

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 7/2010

In the matter between:

MDUDUZI MATSEBULA

Applicant

and

PALFRIDGE LIMITED

Respondent

CORAM:

S. NSIBANDE: PRESIDENT

SIMON MVUBU: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: ADV. I. CARMICHAEL

FOR RESPONDENT: MS. Z. MABUNDZA

RULING ON POINTS OF LAW-6/05/10

1. The Applicant has applied to the Industrial Court for an order in the following terms:

"1.1 That the Respondent be directed to immediately pay to the Applicant, a sum of E1,250.00 (One Thousand Two Hundred and Fifty Emalangenj), this being the notice pay that was due to the Applicant at the time of his dismissal.

1.2. That the Respondent be directed to immediately pay to the applicant, a sum of E15,000.00 (Fifteen Thousand Emalangenj), this being "Maximum compensation" for unfair dismissal.

1.3. Costs of this application including the costs consequent upon the employment of counsel.

1.4. *Granting to the applicant further and/or alternative relief."*

2. The Respondent opposes this application and raises the following preliminary points of law:

"2.1. The matter before court is fraught with potential disputes of fact. There are many forceable (sic) disputes of facts which are inherent in the Certificate of Unresolved Dispute. The application should not have been instituted under Rule 14 of the Industrial Court Rules.

2.2. The relief sought in the Applicant's application is also incapable of being resolved solely on the affidavit. This is the matter that should have been brought for determination under Rule 7 of the Industrial Court Rules."

3. Ms Mabundza for the Respondent argued that the matter was fraught with disputes of fact and could not be decided on the papers because the Applicant alleged he had been unfairly dismissed whereas the Respondent maintained the dismissal had been fair. It was Respondent's submission that the matter ought to have been brought before the court in terms of Rule 7 of the Industrial Court Rules 2007 the culmination of which would have been a trial at which the court would have made findings regarding the fairness or otherwise of the dismissal.

4. Applicant's submissions were that the dismissal was procedurally unfair and that the facts setting out the procedural defects had not been denied by the Respondent. Of significance to the Applicant was that the Respondent admitted that the Applicant had wanted certain witnesses to be brought to the disciplinary hearing for purposes of allowing the applicant to question them on adverse written statements they had given against him. It was Applicant's case that in these circumstances there was no real, genuine and bona fide dispute of facts because the Respondent had not seriously and unambiguously addressed the fact that Applicant had been denied the right to challenge, by cross-examination, the evidence of witnesses who had given adverse evidence against him. The Respondents denial that Applicant was refused the right to cross-examine was there fore a bare denial and should not be allowed to derail the Applicant's case.

5. It is noteworthy that the Applicant has elected to institute proceedings claiming compensation for unfair dismissal and notice pay by way of Notice of Motion supported by affidavit as opposed to the usual procedure.

6. The Applicant's claim for compensation is an illiquid claim for damages which cannot be determined without leading oral evidence. Proceedings on motion are only entertained where there is no genuine dispute of fact. They are not permissible at all where the claim is for payment of illiquid damages.

(see **Juanita Bernadette Balkison v Waterford Kamhlaba (UWC) Industrial Court Case No. 308/2008**).

7. In our view whether the Applicant's dismissal was substantively fair or not is a matter fraught with disputes on which evidence must be led. A finding on the substantive fairness is significant because of the provision of Section 16 (4) of the Industrial Relations Act 2000 (as amended) which provides that the Court may vary the compensation payable as it deems just and equitable if the dismissal is unfair only because the employer did not follow fair procedure. To be able to decide what is just and equitable in the circumstances of each case, it would be necessary in our view that oral evidence be led.

8. In the circumstances, the court will uphold the Respondent's point that the application ought to have come by way of Rule 7 of the Industrial Court Rules 2007. The nature of the Applicant's claim does not permit that it be brought by way of Notice of Motion.

9. The Application is therefore dismissed.

There is no order as to costs.

The members agree.

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT