THE HIGH COURT OF SWAZILAND

BEN M. ZWANE

Applicant

And

SWAZILAND GOVERNMENT

Respondent

Civil Case No 3709/2002

Coram	S.B. MAPHALALA – J
For the Applicant	MR. M. MKHWANAZI
For the Respondent	Advocate Ms. M. Van Der Walt (Instructed by the Attorney General)

JUDGEMENT

(On points of law in limine)

(12/12/2002)

In this application, which is brought under a certificate of urgency, the applicant prays for an order as follows:

1. Waiving the usual requirement of the rules of court regarding notice, service and form of applications and hearing the applications as one of urgency.

2. Declaring that the purported transfer of the applicant from his position as Clerk to Parliament to the position of Principal Assistant Secretary in the Ministry of Agriculture and Co-operatives is null and void and is set aside.

3. Reviewing and setting aside the recommendation of the Civil Service Board to transfer the applicant out of Parliament.

4. Staying and suspending the aforesaid transfer until such time as:

   4.1 The Labour Commissioner has made a determination in terms of Section 26 of the Employment Act 1980 whether the purported transfer results in the terms and conditions of the applicant's employment being less favourable than those applicable prior to the purported transfer.

   4.2 The application for review (this application) filed with the above honourable court to review and set aside the recommendation of the Civil Service Board has been determined.

5. In the event of this honourable court granting a rule nisi in terms of prayers 2 and 3 above or postponing the application, an interim order is granted in terms of prayer 4 above pending final determination of the application.

6. Costs.

7. Further/alternative relief.

The application is founded on the affidavit of the applicant Mr. Ben M. Zwane together with pertinent annexures "A" to "J". The application was set for hearing on the 4th December 2002, at 2.15pm. The respondent was to file its notice of intention to oppose by not later than 4.30pm on Tuesday on the 3rd December 2002, and further to file an answering affidavit by 12.00noon on Wednesday the 4th day of December 2002. According to the original court file respondent was served with the application on the 3rd December 2002, at 3.57pm. It is clear from this that respondent was given very short service to respond to the application and the applicant therefore approaches the court on an extremely urgent basis and it is incumbent on him to make out a case justifying the urgency with which the application was brought. This remains to be seen in this case.

The respondent has filed its opposition in the form of an answering affidavit deposed to by the Attorney General himself Mr. Phesheya Mbongeni Dlamini with pertinent annexures labelled from "SG1" to "SG3". The respondent in his answer raises four points of law *in limine*. Although I must say the last point on costs is not exactly a point of law *in limine* and the court will treat it in the normal way as to who will be the successful party on the points of law *in limine* as a whole.

Before getting into the points of law raised I wish to point out that when the matter came before me on the 4th December 2002, Mr. Mkhwanazi applied that the matter be postponed so that the applicant replies to the answering affidavit. Miss Van Der Walt vigorously opposed this application and urged the court to entertain submissions on the points *in limine* raised by the respondent. I ruled in favour of the respondent and ordered that the points be heard. It is not proper for an applicant to bring an application at such an extreme urgent basis and put the other side at extreme pressures to prepare an answer and then when the matter comes to court to merely ask for a postponement. Such a practice should not be encouraged, and I certainly do not want to encourage it in the present case.

Reverting to the points of law raised, these in their capsule form are as follows:

1. Jurisdiction

The respondent contends that the subject matter of the application concerns the transfer of the applicant as employee. This court therefore has no jurisdiction in matters such as these in terms of Section 8 (1) of the Industrial Relations Act No. 1 of 2000. This is trite law. The applicant, under Case No. 20/2002 in the Industrial Court, wherein Miss Van Der Walt was personally involved and wherein the applicant was represented by the same attorneys brought a similar application in respect of a previous transfer of the applicant, i.e. the applicant knew the correct forum.

2. Urgency

The respondent denies that the matter is urgent and the applicant is put to the st proof thereof. In this regard the respondent has given a chronological account c events between the parties culminating in this urgent application. Further that applicant furnishes no particulars of the alleged irreparable harm to be suffered him should the matter not heard as one of urgency.

3. Interim relief sought

It is contended that the applicant has failed to show a right, *prima facie* or otherwise. In any event, the applicant has another remedy being Section 26 of the Employment Act, 1980.

4. Costs

The respondent contends that a punitive costs order is justified in view of the following: The applicant's reckless and blameworthy disregard of the Industrial Relations Act, 2000; the applicant's reckless and blameworthy disregard of the rules of this court as regards urgency; the unreasonable embarrassment and prejudice to the respondent by the short notice and time periods, for instance only serving the application at the time that a notice of intention to oppose was required and dishonesty and/or gross failure to put before the court a fact/s that was essential for the court to know and/or gross remissness or negligence (see Paragraphs 17.4 (a); (b) and (c) of the answering affidavit).

The parties advanced arguments for and against the points *in limine* and I reserved judgment thereto to today the 12th December 2002. I shall proceed to consider the issues sequentially; thus,

1. Jurisdiction

In this connection I agree in *toto* with the submissions made by Miss Van Der Walt on behalf of the respondent that this court does not have jurisdiction to entertain this matter. The subject matter of the application concerns the transfer of the applicant as an employee. It is my considered view, after reading through the decided cases cited by counsel that in this instance it is the Industrial Court which has the exclusive

jurisdiction in matters such as these in terms of Section 8 (1) of the Industrial Relations Act No. 1 of 2000. This is trite law.

Further it would appear that a similar matter appeared before the Industrial Court where the same parties were involved in an application under Case No. 20/2002 (annexure "SG1").

The applicant in that case deposed in his founding affidavit in that case as follows, at page 2 of the application:

> "**JURISDICTION**
>
> 4. This Honourable Court [referring to the Industrial Court] has jurisdiction to hear this application, which involves infringements of the Industrial Relations Act 2000 and the Employment Act 1980 and the relief sought arises from the breach of the employment contract between myself and the Swaziland Government".

About eleven months later he approaches the High Court and states that the Industrial Court does not have jurisdiction on a similar issue where a similar remedy is being sought. A point of potential substance was made though by Mr. Mkhwanazi that the present case is to seek for a review of the Civil Service Board and the High Court then would be exercising its inherent jurisdiction to review decisions of such bodies as the Civil Service Board. However, in my view, this point is fragmented by the fact that the Employment Act provides for such a mechanism in Section 26 as follows:

> "26(1) Where the terms of employment specified in the copy of the form in the Second Schedule given to the employee under Section 22 are changed, the employer shall notify the employee in writing specifically the changes which are being made and subject to the following subsections, the changed terms set out in the notification shall be deemed to be effective and to be part of the terms of service of that employee.
>
> (2) Where, in the employee's opinion, the changes notified to him under subsection (1) would result in less favourable terms and conditions of employment than those previously enjoyed by him, the employee may, within fourteen days of such notification, request his employer, in writing, (sending a copy of the request to the labour Commissioner), to submit to the Labour Commissioner a copy of the form given to him, under Section 22,

together with the notification provided under subsection (1) and the employer shall comply with the request within three days of it being received by him.

(3) On receipt of the copy of the documents sent to him under subsection (2), the Labour Commissioner shall examine the changes in the terms of employment contained in the notification. Where, in his opinion, the changes would result in less favourable terms and conditions of employment than those enjoyed by the employee in question prior to the changes set out in the notification, the labour Commissioner shall within fourteen days of the receipt of the notification, inform the employer in writing of this opinion and the notification given to the employee under subsection (1) shall be void and of no effect.

(4) **Any person dissatisfied with any decision made by the Labour Commissioner under subsection (3) may apply in writing for a review to the Labour Commissioner, who using the powers accorded to him under Part II, shall endeavour to settle the matter. Where he is unable to do so within fourteen days of the receipt of the application being made to him he shall refer the matter to the Industrial Court which may make an order. (My emphasis).**

From the above it would appear to me that it is the Industrial Court which has powers to grant any order to properly regulate the procedure provided for by Section 26 of the Employment Act. It is common cause that the applicant has submitted himself to the Industrial Court's machinery by invoking Section 26. It goes without saying, therefore that the applicant's first port of call should be the Industrial Court which has powers to grant interim orders to regulate the procedure outlined in Section 26. The Industrial Court may intervene in terms of Section 26 (4) where one party has sought to defeat the effect of the Section like in the present case. This will be in tune with the spirit of Section 4 (1) of the Industrial Relations Act, 2000 which provides, *inter alia* as follows:

"Purpose

5. (1) The purpose and objective of this Act is;
    a) Promote harmonious Industrial Relations;
    b) Promote fairness and equity in Labour Relations;
    c) Promote freedom of association and expression in labour relations;

d) Provide mechanisms and procedures for speedy resolution of conflicts in labour relation; .....

e) .....

f) .....

g) .....

h) .....

i) .....

j) .....

k) ....."

It would appear to me that *in casu* the applicant has one foot in the Industrial Court's jurisdiction and at the same time is seeking to put the other foot in this court thus straddling the wells of justice. This cannot be allowed as the proper court to entertain this suit is the Industrial Court as I have outlined above.

Furthermore, the provisions of the Industrial Relations Act of 2000 in Section 8 (1) put the issue of jurisdiction in *casu* beyond doubt. The Section reads in *extenso* as follows:

> "8. (1) The court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the **Employment Act**, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer's association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof. (My emphasis)".

It is abundantly clear from the wording of the section that any complaint or infringement of any provisions of the Employment Act that it is the Industrial Court which is a proper court to determine the infringement complained of.

I thus find that the point of law *in limine* raised by the respondent is good in law and is accordingly upheld.

2. <u>Urgency</u>

The applicant's application was served on the 3rd December 2002 at 3.57pm, yet called for a notice of intention to oppose to be filed by not later than 4.30pm on the same day, and an answering affidavit by not later than 12.00noon on the 4th December 2002. The applicant set the matter down for hearing at 2.15pm on the 4th December 2002.

The applicant therefore approaches the court on an extreme urgent basis and it is incumbent on him to make out a case justifying the urgency with which the application was brought. There is a long line of decided cases both by this court and the courts in South Africa on how practitioners are to proceed in these matters. Coincidentally, one of them involves the present applicant being ***Ben M. Zwane vs The Deputy Prime Minister and another, Civil Case No. 624/2000*** (unreported) where my Brother Masuku J gave a lucid and comprehensive analysis of the law in this regard. One would have thought that the axiom "once beaten twice shy" would have prevailed on the applicant. In ***Luna Meuber Vervaardigers [EDMS] BPK vs Makin and another t/a Makins Furniture Manufactures 1977 (4) S.A. 135 (W) at 136 G en fin*** **137 G** the learned judge in that case said the following, and I quote:

> "Practitioners should carefully analyse the facts of each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practise of the court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip serve to the requirements of Rule 6 [12] (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down".

(See also ***Gallagher vs Norman's Transport Lines (Pty) Ltd 1992 (3) S.A. 500; Patcor Quarries CC vs Issroff 1998 (4) S.A. 1069 [SE]*** at ***1075; Humprey H. Henwood vs Maloma Colliery Ltd and others Case No. 1623/94*** *per* Dunn J and ***H.P. Enterprises (Pty) Ltd vs Nedbank (Swaziland) Ltd Case No. 788*** (unreported) *per* Sapire CJ.

I must say from the onset that the applicant in the present case has dismally failed to pass the test set by the cases I have cited. The applicant knew as early as the 25th October 2002, that he was transferred with effect from the 1st November 2002, as is

set out in paragraphs 4 and 32 of his founding affidavit. The applicant knew as early as 8th November 2002 with reference to paragraphs 40 of the founding affidavit, that the respondent was maintaining its stance on the transfer issue.

