

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 387/2009

In the matter between:

JOHN NXUMALO

APPLICANT

and

**IMPHUMELELO PERWAY & CIVIL
WORKS (PTY) LTD**

RESPONDENT

CORAM:

**S. NSIBANDE JOSIAH
YENDE NICHOLAS
MANANA**

**PRESIDENT
MEMBER
MEMBER**

**MR. MNISI
MR. M. SIBANDZE**

**FOR APPLICANT FOR
RESPONDENT**

R U L I N G - 5TH AUGUST 2009

1. The Applicant has applied to court on a certificate of urgency claiming for an order:

"1.1 Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the Honourable Court and directing that the matter be heard as one of urgency.

15. *Condoning the Applicant's non-compliance with the said Rules of the Court.*

16. *Directing the Respondent to forthwith return to the Applicant a certain motor vehicle being a Toyota Hilux Double Cab registered SD 568 RN.*
17. *Directing that the motor vehicle referred to in prayer 3 above be taken into the custody of the Applicant's attorneys pending finalization of this matter.*
18. *Alternatively: that the motor vehicle referred to in prayer 3 above be kept under judicial attachment pending finalization of this matter and that the Deputy Sheriff for the Lubombo District is forthwith directed to attach and remove the motor vehicle referred to in prayer 3 and keep same in his/her custody.*
19. *Declaring the suspension of the Applicant unlawful and thus of no force or effect.*
20. *Reinstating the Applicant to his position as the Managing Director of the Respondent forthwith.*
21. *Alternatively: Directing the Respondent to furnish the Applicant with the reasons, purpose and duration of the investigation and suspension.*
22. *Directing that prayers 4 and 5 thereof operate with immediate effect pending finalization of this matter.*
23. *Granting costs of suit on the attorney own client scale.*
24. *Granting further and/or alternative relief."*

In its answering affidavit filed in opposition to the application the Respondent has raised two points *in limine* namely:

25. That given the delay between the suspension, submission of the car and the date of institution of these proceedings the matter is not urgent.
26. That there exists disputes of facts in the matter that can only be resolved on the paper which the Applicant ought to have foreseen/anticipated and that therefore the matter is not one that ought to have been brought by motion proceedings.

It is common cause that Applicant is the Managing Director of the Respondent who is currently serving a suspension pending certain investigations by the Respondent. The suspension is with full pay. It is common cause also that on 18th May 2009, the date of his suspension Applicant was asked to surrender *"the company vehicle currently in your use and custody pending an investigation."* It is common cause that Applicant surrendered the motor vehicle to the Respondent.

The Applicant now seeks to challenge his suspension on two grounds. Firstly he complains that the suspension is unfair and unlawful because he has not been told what it is the Respondent is investigating, what possible misconduct is being investigated against him and how long the investigation will last. Secondly he complains that as part of his employment benefits, he is entitled to use of the vehicle he surrendered to the Respondent and that in fact that vehicle belongs to him. He submits that the vehicle should be returned to him as it belongs to him. Alternatively he submits that having been suspended on full pay he is entitled to continue using the vehicle until such time that he is no longer an employee of the Respondent.

The Applicant submits that the matter is urgent because Respondent's conduct in taking his vehicle away from him and in not giving him full information as to the nature and duration of the investigation is unlawful as it violates his right to be informed of the purpose, misconduct and nature of the investigation. Further that the Respondent's employees are using his vehicle and he has no control over the unlawful action of the Respondent. He complains of not knowing how and for what purpose the vehicle is being used and not knowing where it is kept and whether it is taken proper care of. He complains of being deprived of his lawful entitlement and that the vehicle is depreciating while the Respondent benefits from its unlawful act.

What the Applicant complains of is that there is a manifest injustice or grossly unfair labour practice being perpetrated against him by the Respondent and that this constitutes good cause for hearing the matter as one of urgency. The Applicant complains that he has not been told why he has been suspended, what is being investigated and how long the investigation will last, nor was he consulted when his benefit - the use of the vehicle - was taken away from him.

7. A manifest injustice or grossly unfair labour practice in itself does not qualify a party to join the queue of cases awaiting hearing. It must be shown that the Applicant cannot be afforded substantial redress at a hearing in due course if the matter is heard in the normal way.

(Graham Rudolph v Mananga College I.C. CASE NO. 94/07)

27. With regard to the alleged withdrawal of the motor vehicle as a benefit, the Applicant would in our view be entitled to bring the application on an urgent basis if he had been able to show at least a prima facie right to the benefit he claims. He bases his claim to the vehicle on the Respondent's motor vehicle scheme.
28. The Respondent denies firstly that the vehicle belongs to the Applicant and secondly that there exists the benefit Applicant claims. The Respondent points out that the motor vehicle scheme is unauthorised and unlawful and that in any event there is no compliance with the vehicle policy/scheme upon which the Applicant relies on to establish his claim. Respondent points out that at article 1.3 of the scheme, it is envisaged that the Respondent will pay to the employee a variable allowance to cater for the maintenance and fuel of the vehicles under the scheme. Respondent submits that no such payment is made to the Applicant nor has it ever been made save that the Respondent pays the vehicle. On this basis the Respondent denies the lawful existence of the motor vehicle policy and denies that the Applicant is lawfully entitled to the benefits of the scheme.
29. This denial by Respondent is in our view, significant in that it goes to the very root of the Applicant's claim. One would have expected the Applicant to meet it head on in his replying affidavit and explain whether or not he receives the variable allowance and the reasons for not receiving it should that be the case. The Applicant did not do and simply reiterated the contents of his founding affidavit.
30. The tone of the Respondent's letter seeking the surrender of the vehicle ought, in our view, to have alerted the Applicant that there is a dispute of fact regarding at least the ownership of the motor vehicle and the existence of the very policy he alleges entitles him to the motor vehicle benefit. This is a material dispute of fact which ought to have been foreseen and which cannot be resolved on the papers. Where such disputes exist this court will not entertain proceedings on motion.

**Vivian Hammond v Brent Hammond, Hammond Brothers (Pty) Ltd
I.C. Case No. 635/08.**

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

Rule 14 of the Industrial Court Rules 2007.

31. It is our view that the matter cannot be entertained on this basis.

32. Regarding the Respondent's failure to advise the Applicant why he has been suspended, what the investigation is about and how long it will take, the court is of the view that the Applicant has delayed unduly to bring this application. Having been suspended on 18th May 2009, the Applicant waited until 1st July to launch his application.

14. This court has stated on numerous occasions that a party who takes a lackadaisical attitude towards an infringement of its right and neglects to act promptly in seeking relief cannot at a later stage suddenly engage a high gear and try to accelerate the litigation process by claiming urgency.

Dumisani Dlamini & 16 Others, SMAWU vs SIYASPA (Pty) Ltd t/a Nhlanguano Spar I.C. Case No. 23/09.

After being suspended on 18th May 2009 the Applicant stayed for almost a month before making enquiries about the suspension on 12th June 2009. He again lapsed into lethargy until 1st July 2009 when he launched this application. In our view the urgency is self created.

33. In any event, there is no reason why the Applicant cannot obtain redress in due course. If he is successful in an application brought in terms of the rules in particular Rule 14, he should receive the information he seeks regarding the investigation and the relief he seeks within a relatively short period.

34. In the circumstances the points raised in limine are upheld and the application is dismissed.

There will be no order as to costs.

The members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT