

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1/09

In the matter between:

DELISILE MAPHALALA

APPLICANT

And

LIJAHHA SISU RESTAURANT AND BAR

RESPONDENT

CORAM:

NKOSINATHI NKONYANE DAN

JUDGE

MANGO GILBERT NDZINISA

MEMBER

MEMBER

**FOR APPLICANT FOR
RESPONDENT**

**B. MKOKO V.
JELE**

JUDGEMENT 16.03.09

[1] This is an application brought by the applicant against the respondent on a certificate of urgency.

[2] The applicant is seeking an order in the following terms:

"1. Dispensing with the normal forms and time limits provided for in the rules of the above Honourable Court and dealing with this matter as an urgent matter in terms of the Rule 6(25) of the Rules of the above Honourable Court.

a) Condoning any non compliance with the Rules of Court relating to time limits, manner of service of court process and document and any other procedural requirements.

b) That a *rule nisi* do issue operating with immediate effect,

calling upon the respondent to show cause on date to be determined by the above Honourable Court why prayer 3.1. herein below should not be made and confirmed and made a final order of this Honourable Court.

3.1. That the respondent pays to the applicant a sum of E13,145.75 in respect of remuneration for days she worked from May 2008 to date.

- c) Cost of this application against the respondent at Attorneys and own scale.
- d) Further and/or alternative relief as court may deem appropriate.

[3] The application is opposed by the respondent. In its answering affidavit the respondent raised points *in limine*. All papers having been filed by the parties, the parties to argued the points raise *in limine* together with the merits of the case.

The points *in limine* raised by the respondent are that;

- e) The applicant has not shown that the matter is urgent as she has failed to meet the requirements of urgency namely that; she will not be afforded substantial relief at a hearing in due course.
- f) The applicant became aware of the non-payment of her salary in October 2008 but waited until 2009 to institute legal proceedings.
- g) The applicant has instituted motion proceedings notwithstanding her awareness of dispute of facts.

The undisputed evidence revealed that the applicant was employed by the respondent on or about 25th September 2006 as a short order cook. The applicant was in a supervisory position. As part of her duties she was

responsible for paying salaries of staff. She also paid salary to herself. The employees of the respondent, including the applicant would sign the salary book to confirm that they have been paid the salary for that month.

The applicant states in her papers that the respondent stopped paying her salary in May 2008. The respondent denies this and maintains that it had never stopped paying the applicant her salary. The respondent annexed some documents called summary cash declarations marked "PD1" and "PD2".

[7] It became apparent to the court that there is a serious dispute of fact whether the applicant was paid her salary or not. The documents annexed were clearly not conclusive and could not help the court.

[8] In October 2008 the applicant engaged the services of her representative who caused a letter to be written to the respondent dated 30th October 2008 demanding the payment of the applicant's salary from May 2008. The respondent however also wrote to the applicant's representative a letter dated 24th November 2008. That letter is annexed as "DM-3" in the applicant's founding affidavit. In paragraphs 2-3 of that letter the respondent stated:

"On 10 November 2008, we agreed with your client on flexible payments to be made to her until completion. May you then advise us if that will be acceptable to your company. The agreement was (sic) reason to settlement on our understanding.

Your client (Ms Delisile Maphalala) was requested to bring supporting evidence for any overtime falling between the claimed payment of the months before we can process payments. The aim was to ensure that all claims are summed up together with the salaries."

[9] From this letter it would seem that the respondent was not disputing

that it was indebted to the applicant in the form of unpaid salaries. The respondent seemed to be disputing the payment of overtime only. The applicant's representative on the other hand insists that her client was never paid her salary. There is therefore here a dispute of facts which can only be solved by the leading of oral evidence.

[10] The applicant is claiming payment of the sum of E13,145.75. This amount is made up of both the unpaid salaries and overtime as can be seen from annexure "DM-5" the second page which contains the calculations made by the applicant.

[11] The applicant's representative told the court that the applicant has since been dismissed from work. The circumstances of the case have therefore changed since the application was lodged in court on the 25th February 2009. The applicant cannot now insist that the matter be heard as a matter of urgency as she is no longer in the employ of the respondent. Inconvenience and financial difficulties are not exceptional circumstances to warrant a matter being heard urgently.

See **Graham Rudolph v Mananga College case No. 94/07 I.C. (Ruling on points of law)**

[12] Because of the real dispute between the parties on material questions of fact and the fact that the applicant is now no longer employed by the respondent, the court will uphold the points of law raised by the respondent.

[13] Taking into account all the circumstances of the case the court will make the following order;

h) **The application is dismissed.**

i) **The applicant is granted the leave to file a new application**

**in terms of Part VIII of the Industrial Relations Act, 2000
(as amended) within fourteen days after this judgement.**

j) **No order for costs is made.**

The members agree.