IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 635.08

In the matter between:

VIVIAN HAMMOND **APPLICANT**

And

BRENT HAMMOND **1st RESPONDENT**
HAMMOND BROTHERS (PTY) LTD **2nd RESPONDENT**

CORAM:

NKOSINATHI NKONYANE **JUDGE**

FOR APPLICANT **MR. M. SIBANDZE**
FOR RESPONDENTS **MR. J. HLOPHE**

JUDGEMENT ON POINTS RAISED IN LIMINE

21.01.09

[1] The applicant and the 1 respondent are biological brothers. They jointly own the 2nd respondent. They are co-shareholders in the 2nd respondent and each owns 50% of the shares.

[2] The 2 respondent is a company that is duly registered in terms of the company laws of the Kingdom of Swaziland. The 2nd respondent is conducting business as a supermarket at the Gables Shopping Complex at Ezulwini and is trading under the name Pick 'N Pay. This business was established in 2001, and the 1st respondent was its Managing Director and the applicant was Manager.

[3] In 2003 the applicant and the 1st respondent formed another company by the name of ROSSAL N0.48 (PTY) Limited which was registered with limited liability under the laws of the Republic of South Africa. This company bought Pick 'N Pay Sunninghill with the result that the applicant relocated to South Africa to run this business. The applicant apparently failed to run the business successfully and it was wound up due to bankruptcy by a court order issued by the High Court of South Africa, the Witwatersrand Local Division. (See annexure "BH1").

[4] The applicant then returned to Swaziland in November 2006. When the applicant returned, a dispute ensued about what role, the applicant was to play in the 2nd respondent. The respondent denies that upon his return from South Africa, the applicant resumed his duty as the Manager of the 2nd respondent. The applicant in the meantime, however, continued to have his monthly living expenses paid by the 2nd respondent. The 1st respondent avers that the applicant began to engage in conduct that had the sole intention of bringing down the business, like withdrawing money from the company's account without due regard to the company's cash flow. The 1st respondent avers that it became imperative for him to stop the payment or withdrawals by the applicant in order to save the company from going bankrupt. The Jt^ respondent further avers that the applicant was being paid the amount that he was being paid in his capacity as Director/Shareholder of the company and not as an employee of the company.

The dispute between the parties was referred to Mr. Mark and Kevin Ward for mediation. The dispute could not be resolved. The applicant has thus run to this court on an urgent basis and is asking this court to make an order in the following terms;

"1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a rule *nisi* be issued calling upon the respondents' to show cause on a date to be appointed by the Honourable Court why an order in the following terms should not be made final:

2.1 Ordering the 1st respondent to ensure that the applicant's salary and expenses for November and subsequent months be paid and continue to be paid by the 2nd respondent for as long as applicant tenders his services and remains an employee of the 2nd respondent.

2.2 Granting further and / or alternative relief.

3. Directing that prayer 2.1 operate as a rule *nisi* with immediate and interim effect returnable on a date to be set by this Honourable Court.

4. Granting costs of this application on the scale as between attorney and own client.

5. Further and / or alternative relief."

[6] In their answering affidavit the respondents have raised two points in limine. The applicant filed an application to strike out and also a replying affidavit to the points raised in limine only and said it was reserving its right to file a comprehensive replying affidavit after the court has determined the application to strike out.

[7] When the matter came before the court for argument the court members were not present and the parties agreed that the Judge sits alone to hear and decide on the matter as per the provisions of Section 6(7) of the Industrial Relations Act of 2000.

The two preliminary points raised on behalf of the respondents are that; the matter is not urgent and should not be heard by the court on an urgent basis, and that the applicant has instituted motion proceedings notwithstanding the applicant's awareness of disputes of fact involved.

[9] **Urgency:-**

Ordinarily, the Industrial Court does not entertain disputes brought to it unless a Certificate of Unresolved Dispute is attached certifying that the matter has been through the dispute resolution process as envisaged by Part VIII of the Industrial Relations Act. Urgent applications therefore represent an exception to this rule. Urgent applications in this court are governed by Rule 15 of the Industrial Court Rules of 2007. The applicant is required by this Rule to set forth explicitly the circumstances and reasons which render the matter urgent, the reasons why the provisions of Part VIII of the Act should be waived and the reasons why the applicant cannot be afforded substantial relief at a hearing in due course. On good cause shown, the court may direct that the matter be heard as one of urgency. The use of the word "may" clearly shows that the court has a discretion and does not direct that a matter be heard as one of urgency as a matter of course.

[10] On behalf of the respondents it was argued that the applicant unduly delayed in bringing the matter to court as he got to know about the non-payment of his salary in November 2008 but waited until the eve of Christmas to bring the application. On behalf of the applicant it was argued that the delay in bringing the matter to court was not unduly and that the application was urgent because the applicant is claiming payment of his unpaid wages.

[11] It became apparent during the submissions that there was a dispute whether the applicant was an employee to whom wages were due. The argument on behalf of the respondents was two pronged, namely that the applicant has unduly delayed in bringing the urgent applicant and that the applicant was in fact not an employee of the 2nd respondent.

[12] The evidence from the applicant's replying affidavit shows that the applicant was advised on 8 December 2008 by the company's bookkeeper, Mrs Catherine Fuller that he was not going to get his expenses cheque. The applicant was advised to contact the 1st respondent. The applicant did so and the two started to engage each other on the issue. The applicant should not be punished for first trying to have the matter settled out of court. The policy of this court is in fact to encourage parties to a dispute to first try to resolve it outside the court. I find therefore that the applicant did not unduly delay to bring this application to court and that it was proper for him to try extra curial means of resolving the dispute.

[13] The second part of the argument that the applicant is not an employee of the 2nd respondent will be dealt with under the second point raised by the respondents.

[14] **Dispute of fact:**

It was argued on behalf of the respondents that the court should not hear the matter in the manner that it has been brought, that is, on notice of motion, because there is a dispute of fact whether or not the applicant was an employee of 2nd respondent to whom wages or a salary was due. Ordinarily, an employer is not entitled to withhold an employee's salary when it is due. An employer may withhold an employee's salary only for lawful reasons, for example for a period of not more than one month when that employee is under suspension in terms of Section 39(2) and that employee had first been given a hearing.

(See:- Nkosingiphile Simelane v Spectrum (Pty) Ltd t/a Master Hardware case No. 681/2006 IC)

[15] Assuming in this case that the applicant was an employee of the 2nd respondent to whom wages or salaries were due, it would clearly be unlawful for the 1st respondent to order the stoppage of the applicant's salary whilst the employer -employee relationship subsists.

See :- Sean Maher v. Standard Bank Swaziland Limited case No. 2/98 (IC).

CF:- Graham Rudolph v. Mananga College Case No. 94/2007 (IC) (Judgement on points in Limine)

[16] There is no dispute that the applicant is a co-shareholder and Director of the 2nd respondent. There is a dispute that there is an employer - employee relationship entitling the applicant to be paid a salary. Indeed this is an important issue that the court must deal with before the merits of the case. The Industrial Court has no jurisdiction to hear disputes between co-shareholders. It has jurisdiction to hear only disputes arising between employer - employee relationships. This is in terms of Section 8(1) of the Industrial Relations Act 1 of 2000 which gives the Industrial Court the exclusive jurisdiction to hear disputes arising between an employer and employee in the course of employment.

[17] The first enquiry therefore is whether there was an employer - employee relationship between the applicant and the 2nd respondent. If there was none, *cadit questio,* and the application must be dismissed.

[18] The applicant in his papers merely stated that he is a Director/Shareholder and employee of the 2nd respondent. He did not state when he was employed by the 2nd respondent and what conditions of employment the parties agreed to. In terms of the Employment Act No. 5 of 1980 (as amended) under Section 2, an employee "means any person to whom wages are paid or are payable under a contract of employment."

[19] The fact that a person is appointed a Director does not *ipso facto* entitle him to claim remuneration. A Director is not an employee of the company and has no right to the ordinary benefits of employees and is not entitled to the usual rights arising from a contract of service. He can however enter into a contract of employment with his company with the result that in addition to his position as Director he also stands in the position of an employee.

See:- Cilliers and Benade: Company Law: 4th Edition at pages 324 - 325.

Phillips v. Base Metals Exploration Syndicate 1911 TPD 403.

Brown v Nanco (Pty) Ltd 1976 (3) S.A. 832 (w).

Ross & Co. v. Coleman 1920 AD 408.

[20] There is no allegation by the applicant that upon his return from South Africa he was appointed Managing Director and therefore has two capacities within the company; that of Director and; as Managing Director, that of employee.

See:- Anderson v James Sutherland (Peterhead) Ltd 1941 SC 230.

There is also no allegation by the applicant that he is an Executive Director and therefore entitled to receive a salary.

See:- Conly v. Pasdech Resources (SA) LtdZALC177.

[21] The fact that the applicant decided to refer to the monthly withdrawals that he was making as salary does not make him an employee of the 2nd respondent. The applicant also relied on annexure "VH 10" for his argument that he is an employee of the 2nd respondent. This document is written "To whom it may concern" by Synergy Chartered Accountants (Swaziland) who say that they are the auditors of the 2nd respondent. The auditors do not state however why they wrote the letter or who asked them to write the letter.

[22] The applicant also relies on annexures "VH7", "VH9" for his argument that he was an employee of the 2nd respondent. These documents are copies of remittances to the Department of Taxes. Again, this does not take the applicant's case any further. These documents show that the applicant gets a basic salary of E38,000:00. The directors may as well decide that each of thern will get a salary at the end of the month. That however does not necessarily make them employees.

[23] The capacity of the applicant was in dispute. The 1 respondent denied that when the applicant returned from South Africa, he resumed his duties with the 2nd respondent as Manager. The dispute was referred to the Wards for mediation but could not be resolved. The applicant therefore knew when he instituted these proceedings that there was a dispute that he was an employee of the 2nd respondent.

[24] Proceedings on motion can only be entertained by this court only where a material dispute of fact is not reasonably foreseen.

See:- Rule 14 of the Industrial Court Rules.

Juanita Bernadette Balkisson v. Waterford Kamhlaba (UWC) Case No. 308/2008 (I.C.)

Njabulo Kenneth Simelane v. Swaziland Investment Promotion Authority (SIPA) Case No. 511/08 (I.C.)

[25] The application may be dismissed with costs when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop

See: Room Hire Co. (Pty Ltd v. Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T) at 1162.

[26] The applicant is a Director /Shareholder of the 2 respondent. He is clearly entitled to a form of payment for his upkeep in his capacity as such. He was in fact invited by the 1st respondent to attend an extraordinary meeting by letter dated 22 December 2008 wherein the question of remuneration of Directors was going to be discussed on 29 December 2008. The 1st respondent said he ordered

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the stoppage of any payment to the applicant because the applicant has since engaged in conduct that is aimed at bringing down the 2nd respondent. The applicant must always remember that as a Director that he is subject to certain fiduciary duties towards the 2nd respondent.

[27] Taking into account all the submissions made before the court and the evidence appearing on the papers before the court, I come to the conclusion that it was not competent for the applicant to institute motion proceedings because of the apparent dispute of facts attendant upon this matter which the applicant ought to have foreseen.

[28] This application is accordingly dismissed with costs.

NKOSINATHI NKONYANE
JUDGE OF THE INDUSTRIAL COURT