

IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO. 546/09

HELD AT MBABANE

In the matter between:

VUMILE SHONGWE

Applicant

and

THABSILE MKHALIPHI t/a NGWANE

GENERAL DEALER

Respondent

CORAM:

S. NSIBANDE J. YENDE N.

MEMBER

MANANA

MEMBER

PRESIDENT

MR. MKOKO MR. MAVIMBELA

RESPONDENT

FOR APPLICANT FOR

RULING ON POINTS OF LAW - 2/12/09

1. The Applicant brought an application on notice of motion supported by affidavit for an order in the following terms:

1. That the Respondent herein is directed to pay the Applicant the following monies:

| | | |
|------------------|--------------|-------------------|
| 1.1 | Underpayment | E 8496.00 |
| 1.2 | Overtime | E 14040.00 |
| 1.3 | Leave due | E 846.00 |
| Total Amount due | | <u>E23 382.00</u> |

2 Punitive costs on Attorney-client scale are hereby granted against the Respondent.

3 Any other competent relief.

The Respondent filed a reply in which she raised two points in limine namely that; the application is defective because it did not state when Respondent was to file her notice to oppose and when she should file her replies; and that Thabsile Mkhalihi neither owns a company by the name Ngwane General Dealer nor does she trade under the same name.

When the matter was heard the first point was abandoned by the Respondent who then raised from the bar another point of law namely that the application was fraught with disputes of fact that were foreseeable thus making it a matter not suitable for motion proceedings as envisaged by Rule 14 of the Industrial Court Rules.

The Applicant's attitude was that since Respondent had filed a reply instead of an affidavit opposing the application, there was nothing before the Court in opposition to the application and the order sought should be granted.

The Applicant is correct that where the proceedings are instituted by way of motion supported on affidavit, the Respondent is expected to file an answering affidavit that must clearly and concisely set out:

6. any preliminary legal issues which the Respondent wishes to raise;
7. which allegations in the founding affidavit are admitted and which are denied;
8. All material facts and legal issues which the Respondent relied on its defence.

(see Rule 14 (8) (a) - (c) of the Industrial Court Rules 2007).

9. However it's our view, the Respondent's reply, unprocedural as it may be does not result in any miscarriage of justice. In our view it would be a miscarriage of justice to refuse to hear a party which has clearly indicated its

intention to oppose an application and had filed papers supporting its opposition albeit not in the right format.

10. In any event even if the Respondent's reply were to be struck off, the Respondent having filed an intention to oppose would still be entitled to be heard on the point raised from the bar regarding a dispute of fact that was foreseeable.
11. It is our view that the matter is not suitable to be heard on motion and requires the leading of oral evidence in a trial. The Applicant seeks overtime, leave due and underpayment. These issues need that the Applicant leads oral evidence to establish her claims. The Respondent denies that Applicant is entitled to the claims and in our view Applicant ought to have foreseen that these issues would be disputed since they were disputed at conciliation. The application is not one envisaged by Rule 14 of the Industrial Court Rules 2007.
9. In the circumstances, the point in limine will succeed and the application is dismissed.

There is no order as to costs.

The members agree.

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT