IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 25/2010

In the matter between:

MEMORY NDWANDWE	**APPLICANT**
And	
EVANGELICAL CHURCH SCHOOLS MANAGER	**1ST RESPONDENT**
THE TEACHING SERVICE COMMISSION	**2nd RESPONDENT**
ATTORNEY GENERAL	**3rd RESPONDENT**

CORAM:

D. MAZIBUKO:	**JUDGE**
A. M. NKAMBULE:	**MEMBER**
M. MTHETHWA;	**MEMBER**

MR. MANDLA Z. MKHWANAZI:	**FOR APPLICANT**
MR. ZWELI JELE:	**FOR 1st RESPONDENT**
NO APPEARANCE;	**FOR 2NDRESPONDENT**
NO APPEARANCE:	**FOR 3rd RESPONDENT**

JUDGEMENT - 1st MARCH 2010

1. The Applicant is a headteacher at Franson Christian High School which is based at Shiselweni district Swaziland.

2. The Applicant has moved an application before Court under a

certificate of urgency in which he claims relief as follows;

1. "Dispensing with the rules of court in respect of form, manner of service and time limits and hearing this matter as one of urgency.

2. That a rule nisi do hereby issue calling upon the Respondents to show cause, on a date to be determined by the above Honourable Court, why an order in the following terms should not be made final:

2.1. Setting aside the Applicant's letter of suspension dated 15th January 2010 and a declaration that the same is null and void and of no force and effect.

3. Costs of application.

4. That prayer 2.1 above operate with immediate effect pending final determination of this application.

5. Further and or alternative relief."

3. The 1 Respondent is Manager of Schools that are either owned or controlled by the Evangelical Church. The school where Applicant is headteacher is one of the schools under the control of the Evangelical Church and managed by 1st Respondent.

4. The 2nd Respondent is the Teaching Services Commission a statutory body established in terms of the Teaching Service Act1/1982 and the Regulation established thereunder known as The Teaching Service Regulations 1983.

5. The 3rd Respondent is the Attorney General of the Kingdom of Swaziland sued in his capacity as legal representative of all departments of Swaziland Government.

6. The Applicant states in his founding affidavit that on the 18th November 2009 he was arrested by Police Officers from Nhlangano Police Station. On the 20th November 200 he appeared before Nhlangano Magistrates Court to answer charges of theft, fraud and corruption. It appears he was remanded in custody. He was released from custody on the 25th November 2009 upon paying a bail deposit of E 7,000.00 (Seven Thousand Emalangeni) and provided the requisite surety.

7. On the 21st December 2009 the Applicant received a letter from 1st Respondent which letter reads as follows;

Evangelical Church School
P.O. Box 83
Hlatikulu

21st December 2009

TSC Number 7640
Employment Number
7076598
Mr Memory Ndwandwe
The Headteacher
Franson Christian High School
P.O. Box 1
Mhlosheni

Dear Sir,

MISCONDUCT: YOURSELF

Pursuant to the Criminal Charges of theft and fraud preferred against you under Case Number 181/2009 at Hluthi Magistrate Court, you are hereby called upon to show cause in writing as to why you should not be suspended in terms of Regulation 18 (1) read with Regulation 15 (4) of

the Teaching Service Regulations of 1983 and/or suspended on half pay as per Regulation 18 (2) of the Teaching Service Regulations of 1983, read with Regulation 15(5) of the said Regulations.

Your response should reach this office on or before the 12th January 2010.

Your co-operation will be highly appreciated.

Yours faithfully

Franson Simelane ***E.C.***
Schools Manager

Copied:

-*Executive Secretary, Teaching Service Commission*
-*The Regional Education officer (Shiselweni)*

8. The letter is attached to the Applicant's affidavit and was referred to as annexure A. It will continue to be referred to as annexure A in this judgement.

9. Upon receipt of annexure A, the Applicant wrote to 1st Respondent a letter dated 11th January 2010 which reads as follows;

P.O. Box 1
MHLOSHE
NI

11th January 2010

THE SCHOOL MANAGER
EVANGELICAL CHURCH
SCHOOL P.O. BOX 83
HLATHUKULU

Dear Sir

RE: MEMORY NDWANDWE/MISCONDUCT

The above matters refers.

I acknowledge receipt of your letter dated 21st December 2009 and have noted the contents thereof.

I am unfortunately not aware of any criminal charges pending against me at Hluthi Magistrates Court.

Kindly furnish me with a copy of the charge sheet issued from the said court to enable me to respond to your letter accordingly.

Your urgent response is anticipated.

Yours faithfully
Memory
Ndwandwe

This letter is attached to the Applicant's affidavit and is referred to as annexure B. This letter will continue to be referred to as annexure B in this judgement.

10. According to Applicant annexure B was delivered to 1st Respondent on the 11th January 2010. Applicant states that when writing annexure B he was seeking further particulars from 1st Respondent regarding the criminal charges allegedly pending at Hluthi Magistrates Court as he (Applicant) was not aware of those charges.

11. While awaiting a reply to annexure B the Applicant states that he received another letter from 1st Respondent dated 15th January 2010 which letter is attached to the Applicant's founding affidavit and is referred to as annexure C. This letter will continue to be referred to as annexure C in this judgement. Annexure C reads as follows;

Evangelical Church
School
P.O. Box 83
Hlatikulu

15th January 2010

TSC Number 7640
Employment Number
7076598

Mr Memory Ndwandwe
The Headteacher
Franson Christian High School
P.O. Box 1
Mhlosheni

Dear Sir,

MISCONDUCT: YOURSELF

1. We acknowledge receipt of your letter on the above-cited subject dated 11 January 2010. The contents therein have been noted but you have failed to respond to the contents of the letter dated 21st December 2009.

2. Kindly be informed that in terms of Regulation 18(1), read with Regulation 15 (A) of the Teaching Service Regulations of 1983, you are hereby suspended with effect from the 18th January 2010.

3. The conditions for your suspension are as follows:

(i) You are requested to hand over all school administrative books/documents to the Regional Education officer (Shiselweni).

(ii) You are to stay away from the school premises until your matter has been finalized.

(Hi) Whilst on suspension, do not interfere with witnesses, either directly or indirectly.

(iv) In terms of Regulation 18 (2), read with Regulation 15 (5) of the Teaching Service Regulations of 1983 you shall be suspended on half pay.

Your co-operation will be highly appreciated.

Yours Faithfully

Franson Simelane
E.C. Schools
Manager

Copied: Executive Secretary- Teaching Service
Commission : The Regional Education officer
(Shiselweni)

12. According to Applicant he was suspended by 1 Respondent from work in terms of annexure C with effect from 18th January 2010 without clarity on whether or not there were any charges pending against Applicant before Hluthi Magistrate's Court. Annexure C was handed over to Applicant at a meeting held at the school which was attended by the school committee chairman and an officer from 2nd Respondent. At that meeting Applicant was told that a decision to suspend him on half pay had been taken. The 1st Respondent has denied these allegations.

13. According to Applicant the decision to suspend him and to reduce his pay by half was irregular and should be set aside. The 1st Respondent argues that the manner at which the decision was taken was regular. The matter is opposed both on the question of urgency and on the merits. The 2nd and 3rd Respondents have not filed any papers. Their Counsel informed the Court that they will abide by the Order of Court.

14. The last three paragraphs of the founding affidavit dealt with urgency. The Applicant avers that the matter is urgent and he states his reasons as follows;

"31.

AD.URGENCY

The matter is urgent because the schools open for the first term on the 26th January 2010.

32.

I will not be afforded substantial redress at a hearing in due

course.

The Respondents will not suffer any prejudice by the hearing of this matter on an urgent basis.

15. According to the 1st Respondent, the Applicant has not complied with Rule 15 of the Industrial Court rules. The manner in which the matter is brought to Court does not qualify it to be enrolled as urgent.

16. Since urgency is being challenged, the Court has to decide that point. A decision on the question of urgency will determine the direction the matter will take.

17. The Conciliation, Mediation and Arbitration Commission is established in terms part VIII of the Industrial Relations Act 1/2000 as amended hereinafter referred to as the Act). The Commission (hereinafter referred to as CMAC) shall *inter alia* attempt to resolve through conciliation a dispute reported to it **(Section 64 (1) (b) of the Act).** The Act also provides for arbitration as an alternative dispute resolution mechanism.

18. If the dispute remains unresolved within the time limits stipulated in the Act, CMAC shall issue a certificate of unresolved dispute. Upon receipt of a certificate of unresolved dispute either party may make an application to the Industrial Court for determination of the dispute. The provisions of part VIII are mandatory to any party who wishes to bring an unresolved dispute to Court for determination **(Section 85 (2) of the Act).**

19. The provision of Rule 15 (2) (a), (b) and (c) are peremptory for urgent applications. The Court may direct that a matter be heard as one of urgency on good cause shown i.e. upon satisfactory compliance with the rule 15 (2) (a) (b) and (c). Failure to comply with Rule (15) (2) (a) (b) (c) will result in a party failing to show good cause with the result

that urgency will fail to be established.

20. The onus is on the Applicant to demonstrate in his affidavit facts, which will persuade the Court to hear the matter on an urgent basis. There is no list of circumstances that automatically qualify for urgency. Each matter is to be dealt with on its own peculiar facts. The Courts in other decided cases have accepted that the Applicant would satisfy the requirement of urgency if he were to demonstrate a well grounded apprehension of irreparable harm if urgent relief is not granted. In the matter of

Zodwa

Mkhonta

And

Swaziland Electricity Board

Industrial Court case No. 343/2002 the Court stated as follows in page 9;

"... Applicant has on a balance of probabilities demonstrated the urgency of the matter by establishing a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted."

This Court is in agreement with the principle stated in this quotation.

21. All disputes that come before Court for determination are to some extent urgent to the Applicants who brought them. By simply stating in his papers that the matter is urgent and nothing more, the Applicant is failing to advance his case any further.

22. The Applicant has stated *inter alia* that his matter is urgent because

the schools open for the first term on the 26th January 2010. There is no indication as to what harm or prejudice will Applicant suffer if the schools open as stated while he is processing his claim in accordance with part VIII of the Act. On this ground the Applicant has failed to persuade the Court to hear the matter as urgent.

23. The Applicant avers further that he will not be afforded substantial redress in due course. Again it is not clear as to why the Applicant is of the opinion that the procedure provided for in part VIII of the Act will not assist him in getting his claim heard and finalised. The function of CMAC is to resolve such disputes quicker and cheaper. The Industrial Court is available to adjudicate on the matter in the event that the dispute remains unresolved at CMAC. There is no indication that the Applicant's rights will be compromised if he were to follow the CMAC route as is expected of other litigants.

24. The third reason that was advanced by Applicant is that the Respondent will not be prejudiced if the matter is heard on an urgent basis. The facts on which this statement is based have not been stated. The Court is not in a position to assess the validality of this allegation in the absence of facts.

25. The rules were designed to regulate fair play in the arena of litigation. The Respondent is entitled to be given adequate notice that a particular matter in which Respondent has an interest is scheduled for hearing on a future certain date. That gives Respondent adequate time to instruct Counsel of his choice, draft the necessary papers, interview witnesses and prepare himself mentally, financially and otherwise to fight the matter in Court. When an applicant brings an urgent application before Court he thereby deprives the Respondent the advantage of working at his pace in preparing his defence. The Respondent may not be able to find Counsel of his choice on short notice. The Respondent may not be able to find time to locate and

interview all his witnesses. The Respondent may not have sufficient time and funds to adequately prepare for and prosecute his defence. That can create serious prejudice on the part of the Respondent. The Court has to balance the rights and interests of the Applicant with the prejudice that the Respondent may suffer if the matter is heard on an urgent basis. The Applicant has a duty to place before Court in his founding affidavit all the necessary facts in order for the Court to make an informed decision.

26. The Applicant is challenging his suspension. He wants the suspension set aside so that he can return to work. Other than the fact that the Applicant is suspended as headmaster, it appears the school is operating normally. It appears the Applicant can still file his claim in the normal form and await his turn in Court to argue his case. The fact that Applicant believes that he has a strong case on the merits does not mean that his case is therefore urgent. The strength of the Applicant's case should not be used as the only factor to determine whether or not to enrol a matter as urgent. Otherwise all matters with a ***prima facie* strong case** will qualify to be enrolled on urgency basis. That would be contrary to the spirit of Rule 15. There should be other factors to be considered which includes but not limited to irreparable harm that would occur if the matter is not determined urgently.

27. The Applicant is further challenging the half pay which the Respondents have withheld. That claim can also be dealt with at CMAC. If the dispute remains unresolved it can be adjudicated upon. The basis on which urgency is based must appear clearly on the papers filed by Applicant. **(See Phylyp Nhlengethwa and others v Swaziland Electricity Board Industrial Court Case No. 272/2002).**

28. Failure on Applicant's part to follow the requirements of rule 15 may be fatal to his case. In the matter of

Vusi

Gamedze

And

Mananga College

Industrial Court case No. 207/06 the Court stated as follows at page 5;

"Normally, the Industrial Court will not take cognizance of any dispute which has not been through the conciliation process prescribed by Part VIII of the Industrial Relations Act No. 1 of 2000 and certified as an unresolved dispute. The present Applicant 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 he 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 matter urgent, and state the reasons why he cannot be afforded substantial relief if the matter were to be dealt with in the normal way."

This Court agrees with the principle laid down in that quotation. For the reasons stated above the request to hear this matter as an urgent application fails. The rest of the prayers cannot be heard until the matter is properly enrolled.

29. The Court Orders as follows;

1. Prayer 1 of the Notice of Motion is dismissed with costs.

2. The remaining prayers will stand over until the matter is dealt with at CMAC in terms of the Act.

The members agree.

DUMSANI MAZIBUKO
JUDGE OF THE INDUSTRIAL COURT