being opposed.

The Applicant, in his founding Affidavit deposed as follows:-

That he was employed by the Civil Service Board of the Swaziland Government as Clerk of Parliament. On the 8th February, 1999, he was interdicted from performance of his duties by the Prime Minister and certain allegations of misconduct were levelled against him and in respect of which he was to exculpate himself. The Applicant challenged this interdiction before this Honourable Court and on the 25th January, 2000, the learned Chief Justice set aside the interdiction and granted further ancillary relief therein prayed for. This decision has been appealed against.

On the 21st February, 2000, the Respondent then issued a fresh interdiction on the Applicant with immediate effect and as a consequence whereof, the Applicant was to receive 50% of his monthly salary. By letter dated 21st February, 2000, the 1st Respondent preferred certain charges against the Applicant against which he must again exculpate himself. It is this interdiction that the Applicant intends to have set aside by this Court.

In opposition to the Orders prayed for by the Applicant, the Respondents, duly represented by the Attorney-General, raised the following main points of law, on the basis of which this Court was moved to dismiss the application with costs on the scale of attorney and own client, namely

(i) Jurisdiction

(a) That the Applicant's Founding Affidavit lacks the essential allegation of

jurisdiction and/or a set of facts that indicate that this Court has jurisdiction to entertain this application.

(b) That this Court does not have jurisdiction to hear and determine this matter, due regard being had to the provisions of the Industrial Relations Act, 1 of 1996.

(ii) Notice of Motion A Nullity

It was further argued that the Applicant used Form 2 and not Form 3 of the Rules of Court and that no condonation for the use of the wrong form was canvassed, in view of the fact that the Applicant only required the Court to waive requirements as only relate to notice and service.

(iii) That matter is not urgent in that the Founding Affidavit does not fully address the requirements of Rule 6 25 (a) and (b) of the Rules of Court.

The Applicant filed his heads of argument in which it challenged the Respondent's submissions referred to above. I shall now deal with the above points of law as raised by the Respondents *ad seriatim.* The others are in my view minor and need not be referred to.

(i) Jurisdiction

(a) Failure to make allegations on jurisdiction in Founding Affidavit

It was argued by the Applicant that whether or not the Court has jurisdiction is a conclusion of law. Mr Dunseith argued that it is unnecessary to plead conclusions of law but the Court can determine from the facts set out in the Founding Affidavit and the relief prayed for that it has jurisdiction to entertain the application. In support of this argument the Court was referred to Herbstein and Van Winsen " The Practice of the Supreme Court of South Africa, 4th Edition, Page 55.

The Respondents referred the Court to the case of TITTY'S BAR AND BOTTLE STORE (PTY) LTD AND OTHERS 1974 (4) SA 362 in support of their contention. This case

appears however to deal with striking out allegations appearing in Replying Affidavits which should properly have been included in the Founding Affidavit and deals, in particular, with a failure by the Applicant to establish his *locus standi* in *judicio.* It does not deal with the question of jurisdiction as raised in this matter and is therefore irrelevant in my view.

It is common cause that no facts or allegations have been made by the Applicant to show that the Court has jurisdiction. It is not even stated where the Applicant resides. Must all this be left to the Court to make an assumption that it has jurisdiction?

Hebstein & Van Winsen (supra), at page 364 state that founding affidavits must contain certain averments and that it is necessary to clearly state, amongst others that the Court has jurisdiction. On the other hand, Erasmus, "Superior Court Practice" at B – 37 to 38, states as follows:-

> *"The facts must be set out simply, clearly and in chronological sequence, and without argumentative matter in the affidavits which are to support the notice of motion. The statement of facts must contain the following information:*
>
> *(i)* ...
> *(ii) the facts indicating that the court has jurisdiction".*

The legal position stipulated by the learned authors above also finds support in Harms, in his works entitled "Civil Procedure in the Supreme Court", at page 79 and the cases therein cited. There, the learned author states as follows: -

> *"In any summons or founding affidavit, the necessary factual allegations relating to jurisdiction must be made. It is not sufficient to state the legal conclusion of jurisdiction."*

Clearly, this has not been done in this case neither factual allegations nor legal conclusions of jurisdiction have been stated *in casu.* The allegations must appear in the affidavit and the Court must not be left to deduce that it has jurisdiction. I am disinclined to agree with Mr Dunseith's submission in this regard. This point of law is accordingly upheld.

(b) Implications of the provisions of Section 5 of the Industrial Relations Act, 1996

On the second question regarding jurisdiction, the Respondents contended that the case in issue arises from an employment relationship and involves a suspension, which falls under disputes as defined in Section 2 of the Act. It is therefor, contended that the Industrial Court has exclusive jurisdiction to deal with this matter and to that extent, the jurisdiction of the High Court is excluded. Mr Dunseith argued otherwise. He argued that the Industrial Court only has jurisdiction in matters where the dispute procedures prescribed by the Industrial Relations Act have been followed. If not, continued Mr Dunseith, the matter cannot be said to be properly before the Industrial Court. The Court was referred by both parties to the case **SIBONGILE NXUMALO & OTHERS v ATTORNEY – GENERAL AN D OTHERS CASE NO.25, 30, 28, 29/96** (per Tebbutt J.A.). At page 11 of the said judgement, Tebbutt J.A. had this to say,

> *"An analysis of the entire present Act reveals that those matters which are expressly reserved for the Industrial Court's consideration are (a) the provisions of the constitutions of employer or employee organisations, any violations of such constitutions, unlawful conduct in the election of office bearers in such organisations' funds and certain ancillary matters relating to employee and employer organisations...(b) the establishment of joint industrial councils, work councils and collective agreements..... and (c) determination of disputes."*

Section 2 defines dispute as including a "grievance, a trade dispute and means any dispute over the –

(a)....

(b).....

(c) disciplinary act, dismissal, employment, **suspension from employment,** re-employment or re-instatement of any person or groups of persons, (my emphasis)

(d)...

(e)...

(f)....

At page 11 to 12, the learned Judge of Appeal proceeded to states as follows:-

> *"From this definition, it is clear that the legislature had in mind, when enacting that the Industrial Court should adjudicate the disputes was that those disputes should be of the type set out in the definition viz disputes relating to employer employee organisation..... In other words those matters which fall under what may generally be described as industrial or trade disputes."*

Tebbutt J.A. proceeded to analyse a case decided by the Botswana Court of Appeal in **BOTSWANA RAILWAYS ORGANISATION v J. SETSOGO AND OTHERS** in which that Court held that exclusive jurisdiction was confined only to matters which had been "properly brought before it under this Act", and was of the view that that decision was persuasive authority in the **Nxumalo case.**

In conclusion, the learned Judge of Appeal stated thus: -

> *"It confines the Industrial Court's jurisdiction solely to those matters set out in the Act, to those disputes which have run the gauntlet of the disputes procedure, and to those issues arising from the other legislation specifically set out in Section 5 (1). Having regard to the principle that in order to oust the jurisdiction of the ordinary courts, it must be clear that the legislation intended to do so and that any enactment which seeks to do so must be given a strict and restricted construction, it is in my view, clear that save for the specific provisions mentioned, Section 5 (1) does not disturb the common law of master and servant."*

It is clear that this case was never submitted to the dispute's procedure set out in the Industrial Relations Act. In view of the *ratio decidendi* in the **Nxumalo** case, this matter is not properly before the Industrial Court and therefore, it cannot be said to be one in respect of which the Industrial Court can be said to have exclusive jurisdiction. This point should accordingly fail.

I come to this view with a heavy heart with due regard to what Tebbutt J.A. stated at page 15 of the judgement, namely

> *"In those matters which **can** (my emphasis) be properly brought before the Industrial Court as set out in the Act, the appropriate forum is the latter Court and to that extent the High Court's jurisdiction is ousted".*

The above excerpt, as Miss van der Walt correctly argued introduces exclusive jurisdiction not only over matters actually brought to it but also those capable of being so brought.

