IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 167/06

In the matter between:

BONGANI MDLULI **APPLICANT**

And

THE UNIVERSITY OF SWAZILAND **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: **JUDGE**

DAN MANGO: **MEMBER**

GILBERT NDZINISA: **MEMBER**

FOR APPLICANT: **Z. MKHWANAZI**

FOR RESPONDENT: **T. MAGAGULA**

RULING ON POINTS OF LAW

24.04.07

[1] On the 3rd May 2006 the applicant instituted an urgent application against the respondent.

[2] The applicant was seeking, *inter alia,* an order:-

> "2. Setting aside the suspension of the applicant and re-instating him to the position of Security Guard/Officer with the respondent."

[3] On the 26th June 2006 a consent order was granted in terms of prayer 2.

[4] It seems however that although the applicant was re-instated he was not paid his arrear salary covering the period from the 9th November 2000, when he was suspended without pay, up to the date of the consent order.

[5] The applicant has now approached the court again by way of urgent application for an order, *inter alia;*

> "2. Directing the respondent to pay the applicant his arrear salary calculated from November 2000 to the date of judgement."

[6] The respondent in its answering affidavit raised points *in limine.* The court is called upon to make a ruling on those points.

[7] The respondent raised two points *in limine,* namely that the matter is not urgent and secondly that the application should be dismissed as there is a dispute of fact.

[8] **Dispute of fact-**

It was argued that there was a dispute of fact as to whether the employer was obliged to pay the applicant arrear wages following his arrest by the police and kept in custody.

[9] It was argued that it is only when the employee is kept in custody as a result of a complaint laid by his employer and the employer naming the employee as an accused and is subsequently acquitted that the employer is obliged to pay arrear wages. The respondent relied on the provisions of SECTION **39(1)** AND **(5)** OF THE EMPLOYMENT ACT NO. 5 OF **1980** as amended.

[10] It was argued on behalf of the respondent that the respondent never named the applicant as the accused person.

[11] The submissions of the respondent were based on the interpretation to be given to Section 39 of the Employment Act. The interpretation of the Act can only be a question of law and not a dispute of fact. This point is accordingly dismissed.

[12 The applicant's case before the court is not that he wants the respondent to pay him arrear salary for the period that he was in custody. The applicant's case is that since he was re-instated in terms of the consent order, the respondent should pay him his arrear salary for the period that he was on suspension without pay.

[13] An employer may suspend an employee, who is not in police custody, without pay for a period not exceeding one month. (See Section 39 (2) of the Employment Act, 1980). In the present case the applicant was suspended without pay for more than one month.

[14] The respondent is however not legally bound to pay arrear salary for the period that the applicant was in police custody.

[15] The second point raised *in limine* is therefore dismissed.

[16] **Urgency:-**

This ground will also be dismissed by the court. The initial application was never finalised. That application is still pending before the court. The parties have been postponing the matter pending argument on the merits. On the 27th July 2006 the respondent even tendered wasted day's costs, as it was not ready for argument and had not yet filed the answering affidavit.

[17] The present application is therefore interlocutory in nature and there was therefore no requirement on the part of the applicant to report the matter to the Conciliation Mediation and Arbitration Commission first before it could launch the present application.

[18] As the parties were already litigating, there was no need for the applicant to follow the rigours of reporting a dispute. The circumstances of this case warrant that the matter be heard on an urgent basis taking into account that the applicant was suspended without pay from November 2000 until the 26th June 2006 when he was reinstated.

[19] This point is accordingly dismissed. It follows therefore that the points raised *in limine* by the respondent are to be dismissed, and that is the order that the court makes.

[20] The respondent is ordered to pay the costs. Date for argument on the merits to be arranged in court.

The members agree.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT

thing to do is for Applicant to withdraw the case from Industrial Court, tender wasted costs and proceed with the matter at CM AC. Alternatively Applicant would have to withdraw the matter from CMAC and proceed with her claim at Industrial Court. The Applicant has done neither of the two options available to her. The Court takes note of the fact that in clause 4 of her founding affidavit the Applicant stated that the Industrial Court has jurisdiction over the matter which the Applicant has brought to Court. The Applicant cannot in the same affidavit admit and deny the jurisdiction of the Industrial Court in the same matter. That would amount to a serious contradiction on Applicant's part and would certainly not assist the Applicant in her case. The Court fails to see merit in this argument.

For reasons stated above the Court hereby rules that the application should fail. The Court makes

the following order;

(a) The application is dismissed.

(b) Each parry is to pay its costs.

The members agree

DUMSANI MAZIBUKO

JUDGE OF THE INDUSTRIAL COURT