

IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO. 318.08

In the matter between:

SITHEMBILE MHLANGA & 3 OTHERS

APPLICANT

AND

CIVIL SERVICE COMMISSION

RESPONDENT

CORAM:

S. NSIBANDE : ACTING JUDGE

P. THWALA: MEMBER

A. NKAMBULE: MEMBER

N. DLAMINI: For the Applicants

V. KUNENE: For the Respondent

RULING ON POINTS OF LAW 23rd JULY, 2008

1] The Applicants by way of Notice of Motion instituted these proceedings with a certificate of urgency on 7th July, 2008.

2] The Applicants are seeking an order in the following terms;

"1. Dispensing with the forms of service and time limits provided for in the Rules of Court hearing this matter as once of urgency.

2. Issuing a rule nisi calling upon the Respondents to show cause (if there be any) on a day to be fixed by this Court why an Order in the following terms should not be made final;

2.1. Staying the transfer/posting of Applicants notified in the letters of 19th May, 2008 pending the final determination of this application.

2.2. Declaring the "transfers" of the Applicants as notified in the letters of 19 May, 2008 to be postings and setting them aside for being beyond the I' Respondents powers, hence null and void.

2.3. Giving immediate interim effect of the rule nisi pending the conclusion of these proceedings.

3. Costs of the application if it is opposed; and

4. Granting the Applicants further and/or alternate relief "

3] The application is opposed by the Respondents. From the bar, the Respondents raised two points of law namely that the application was not urgent and that if it is then such urgency is self created; Secondly that the Applicant seeks the court to grant a declaratory order as to a fact whereas in law, the court can only grant a declaration as to a right. The Court, it said is unable to grant the declaration sought by the Applicants.

4] **AD URGENCY**

The Respondents argued that:-

4.1. Applicants were transferred on 19th May, 2008 and came to court on 30th May to challenge the transfers on the basis of urgency. The matter was argued on the merits following the issuance of a *rule nisi* staying the transfers and on 3rd July, 2008 the application was dismissed.

4.2. The Applicants had based their urgency in the previous matter on the same facts as they do in this matter.

4.3. That having failed in the previous matter, they can not approach the court again on the same facts pleading for the matter to be heard urgently, in circumstances where the

initial application had failed because they had misread the law.

The court was referred to the case of **Humphrey Henwood vs Maloma Colliery Ltd and Another, 1987 -1995 (4) SCR @ 48.**

5] The Applicants argued that although their application was dismissed on 3rd July, they had not lost any time because they have come to court immediately and that the dismissal of their initial application was on technicality. It was said that the applicants' situation remained the same and that in particular paragraph 13 of the Founding Affidavit founded the applicants' ground for urgency.

Paragraph 13 of the founding affidavit reads;

"The 3rd Applicant stays with her child who is a grade 7 pupil at Tshaneni Primary School, who can not commute daily form Piggs Peak to Tshaneni nor can he change schools midyear ".

6] The court finds that the contents of this paragraph establish a manifest injustice being visited upon the Applicants, in particular the third Applicant.

7] The Court will therefore follow the decision in the case of **Lavumisa DIamini vs Swaziland Television Authority, Chief Executive Officer (IC) Case No. 523/06** wherein the court followed the decision in **Vusi Gamedze vs Mananga College (IC) Case No.267/06** as authority that where the founding affidavit reveals a manifest in justice or a grossly unfair labour practice, that in itself constitutes a ground for urgency.

8] It seems to the Court that the Applicants can not be faulted for the manner in which they have prosecuted their claim. They acted with haste after receiving the transfers and with further haste after their initial application was dismissed for "technical" reasons. The matter was brought to court within four days of its dismissal by the Court.

9] The Court therefore finds that Applicants have established grounds for urgency.

10] **AD. DECLARATION OF FACT**

The Respondents' second point was that this court cannot grant a declaration as to a fact. The declaration must relate to a right. The Applicants ask the court to declare that "the transfers of Applicants notified in the letters of 19th May, 2008 to be postings".. ..Such

declaration, the Court was told would be a declaration as to fact and not as to a right the Applicants have.

11] The Court was referred to **Amler's Precedents of Pleadings at page 132** where the learned authors state:

"Right: A court cannot grant a declaration as to a fact. The declaration must relate to a right. The persons who have such a right are those in whom the right inheres or against whom it avails".

12] Applicants conceded that where party sought a declaratory interdict, that party would have to outline their rights as against the Respondents rights to enable the court to make a declaration order to rights. They, however, submitted that despite the reading of prayer 2.2., what the Applicants seek from the Court is an interpretation of the letters dated 19 May, 2008 purporting to transfer them to Piggs Peak. The interpretation, the Court was told would be an issue of law and not fact.

14] Unfortunately for the Applicants, their argument is not backed by the papers filed in support of their application. The declaration sought, appears to the Court to be a declaration as to a fact and not a declaration as to a right.

15] A person seeking a declaration of rights must set forth his contention as to what the alleged right is as well as show that he has an interest in that right.

(See ECA (SA) and Another Vs BIFSA (2) 1980 (2) SA 516.

16] In the present case, the Applicants have not asserted that they have any right as against the 1st Respondents and have not sought a declaration of rights against it. All that they seek in the Notice of Motion is a declaration that the letters of transfers of 19th May, 2008 are letters of postings. That is a declaration as to a fact not as to a right.

17] There is therefore no basis for granting the relief sought and the application is accordingly dismissed.

18] The members agree.

S. NSIBANDE
ACTING JUDGE