

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 541/06

In the matter between:

SGIDY KHOZA & TWO OTHERS

Applicant

and

JEROME XABA T/A XABA CONSTRUCTOR

Respondent

CORAM:

P. R. DUNSEITH	:	PRESIDENT
JOSIAH YENDE	:	MEMBER
NICHOLAS MANANA	:	MEMBER
FOR APPLICANT	:	F. MDLULI
FOR RESPONDENT	:	S. MUSI

J U D G E M E N T – 29/09/06

1. The Applicants applied on Notice of Motion supported by affidavit for an order in the following terms:
 - 1.1 Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as an urgent one.
 - 1.2 Directing that the unpaid wages and underpayments

of wages be paid immediately according to the calculation of the Founding Affidavit annexed herein.

1.3 Directing that Applicants, be each of them paid 6 months wages for unfair dismissal and 1 month wage for Notice.

1.4 Directing that in case the court gives ruling that it cannot deal with prayer 3 together with prayer 2, it must therefore make an order that prayer 3 be transferred to the roll to be dealt with separately in future in the same case number.

2. The Respondent filed an Answering Affidavit raising certain points in limine, to wit:

2.1 the Founding Affidavit is defective because there is no allegation that the facts deposed to are true and correct;

2.2 the deponent to the Founding Affidavit has not alleged that he had the authority of the other two Applicants to institute legal proceedings on their behalf;

2.3 no cause of action is made out in the Founding Affidavit;

2.4 the application is not urgent and no sufficient grounds have been established why the usual time limits prescribed by the rules of court should not be observed.

3. There is no merit in the first three points set out above:

3.1 the Founding Affidavit has been properly sworn before a Commissioner of Oaths, the deponent acknowledging that he has read and understands the contents. The allegation that the contents are true and correct is implied by the deponent signing the affidavit under oath.

3.2 the second and third Applicants have given powers of attorney to their representative Mr. Friday Mdluli to represent them in the matter. These powers are sufficient evidence that all the Applicants have authorized the institution of the proceedings.

3.3 A cause of action is made out in the Founding Affidavit read together with the attached report of dispute SM2. The Applicants are claiming payment of:

- unpaid wages for June 2006.

underpayment of leave pay and overtime worked .
notice pay
compensation for unfair constructive dismissal.

They allege that they were obliged to resign from their employment because their wages were consistently paid late or not at all. Prima facie, this is a valid reason to found a claim for constructive dismissal in terms of Section 37 of the Employment Act 1980 (as amended).

4. The Respondent's objection to the application being brought by way of urgency is sound. No acceptable basis for urgency is set out in

the Founding Affidavit. The averment that the matter is urgent because non-payment of wages is involved cannot be accepted as sufficient.

Financial hardship or loss of income is not regarded as a ground for urgency.

See Hultzer v Standard Bank of SA (Pty) Ltd (1999) 8 BLLR 809 (Ic) at 812.

“Most of these litigants suffer considerable financial difficulties upon dismissal just like the Applicant herein. Without seeming to take lightly his predicament, if we were to order that the matter be treated as urgent purely on the grounds that he has no gainful employment and thus is experiencing money shortage, then every case now pending before court would qualify to be treated as urgent.”

- *per* **Nduma JP in Kenneth Makhanya v NFAS Industrial Court Case No. 286/2004**

See also **Phineas Vilakati v J. D. Group (Industrial Court Case No. 41/97 page 2) and SAPWU and Another v RSSC (Industrial Court Case No. 79/98.)**

5. The Respondent concedes in its Answering Affidavit that certain wages are due and payable to the Applicants, as follows:

Sgidy Khoza	E615.00
Melusi Khoza	E795.00
Mancoba Magagula	E350.00

Mr. Musi for the Respondent has very properly consented to judgement being entered for the payment of these amounts.

6. The issues in this matter appear clearly from the pleadings filed of record. The matter is ready for trial. No prejudice will be occasioned to the parties if the matter is referred to the Registrar for allocation of a trial date on the basis of the pleadings already filed, and Mr. Musi did not raise any objection to the court so ordering.

7. The court makes the following order:

(a) The Respondent is ordered to pay the following amounts to the Applicants within seven (7) days:

	Sgidy Khoza	E 615.00
Melusi Khoza	E 795.00	
Mancoba Magagula	E 350.00	
	Total	<u>E1,760.00</u>

(b) The balance of the Applicant's claims are referred to trial on the pleadings as presently filed.

(c) The matter is referred to the Registrar for allocation of a trial date.

(d) There is no order as to costs.

The members agree.

P. R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT