IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 56/2009**

In the matter between:

DUMSAIM! DLAMINI **APPLICANT**

and

SWAZILAND TRADING HOUSE AND ANOTHER

RESPONDENTS

CORAM:

S. NSIBANDE A.M. **MEMBER**

NKAMBULE M. MTETWA **MEMBER**

ACTING JUDGE

MR. T. MLANGENI MR. **FOR APPLICANT FOR**

2. JELE **RESPONDENT**

JUDGEMENT ON POINTS IN LIMINE ■TH

MARCH 2009

If

[1] The Applicant has applied to Court on a certificate of urgency for an order in the following terms;

"1. That the normal rules of Court as to notice, time limits and procedure be and are hereby dispensed with and the matter heard as an urgent one;

2. *That the Respondents be and are hereby directed, jointly and/or severally, to forthwith pay the Applicant his monthly salary for the months of December 2008 and January 2009;*

3. *That the Respondents be and are hereby directed to pay the Applicant's monthly salary for subsequent months until the issue of Applicant's tenure of office as the Chief Executive Officer of the Respondents is determined through a hearing in due course or by whatever other means;*

4. *Costs of wite;*

5. *Further and/or alternative relief."*

[2] The Applicant asserts he is the Chief Executive of the Respondents. On 7th November 2008 he was suspended from work, on full pay, pending an investigation into suspected misconduct. He was subsequently charged with various counts of misconduct and notified to appear before a disciplinary enquiry on 8th December 2008.

[3] On 7th December 2008, the day before the disciplinary enquiry, the Applicant tendered his resignation from his employment, with immediate effect. The resignation was, however, conditional on *"tire provision of a reasonable exit/termination agreement between the companies, the board and myself."*

The Respondents accepted the Applicant's resignation but no reasonable exit agreement was provided. The Applicant then withdrew his resignation. It is on the basis that he withdrew his resignation that he brings this application for the payment of his salary from December 2008.

He alleges that the matter is urgent because the non-payment of his salary is causing him an enormous amount of hardship. The financial hardships associated with the withholding of his salary are the basis of the urgency of the application.

The Respondent opposes the application and has raised a point of law namely:

6.1 (a) That the matter is not urgent because the applicant grounds his urgency on economic hardships caused by the non-payment of his salary whereas in the Respondents' view, he was no longer their employee having resigned in December 2008 and there was therefore no withholding of salary that could be used to justify the application being urgent.

(b) The Applicant has failed to fulfill the requirements of Rule 15 (2) (b) of the Rules of Court in that he has not set forth explicitly, in his founding affidavit the reasons why the provisions of Part VIII of the **Industrial Relations Act** should be waived. This requirement, it was submitted, is peremptory and a failure to adhere to it means that the application must fail.

Secondly, the Respondent filed an application to strike out paragraphs 8.1 up to 8.7 of the Applicant's replying affidavit on the basis that the aforementioned paragraphs contained facts that were in the Applicant's knowledge when his founding affidavit was prepared and ought to have been included therein but were not included in the founding affidavit.

It was submitted that the Applicant should stand or fall by his founding affidavit and the facts alleged in it since the Respondents were now precluded from dealing with the new matters he has raised in reply. The Respondents applied in the alternative that they be allowed to file a further affidavit to address the issues raised in the reply in the event that the Court refused to strike out the allegedly offensive paragraphs.

The Applicant in response argues that this Court being a Court of equity and promoting fairness in industrial relations, ought to look beyond the technicalities and get to the bottom of factual issues. The Applicant, it was submitted remains an employee by virtue of the withdrawal of his letter of resignation and the with-holding of his salary is a good ground for the court to enroll the matter as an urgent one.

The Court was further urged to look at the founding affidavit as a whole and hold that on such a reading, the Applicant .has made sufficient averments to justify a departure from the procedure in terms of Part V111 of the **Industrial Relations Act.** The Court should not look for a recital of particular words.

Regarding the application to strike out, the Applicant's position was firstly that the averments complained of were not new matters but an expansion of matters set out in the founding affidavit as a consequence of the denials contained in the Respondent's answer. The Court, it was argued had the discretion to allow the new matter to remain in the affidavits, if it found that they were indeed new matter, and give the respondents an opportunity to deal with it by

filing further affidavits.

[12] The authorities cited by both parties are unanimous on one point - an applicant who seeks to have his matter determined on an urgent basis must not only satisfy the court that the matter is sufficiently urgent to justify the usual time limits prescribed by the rules of court being curtailed, but must also establish good cause for dispensing entirely with the conciliation process. In order to do so, he must explicitly set forth the circumstances which render the mater urgent apd state the reason why he cannot be afforded substantial relief in due course (See - **Vusi Gamedze and Mananga College IC Case 267/06; Phillip Nhlengethwa and 6 Others and Swaziland Electricity Board IC Case 272/2002; Kenneth Makhanya and The National Football Association of Swaziland IC Case 286/2004).**

[13] In this matter the Applicant has not even attempted to set out reasons why Part V111 of the **Industrial Relations Act** should be waived or why he cannot be afforded redress in due course. While Applicant's argument regarding the need to limit technicalities in this court is quite seductive, **it** misses the point that the requirement of the rule is not technical at **all.** Given that the court will not normally take cognizance of disputes that have not been through the conciliation process it is incumbent upon **an** applicant who wishes to be heard ahead of all "other litigants **to** set out explicitly why that should be so, otherwise every case would qualify to be treated as urgent.

[14] The Applicant's case is further complicated by the fact of his resignation from employment. It is trite that resignation brings the employment contract to an end (see **John Grogan's Workplace Law 8th Edition page 78** and **Bonkhe** Lukhele **and Swaziland Development Finance Corporation IC Case** 39**/08).** The Applicant alleges his resignation was conditional and was induced by the chairman of the Respondent's Board of directors whereas the Respondents state that the resignation was voluntary and a unilateral act on the Applicant's part and that such action was accepted by the Respondents.

[15] The Applicant's right to a salary is entirely dependant on the determination, in his favour, of the question whether his resignation was voluntarily tendered or induced and whether as a consequence of such inducement it can be unilaterally withdrawn. The circumstances surrounding his resignation are contentious and are critical to the determination of that question. They require proper and full investigation by way of oral evidence and should not be decided in motion proceedings, it is the Court's view that these issues cannot be determined without the hearing of oral evidence.

[16] It is the Court's view that the Applicant must comply with the dispute reporting procedures prescribed by the Industrial Relations Act. If the matter remr.ins unresolved after conciliation it may be referred to the Industrial Court for determination. It is at this stage that all the circumstances surrounding the resignation - including any alleged inducement - may be fully explored by way of oral evidence at the trial.

17. On this basis the point with regard to urgency succeeds. Consequently it will not be necessary to determine the application to strike out. The application is dismissed, with no order as to costs.

The members agree.

ACTING JUDGE OF THE INDUSTRIAL