(ii) Notice of Motion A Nullity

Miss van der Walt argued that instead of bringing this application in conformity with Form 3, the Applicant herein brought the same in accordance with Form 2, which is expressly designed for *ex parte* applications. Miss van der Walt's argument is correct and is fully supported by the Rules. This Mr Dunseith rightly conceded.

Rule 6 (9) which is peremptory states as follows: -

> *"Every application other than one brought **ex parte** shall be brought on notice of motion as near as may be in accordance with Form 3 of the First Schedule and true copies of the notice, the supporting affidavits and all annexures thereto, shall be served upon any party to whom notice thereof is to be given."*

Form 3 requires the Respondent, in addition to other issues to be informed of when a notice to oppose, if any, should be filed and also when answering affidavits should be filed. Form 2, which is presently being used is clearly designed for *ex parte* applications as envisaged by the provisions of Rule 6 (4) and the said Form 2, itself clearly stipulates so.

Miss van der Walt is therefore correct. The proper Form was not used and condonation for not using it was not prayed for regard being had to prayer 1 of the Applicant's Notice of Motion. Mr Dunseith argued that the procedure adopted by the Applicant in this case has been used for a long time and that in fairness to the Applicant, the Court should first issue a warning before insisting on following the express provisions of the Rules in this regard.

Mr Dunseith requested the Court to condone this non-compliance. He further argued that not withstanding the non-compliance with Form 3, the non-compliance does not result in the Notice of Motion being rendered a nullity and that the objection is one as to form only made with no purpose but to obstruct the expeditious hearing of the application.

While the Court may grant condonation, it is unfair to say that this objection is made to obstruct the expeditious hearing of the application. The Rules peremptorily direct that Form 3 is to be used and in this case, no application for condonation is made for non-complicance with the Forms. The Respondent is perfectly entitled to raise this point and help the Court set the compliance with the requirements of the Rules in proper perspective.

I will, in exercise of my discretion condone the non-compliance in this case only for the reason that the procedure adopted by the Applicant has been consistently but erroneously followed for a long time. Time has come for this Court to insist on the strict requirements of Rule 6 (9), regarding the use of Form 3. The use of Form 3, even in urgent applications serves to safeguard the interests of Respondents which are endowed to them by the Rules. Notwithstanding the urgency that attaches, the Respondent is entitled to service of the application. He is also entitled to know when he should file the Notice to Oppose and when to file the Answering Affidavits. To use Form 2 renders the Respondent a mere stooge being left entirely in the Applicant's hands.

I find it apposite, in this regard to refer to the case of GALLAGHER v NORMAN'S TRANSPORT LINES (PTY) LTD 1992 (2) SA 500, where Flemming DJP held that the invariable use of the short form of notice of motion is unacceptable. At page 502 E to 503 A, the Learned Judge stated as follows:-

> *"Rule 6 (5) a of the Uniform Rules of Court is peremptory. An application must be in accordance with Form 2 (a)....No Rule says that any of the said obligations do not apply to an urgent application. Such an application is an "application' in terms of Rule 6 (5). The only qualification is that in an urgent matter an applicant may 'amend the rules of the game' without asking prior permission of the Court... But the intent of the Rules is that such amendment is permissible only in those respects and to that extent which is necessary in the particular circumstances ....The Court is enjoined by the Rule to dispose of an urgent matter by procedures*

> *"which shall as far as practicable be in terms of these Rules; that obligation must of necessity be reflected in the attitude of the Court about which deviations it will tolerate in a specific case. The mere existence of some urgency cannot therefore justify an applicant not using Form 2 (a) of the First Schedule to the Uniform Rules. The rules do not tolerate the illogical knee-jerk reaction that, once there is any amount of urgency, that form of notice of motion may be jettisoned – and a rule nisi may be sought. The Applicant must, in all respects, responsibly strike a balance between the duty to obey Rule 6 (5) and the entitlement to deviate, remembering that the entitlement is dependent upon and is thus limited according to the urgency which prevails."*

The Form 2 (a) referred to above, is in *pari materia* with to our Form 3. In the circumstances, time has come for this Court to refuse to allow the "illogical knee-jerk reaction" referred to above to continue haunting litigants in this Court. This can only be done if this court will refuse to entertain matters which are not *ex parte* but where the use Form 3 has been jettisoned less still, those cases where no condonation for dispensing with Forms is not prayed for. This will be so even if the matter is urgent. It is important to comply as far as practicable in the circumstances with the requirements of Form 3. The Courts in the Republic of South Africa, which had Rules in *pari materia* with ours correctly rendered this practice unacceptable and it is obedience to our Rules that dictates that we should adopt a similar stance as the South African Courts without further delay.

(iii) Urgency.

It was contended for and on the Respondent's behalf that no reasons are furnished as to why the Applicant claims that he cannot be afforded substantial relief at a hearing in due course. It was further contended that the Applicant failed to set forth explicitly the circumstances he avers render the matter urgent. Mr Dunseith stated, certain facts which he set out in the heads of argument must be considered in deciding whether the Applicant has complied with the provisions of Rule 6 (25) (a) and (b).

The said Rule reads as follows:-

a. "In urgent application, the Court or a Judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rule) as to the Court or Judge, as the case may be, seems fit.

b. In every affidavit or petition, filed in support of an application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial relief at a hearing in due course."

In the case of **HUMPHREY H. HENWOOD v MALOMA COLLIERY AND ANOTHER CASE NO.1623/93,** Dunn J. held that the above provisions are peremptory and I am in respectful agreement with that view. In addressing the requirements of Rule 6 (25) (a) and (b), the Applicant stated as follows at paragraph 24 of his Founding Affidavit:-

"This matter is urgent in that the decision to interdict me is prejudicial to me as it affects my rights to my job and salary. I have been on suspension for over twelve months and was receiving only half my normal salary.

If this matter is not heard urgently the prejudice I have already suffered will continue and I have reason to believe that this state of affairs will most likely continue for many months before a disciplinary hearing is held against me.

25. The disruption of my family life in terms of basic necessities such as water, electricity, and financial support has already taken its toll and should I be subjected to another long suspension my family and myself are going to find this state of affairs highly intolerable.

Clearly, there was not even a feeble attempt by the Applicant herein to address the requirements of Rule 25 (b), particularly regarding why he claims that he cannot be afforded substantial relief at a hearing in dues course. I had occasion to deal with a similar

point in the case of **MEGALITH HOLDINGS v RMS TIBIYO (PTY) LTD & ANOTHER CASE NO.199/2000.** At page 5, I stated as follows:-

> *"The provisions of Rule 6 (25) (b) above exact two obligations on any Applicant in an urgent matter. Firstly, that the Applicant shall in affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the same affidavit or petition to state the reasons why he claims he could not be afforded substantial redress at a hearing in due course. These must appear* ***ex facie*** *the papers and may not be gleaned from surrounding circumstances brought to the Court's attention from the bar in an embellishing address by the Applicant's counsel."*

I reiterate this view. In H.P. ENTERPRISES (PTY) LTD v NEDBANK (SWAZILAND) LTD CASE NO.788/99 (unreported), Sapire C.J. stated the requirements of the above Rule with absolute clarity, as follows:-

> *"A litigant seeking to invoke the urgency procedures must make specific allegations of fact which demonstrate the observance of the normal procedures and time limits prescribed by the Rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the litigation. The facts alleged must not be contrived or fanciful but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow."*

As I have stated, no attempt to address this requirement in his affidavit was made by the Applicant *in casu.* No facts or allegations are made from which it is demonstrated that irreparable loss or irreversible deterioration to his prejudice will ensue. The Applicant attempted to raise some of the facts and allegations in the heads of argument and this is not what is required or contemplated by the Rules. These allegations must be included in the Founding Affidavit which is deposed to under oath. An applicant must stand or fall on his Founding Affidavit.

In the premises, it is ordered that the first point on jurisdiction and the one on urgency must be upheld with costs. I however am not convinced that there are, in the circumstances,

reasons why costs should be on the punitive scale. Costs be and are hereby declared to be on the ordinary scale.

T.S. MASUKU

JUDGE