There is no explanation why the applicant only now approaches the court, and then on such short notice. There is no earth shattering event which has propelled the applicant to move this application on such an extreme urgent basis reflected in the applicant's papers. It is my considered view, on an objective assessment, that the grounds advanced by the applicant in paragraphs 31 to 49, cannot found true urgency, and certainly not urgency justifying the drastic abridgement of the prescribed time periods in issue, which effectively amounts to hardly any notice at all, and which pay mere lip service to the requirement of Rule 6 (25) of the Rules of the High Court. This application has a "steamrolling effect", as aptly put by Miss Van Der Walt for the respondent.

For the above reasons, I uphold this point of law *in limine*.

3. Interim Relief Sought

I find it unnecessary to consider this point in view of my finding on the point on jurisdiction. It is for a proper court to determine this point. I expressed my reservations on this point when the matter was argued that how can one apply for an interim interdict for an act which has already been done. It is common cause that a new Clerk to Parliament was appointed a few weeks ago and has assumed his duties as such. It is trite law that a court will not grant an interim interdict restraining an act already committed for the object of an interdict is the protection of an existing right, it is not a remedy for the past invasion of rights. (See ***Conde Nast Publications Ltd vs Jaffe 1951 (1) S.A. 81 (c) and C.P. Prest – The Law and Practice of Interdicts; Greyhound Racing International (Pty) Ltd vs Game Supermarket (Pty) Ltd Civil case No.2714/96*** (unreported); and ***Francis vs Roberts 1973 (1) S.A. 507.*** I must stress, however, that the above is a mere observation made *obiter* and the question is still open for debate in a proper forum.

4. The issue of costs

The respondent has applied for punitive costs in the event that the court upholds the points of law *in limine*. The respondent has premised such an application for costs in its answering affidavit in paragraphs 17, 17.1, 17.2,1 17.3, 17.4(a), 17.4(b), 17.4(c).

An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loathe to penalize a person who has exercised his right to obtain a judicial decision on any complaint he may have (see ***DeVilliers vs Murraysburg School Board 1910 CPD 535 at 538 and Herbstein*** *et al,* ***The Civil Practice of the Supreme Court of South Africa (4th ED)*** at page *717* and the cases cited thereat).

The grounds upon which the court may order a party to pay his opponent's attorney-and-client costs include the following: that he has been guilty of dishonesty or fraud or that his motives have been vexations, reckless and malicious or frivolous (see **Herbstein** *et al (supra)* at page 718 and the cases cited thereat). It appears to me that in the present case the applicant has been reckless in a number of respects. Firstly, the applicant disregarded the rules of court as regards urgency as I have stated earlier on in this judgement. Secondly, the applicant has been dishonest in not putting before the court fact/s that was essential for the court to know and/or gross remissness or negligence. One example of such remissness is found in paragraph 28 of the applicant's founding affidavit where it is alleged that there is no job description for Principal Assistant Secretary. The said paragraph reads as follows:

> "28. Though no job description is available for the position of Principal Assistant Secretary, to the best of my knowledge and belief this position:
>
> 25.1 Is not held by a controlling officer.
>
> 25.2 Is only confirmed and limited to the Personnel section of the Ministry of Agriculture and Co-operatives.
>
> 25.3 Has limited responsibilities involving supervision of not more than five officers.
>
> 25.4 Does not carry the status and importance of the position of Clerk to Parliament.

25.5 Cannot be equated in rank to the position of quasi Head of Department held by the Clerk to Parliament".

The true position as reflected in the papers under Case No. 20/2002 at the Industrial Court, such papers which have been incorporated into the present proceedings the relevant job description is clearly outlined in that document. This fact was known by the applicant when he launched the present application. The applicant was not candid with the court in this regard and the court frowns upon this lack of candour on the part of the applicant.

I agree in *toto* with the submissions by Miss Van Der Walt that this is a case where the court is enjoined to grant costs at a punitive scale.

The Court Order

The following order is thus recorded:

a) The respondents point of law *in limine* are upheld and the application is accordingly dismissed;

b) The applicant is to pay costs at attorney-and-client scale including costs of counsel.

S.B. MAPHALALA

JUDGE