IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 251/07**

In the matter between:

GIDEON MHLONGO **Applicant**

and

THE CITY COUNCIL OF MBABANE **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
ANDRIAS NKAMBULE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**H. OLIVIER**
FOR RESPONDENT	**:**	**P. KENNEDY**

J U D G E M E N T - 09/12/2008

1. The Applicant instituted the present application against the Respondent on the 5th June 2007. In his particulars of claim he alleges *inter alia* as follows:

1.1 He was employed by the Respondent in 1990 and he was in the continuous employ of the Respondent thereafter until 31st January

2003.

1.2 The Respondent is a Municipal Council established in terms of the Urban Government Act No. 8 of 1969. On the date of termination of his services, the Applicant was its Chief Executive Officer.

1.3 The Respondent terminated the Applicant's services on 31st January 2003 on the grounds that his contract of employment was not approved by the Minister of Housing and Urban Development as required by section 48 (3) of the Urban Government Act, 1969.

1.4 The purported dismissal of the Applicant was substantively and procedurally unfair and unreasonable in all the circumstances.

2. The Applicant claims reinstatement to his employment, failing which payment of certain contractual and terminal benefits and maximum compensation for unfair dismissal.

3. The Respondent filed a Reply in which it raises three Special Pleas. The first Special Plea avers that the Applicant has no cause of action against the Respondent based upon his alleged unfair dismissal on the 31st January 2003 because any claim that arose by virtue of such dismissal was extinguished by later events. The second Special Plea avers that the Applicant has failed to comply with the provisions of section 116 (1) and section 116 (2) of the Urban Government Act and the Applicant is thereby precluded from instituting the present proceedings. The third Special Plea alleges that the dispute before the court has not been certified as unresolved in terms of the provisions of Section 85 (1) of the Industrial Relations Act 2000 and the court has no jurisdiction to entertain the application. This latter Special Plea was abandoned at the hearing and nothing further need be said

about it.

4. Before addressing the merits of the two remaining Special Pleas, the court must first deal with the contention of the Applicant's counsel that the procedure of a special plea is entirely inappropriate in this matter. Counsel objects to the procedure because, in his submission, the Special Pleas do not introduce "fresh facts from outside the circumference of the declaration" which, if proven, would constitute a good defence to the application.

5. There is no merit in this contention. A special plea is a plea *"which, apart from the merits, raises some special defence, not apparent ex facie the declaration ……. which either destroys or postpones the operation of the cause of action"* - per **Innes C. J. in Brown v Vlok 1925 AD 58**. The Special Pleas filed by the Respondent raise special defences which rely on facts not pleaded in the Applicant's particulars of claim and which have as their object the quashing of the Applicant's claims. In our finding the procedure followed by the Respondent is correct and in accordance with the rules of court.

6. The facts extraneous to the particulars of claim upon which the Respondent relies for its Special Pleas are common cause between the parties. The Respondent relies upon allegations in its Reply which are admitted by the Applicant in his Replication, and facts appearing from documents placed before the court by consent of the parties. It was not necessary in the circumstances for any oral evidence to be led in support of the Special Pleas.

FIRST SPECIAL PLEA

7. Turning to the merits of the first Special Plea, the relevant factual events and circumstances which are common cause may be summarized as follows:

7.1 The Applicant's employment was terminated on 31st January 2003.

7.2 On 7 February 2003 the Applicant launched an urgent application in the Industrial Court under Case No. 31/2003 in which he sought an order that he be reinstated with immediate effect into his erstwhile position as Chief Executive Officer on the same terms and conditions as applied prior to his dismissal on 31st January 2003.

7.3 On or about 10th February 2003 the Applicant reported an unfair dismissal dispute to the Labour Commissioner in terms of section 76 of the Industrial Relations Act 2000.

7.4 On 30 May 2003 the Industrial Court (Nkambule J. presiding) issued an order in the following terms:

7.4.1 The first and second Respondents jointly are directed forthwith to re-instate the Applicant in his position as Chief Executive Officer of the first Respondent on the same terms and conditions as

applied prior to his dismissal on 31st January 2003.

7.4.2 The 1st and 2nd Respondents are hereby interdicted from taking any steps to terminate the services of the Applicant, save as provided for in the Applicant's contract of employment or for some lawful or valid reason as provided for in the Employment Act and the Industrial Relations Act.

7.4.3 The 1st and 2nd Respondents are hereby interdicted from advertising the post of Chief Executive Officer or to take any steps to engage the services of a third party in the position of Chief Executive Officer.

Prayers 1 to 3 operate as an interim interdict pending the final adjudication of the dispute between the Applicant and the Respondents by the above Honourable Court.

7.4.4 It should be understood that the Applicant is reinstated with immediate effect, and that first Respondent's Mayor William Mbhamali is ordered in the company of two court orderlies to lead the Applicant to his office at the rising of the court.

7.4.5 First Respondent to pay costs of this application on attorney client scale including costs of counsel.

7.5 Pursuant to the said order, the Applicant was duly reinstated in his employment pending the final adjudication of the dispute regarding his dismissal on the 31st January 2003.

7.6 The Respondent appealed against the interim reinstatement order to the Industrial Court of Appeal. The appeal was considerably delayed through no fault of the parties but in the result the appeal was dismissed.

7.7 The Applicant was suspended from his employment pending a disciplinary hearing. The hearing took place in the absence of the Applicant on 17th, 18th and 19th September 2003, but the outcome (if any) was not communicated to the Applicant.

7.8 On 21st November 2003 the Applicant resigned from his employment with the Respondent. In his letter of resignation he listed various acts and omissions of the Respondent which he considered had made it impossible for him to carry out his duties and functions after his reinstatement by the court, and he concluded by saying: "*My inability to perform my duties and functions has been due entirely to your obstructive, wrongful and unlawful conduct, which constituted constructive and unfair dismissal entitling me to terminate the contract of employment, which I hereby do with immediate effect ……"*

7.9 The Applicant launched an action in the High Court of

Swaziland under Case No. 894/04 alleging that his resignation on 21 November 2003 constituted an unfair constructive dismissal and claiming payment of damages and contractual benefits. This action was subsequently withdrawn.

7.10 The Conciliation, Mediation and Arbitration Commission certified the unfair dismissal dispute reported on 10th February 2003 as unresolved on the 5th June 2006.

7.11 The present application was instituted on the 5th June 2007.

8. The Respondent submits that the interim reinstatement order of the Industrial Court of the 30th May 2003 had the effect of reviving and restoring the employment relationship between the parties. In our view, this is precisely what the interim order intended and achieved. The *status quo ante* the termination on 31st January 2003 was restored and the employment contract between the parties revived, subject to the final adjudication of the unfair dismissal dispute by the Industrial Court.

9. The Respondent further submits that the final adjudication of the dispute arising from the Applicant's dismissal on 31st January 2003 became academic and of no practical purpose when the Applicant resigned from his employment on the 21st November 2003. Any claim that vested in the Applicant by virtue of the dismissal on 31st January

2003 was extinguished by his reinstatement and subsequent resignation.

10. In our judgement there is merit in this submission. If the Applicant had not resigned, the final adjudication would have been concerned only with two possible outcomes: either confirming the Applicant's reinstatement, or confirming the Applicant's dismissal on 31st January 2003 as lawful and fair. When the Applicant resigned from the Respondent's employ, these two outcomes became academic. The envisaged final adjudication was overtaken by events.

11. The Applicant's counsel submits that the resignation of the Applicant on 21st November 2003 constituted a constructive dismissal which was part and parcel of the dismissal on 31st January 2003. This submission is logically untenable. Firstly, the dismissal of 31st January 2003 cannot provide grounds for constructive dismissal because it was cured by the interim reinstatement order. Secondly, the cause of action pleaded in the Applicant's particulars of claim is pinned securely and exclusively to the dismissal of 31st January 2003. An alleged constructive dismissal which took place some 10 months later is irrelevant to the cause of action as pleaded, and only serves to emphasize that the dismissal of 31st January 2003 was nullified by the interim reinstatement order.

12. Whether or not the resignation of the Applicant constitutes a constructive dismissal is not a matter that arises for decision in the present application. The alleged constructive dismissal gives rise to an entirely separate cause of action. Such cause of action was only

completed when the Applicant's employment was terminated by virtue of his resignation on the 21st November 2008. No such case has been pleaded in the particulars of claim, nor apparently was any such dispute reported to the Labour Commissioner in terms of section 76 of the Industrial Relations Act 2000.

13. In our judgement any claim the Applicant had by virtue of his dismissal on 31st January 2003 was extinguished by the restoration of the *status quo ante* and his subsequent resignation.

14. Determination of the question whether or not the dismissal of the Applicant on 31st January 2003 was fair and lawful has indeed become academic. The court does not exercise its jurisdiction to answer academic questions – see **Anglo Transvaal Colleries Ltd v South African Mutual Life Assurance Society 1977 (3) SA 631 (T) at 635 F-G.**

15. It is not clear to the court why the Applicant has elected to pursue the academic dispute arising from his dismissal on 31st January 2003 when such dismissal was remedied by reinstatement, albeit interim, instead of pursuing his grievance concerning his alleged constructive dismissal on 21st November 2003. Nevertheless the court can only deal with the case pleaded before it.

16. We uphold the first Special Plea.

SECOND SPECIAL PLEA

17. In its second Special Plea, the Respondent alleges that:

17.1 the Applicant instituted these proceedings without giving the Respondent thirty days notice of its intention to do so, as required by section 116 (2) of the Urban Government Act; and

17.2 the Applicant's claim has prescribed by virtue of the provisions of section 116 (1) of the Urban Government Act.

18. Following the Applicant's dismissal on 31st January 2003, his attorneys wrote to the Respondent on the 5th February 2003 demanding his reinstatement. The letter explicitly states that should the demand not be complied with, the attorneys' instructions are to proceed to the Industrial Court and bring an urgent application for the necessary relief. The letter sets forth sufficient particulars as to leave the Respondent in no doubt as to the nature of the Applicant's complaint.

19. In our view this letter constitutes sufficient compliance with the requirements of section 116 (2). It is expressly stated in the letter that legal proceedings will result if there is no compliance with the demand, and therefore the purpose of section 116 (2) has been met – the letter served to put the Respondent on enquiry and afforded it an opportunity to investigate the matter and avoid litigation if so advised.

See **Abrahamse v East London Municipality & another 1997 (4) SA 613 (SCA) at 623H- 624C**

20. Turning to section 116 (1) this section provides as follows;

"No legal proceedings of any nature shall be brought against a council in respect of anything done or omitted by it after the commencement of this Act, unless such proceedings are brought before the expiry of twelve months from the date upon which the claimant has knowledge or could reasonably have had knowledge of the act or omission alleged."

21. The present application was instituted on the 5th June 2007, some fifty two months after the date upon which the Applicant became aware that he had been dismissed. *Ex facie* the provisions of section 116 (1), the Applicant is prohibited from instituting the application.

22. The Respondent submits however that section 116 of the Urban Government Act has no force or effect, because it is inconsistent with the following fundamental rights which vest in the Applicant by virtue of Chapter 111 of the Constitution.

22.1 the right to equal protection of the law in terms of section 20;

1.1 the right to a fair hearing in terms of section 21;

22.2 the right of a worker to be protected from unfair dismissal in terms of section 32 (4)(c).

22.3 the right to administrative justice and the right to apply to a court of law in respect of any decision taken against him by a public authority with which he is aggrieved, in terms of section 33 (1);

22.4 the right of access to a court of law, in terms of sections 20, 21 and 33(1);

22.5 the right to be protected from deprivation of his property in terms of section 19 (2).

23. The Applicant's counsel advanced a painstaking and comprehensive argument with regard to these constitutional provisions in support of his submission that section 116 is inconsistent with Chapter 111 of the Constitution and should be considered as no longer valid law and therefore of no force or effect.

24. The court was referred to the recent unreported judgement of the High Court in the case of **Fakudze v Chairman of the Council-in-Committee of the Manzini City Council (Unreported Civil Case No. 252/07).** In this judgement Annandale ACJ points out that a claimant who is debarred under section 116(1) or (2) from instituting proceedings against a municipal council is given the right under section 116(3) to apply to the High Court for special leave to institute proceedings. The learned Acting Chief Justice expresses his considered opinion that section 116(2) of the Act "*could only be said to cause an unfair disadvantage to the applicant once he has sought liberation from the time limit imposed by the statute but a denial of condonation followed his application*." The acting Chief Justice concludes that the constitutionality of section 116(2) cannot be challenged by a party who has failed to first exercise his remedy of applying to the High Court for special leave.

25. In the present matter the Applicant has not applied for special leave to

institute the proceedings notwithstanding that the period of twelve months provided by section 116(1) has long expired. The Respondent submits that the Industrial Court is bound by the judgement of Annandale ACJ in Fakudze's case (*supra*) and the court must dismiss the Applicant's constitutional argument out of hand on the basis of *stare decisis*.

26. We do not consider that we are bound by the judgement in Fakudze's case for the following reasons:

26.1 The judgement dealt with a constitutional challenge to section 116(2), not section 116(1). Although the principle laid down by the learned acting Chief Justice could be said to apply to both sections, the judgement is strictly speaking *obiter dictum* with regard to the constitutional challenge to section 116(1).

26.2 We are unable to extend the principle laid down in the Fakudze case to the present matter because in our respectful view the approach of the learned acting Chief Justice to the constitutional challenge was incorrect. In the case of **Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC)** the Constitutional Court of South Africa held that the requirement of written notice as a precondition to the institution of legal proceedings against a municipal council is an obstacle to such proceedings and interferes with the constitutional right of access to the courts. Referring to a provision similar to

section 116(3) which allowed a claimant who had not given the requisite notice to apply to a court for special leave to institute proceedings, the Constitutional Court said: *"..[T]he condonation opportunity afforded to a prospective claimant by s 4 does not render the impediment immaterial. The obstacle remains regardless of this potential amelioration of its harshness."* The Court said that the provision for special leave is but one part of a composite scheme designed to limit actions against local authorities. The Court held that the scheme as a whole constitutes a material limitation of an individual's constitutional right of access to a court of law, and that such limitation is not reasonably justifiable.

26.3 In our respectful view it is juristically untenable for the High Court, being the constitutional court of Swaziland, to refuse to consider whether a statutory scheme designed to limit an individual's right of access to court infringes on an individual's constitutional rights, simply because the individual did not exercise the remedy provided by the very statutory scheme under constitutional challenge. If a law is unconstitutional, then it is invalid and an individual does not require condonation for not complying with it. Moreover the test for the constitutionality of a law is not whether the law "causes an unfair disadvantage" to the claimant, but whether the law is inconsistent with the fundamental constitutional rights of the claimant.

26.4 The present matter is also distinguishable from Fakudze's case on another significant basis. Fakudze's case was heard in the High Court. The present matter in the Industrial

Court is governed by the provisions of the Industrial Relations Act, 2000 (as amended). The Act requires a dispute to be reported to the Conciliation, Mediation and Arbitration Commission and certified as unresolved before it may be referred to the Industrial Court or an arbitrator for adjudication. Section 76(2) of the Act permits the dispute to be reported within a period of 18 months from the date the dispute first arose. If legal proceedings against a municipal council *qua* employer must be instituted in the Industrial Court within 12 months, this seriously undermines the protection afforded to employees of the council by Part VIII of the Industrial Relations Act. In this regard, it may be argued with some force that section 116(1) is inconsistent with section 32(4)(d) of the Constitution.

27. Section 35(3) under Chapter 111 of the Constitution provides:

> "If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgement of that person, which shall be final, the raising of the question is merely frivolous or vexatious."

28. The Industrial Court is subordinate to the High Court, since its proceedings are subject to review by the High Court in terms of section 19 (5) of the Industrial Relations Act 2000.

29. In our judgement in the case of **Stanley Matsebula v The Under**

Secretary, Ministry of Education & Others (Unreported IC Case No. 50/2007) we made the following observations with regard to sections 35 (3) of the Constitution (at paragraphs 28 and 30):

"The High Court is clearly indicated as the preferred adjudicating authority for questions involving Chapter 3 contraventions. Parties litigating in subordinate courts are given the right to have such questions referred to the High Court for determination, and the proceedings stayed in the interim, *if they so request. Upon such request the presiding officer shall refer the question to the High Court. The presiding officer in the subordinate court may also, in his discretion, stay the proceedings and refer the question to the High Court for determination……. It goes without saying, however, that presiding officers will be loathe to decide any Chapter 3 question which involves a finding that a statute or a common law rule is inconsistent with the Constitution, and such questions will inevitably be reserved for determination by the High Court."*

30. If the court had not upheld the first Special Plea, I would have referred the question of the constitutionality of section 116 (1) to the High Court and stayed the proceedings in the interim. In my view the raising of the question can by no means be regarded as frivolous or vexatious. On the contrary, the arguments of the Respondent make out a substantial case for the striking down of section 116.

31. The first Special Plea raised by the Respondent has been upheld. It follows that the application must be dismissed. On the question of costs, there is no reason why the costs should not follow the event. Both parties employed counsel from South Africa and asked for a special direction in terms of Rule 68(2). This rule permits the court to direct that the taxing master on taxation is not to be bound by the

amounts set out in section H of the tariff (costs of counsel), and where such a direction is given the taxing master may, if (s)he thinks fit, allow on taxation such larger sums as (s)he thinks reasonable.

32. **The application is dismissed with costs. The court directs that the taxing master on taxation is not to be bound by the amounts set out in section H of the tariff (costs of counsel) and may allow such larger sums as (s)he thinks reasonable.**

The members agree.

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PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT