IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO.224/2010**

In the matter between:

MALUNGE DLAMINI **APPLICANT**

And

UMKHANGISO INVESTMENTS (PTY) LTD **RESPONDENT**

CORAM:

D. MAZIBUKO: **JUDGE**

A.M. NKAMBULE: **MEMBER**

M. MTETWA: **MEMBER**

MR. L. MZIZI **FOR APPLICANT**

MR. L. DLAMINI **FOR RESPONDENT**

JUDGMENT 09th JULY 2010

Urgent application - requirements of - Provisions of Rule 15 (2) (a), (b) and (c) mandatory - failure to comply with Rule 15 (2) (a), (b), and (c) fatal to Applicant's case - material disputes of fact impediment to urgent application.

[1] The Applicant has brought an urgent application before Court

in which Applicant seeks an order on the following terms;

> "*1. Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.*
>
> *2. Condoning non compliance with the rules relating to service of process.*
>
> *3. That the Respondent be and is hereby ordered to pay forthwith Applicant's arrear salaries for the months of October 2009, November 2009, December 2009, January 2010, February 2010, March 2010 and April 2010 in the sum of E 31, 500-00 and further pay other salaries when they become due.*
>
> *4. That the Respondent be and is hereby ordered to declare Applicant's present employment status.*
>
> *5. That the Respondent be and is hereby ordered to pay costs of suit.*
>
> *6. That a Rule nisi do hereby issue returnable on a day to be determined by the Honourable Court calling upon the Respondent to show cause why an order in the terms set out above should not be made final*"

[2] The Applicant avers that he was employed by the Respondent as a centre manager. The Applicant does not state when exactly was he employed. He was paid a salary of E4, 500.00 (Four Thousand Five Hundred Emalangeni) per month. The last payment of salary was for the month of September 2009. About 6th July 2009 the Applicant was served with a letter suspending

him from work with immediate effect. In that letter the Respondent invited the Applicant to a disciplinary hearing which was scheduled for the 16th July 2009. There were certain charges listed in that letter which the Applicant had to answer at the hearing. A copy of the letter of suspension is attached to the founding affidavit marked **A.**

[3] The Applicant alleges that while he was on suspension he was served with a second letter from the Respondent which had additional charges to those which the Applicant had to answer on the 16th July 2009. A copy of the second letter is attached to the founding affidavit marked **B.** According to the Applicant he was served on the 14th July 2009 with annexure **B.** The disciplinary hearing was scheduled for the 16th July 2009. It did not however take place that day. Instead the hearing commenced on the 29th July 2009. The ruling was delivered in October 2009.

[4] The Applicant avers further that since he was suspended from work on the 6th July 2009 he has not heard from the Respondent regarding their work relationship. The Applicant noted that in the ruling of the disciplinary hearing the chairman made certain recommendations concerning the employment contract between the Applicant and Respondent. Upon receipt of the ruling the Applicant awaited communication from the Respondent regarding lifting of the suspension so that Applicant may return to work. The ruling from the chairman of the disciplinary hearing suggested *inter alia* that the parties should negotiate an amicable termination of the Applicant's employment contract. The chairman further recommended that the employment contract should be terminated by 5th October 2009. A copy of the chairman's findings and recommendation is attached to the founding affidavit marked **C.**

[5] The Applicant avers further that while on suspension he expected the Respondent to pay him his salary as and when it falls due. The Applicant argues that he has not been paid his salary for the period October 2009 to April 2010. He calculates the salary arrears over the aforementioned period of 7 (seven) months at the monthly rate of E 4, 500.00 (Four Thousand Five Hundred Emalangeni). The Applicant claims to be owed the sum of E 31, 500.00 (Thirty One Thousand Five Hundred Emalangeni) by Respondent being salary arrears due for the aforementioned period. This is the amount that Applicant has prayed for in his notice of motion. The Applicant has further prayed that the Respondent should be ordered to declare the employment status of the Applicant. According to the Applicant it is no longer clear to him whether or not he is still an employee of the Respondent. He is therefore seeking an order from Court which will compel the Respondent to clarify the relationship between the parties.

[6] The Applicant has stated several reasons for bringing this matter as an urgent application before Court. The Applicant states that since the Respondent has failed to pay his salary he is suffering economic hardship on a daily basis. He is unable to support himself and his dependants without a regular payment of salary.

6.1. The Applicant argues further that failure by Respondent to pay his salary constitutes a breach of statutory obligation. The Applicant referred the Court to section 47 (1) (a) of The Employment Act No.5/1980 as amended.

6.2. The Applicant further submitted that in this matter a material dispute of fact is not reasonably foreseeable. It is an application which is solely for determination of a question of law. A certificate of unresolved dispute is not necessary and is dispensed with in law. The Court was

referred to Rule 14 (1) as read with the latter part of the Rule 14 (6) (b). Since a certificate of unresolved dispute is not required it follows therefore that Part VIII of the Act is also dispensed with in law. By Act is meant the Industrial Relations Act No. 1/2000 as amended by Act No.3/2005.

[7] The matter is opposed both on the technical points and on the merits. In particular the Applicant has challenged urgency in the application and has urged the Court not to enrol the matter as urgent.

7.1. It is argued that the matter is fatally defective in that the Applicant has not attached to his affidavit a copy of a certificate of unresolved dispute as required by Rule 7 (4) (d).

7.2. The Respondent argues further that the urgency is self created by Applicant. The Applicant could have taken the necessary steps in October 2009 to file his claim for arrear salary. Further, the Applicant could have filed a claim in the year 2009 for a determination of his employment status with the Respondent. By failing to prosecute his claims when he had an opportunity to do so the Applicant created a delay which he now treats as an urgent application.

[8] According to the Respondent the Applicant was employed on a fixed term contract. The contract was for a period of 12 (twelve) months starting 1st October 2008 and ending 31st September 2009. The Respondent argues that the terms and conditions of employment are contained in a letter dated 29th September 2008. A copy of this letter is attached to the answering affidavit marked **UI.** The Respondent states that the Applicant is not entitled to

payment of salary after September 2009 since the contract of employment was terminated on the 31st September 2009. The Applicant was no longer the Respondent's employee after that date. According to the Respondent the Applicant was notified by letter dated 16th October 2009 that his employment contract with Respondent has terminated by effluxion of time with effect from the 31st September 2009. A copy of that letter is annexed to the answering affidavit marked **U2.** It is alleged that annexure **U2** was delivered to the Applicant by the chairperson of the Respondent's board of directors.

In his replying affidavit the Applicant denies that he was employed on a fixed term contract of 12 (twelve) months. The Applicant denies that annexure **Ul** contains terms and conditions of his contract of employment with Respondent. The Applicant avers that it was his first time to see annexure **Ul** as it is annexed to the answering affidavit. He argues further that annexure **Ul** is a fabricated document and he states his reasons for his assertion. As far as the Applicant is concerned he is a pensionable employee of the Respondent. The Applicant further denies that annexure **U2** was delivered to him. He avers that it was his first time to see annexure **U2** as it is annexed to the answering affidavit. The Applicant argues that annexure **U2** is a fabricated document and states his reason for this assertion. The Applicant submits further that the deponent to the answering affidavit namely Thokozile Sigudla has perjured herself in that affidavit. The Court was requested to reject the contents of that affidavit. According to the Applicant he is still an employee of the Respondent as his employment contract has not been terminated. He is therefore entitled to payment of salary while he is on suspension.

The general rule is that before an Applicant can refer a dispute to

the Industrial Court for determination that Applicant must demonstrate compliance with Part VIII of the Act. The Act requires the Applicant to report a dispute at CMAC. Within the time limits prescribed and with the dispute resolution machinery available in the Act, CMAC should attempt to resolve the dispute that has been reported (Section 64 (1) (b) and (c) of the Act). Should CMAC fail to resolve the dispute, CMAC is enjoined to issue a certificate of unresolved dispute (Section 85 (2) of the Act). An applicant who is still aggrieved may refer the dispute to Court for determination (section 85 (2). The Applicant must attach a copy of the certificate of unresolved dispute to his application papers before Court (Rule 7 (4) (d). By CMAC is meant the Conciliation, Mediation and Arbitration Commission established in terms of section 62 (1) of the Act.

There are exceptions to the above stated rule. An applicant who approaches the Court by way of an urgent application can ask the Court to waive the provisions of Part VIII of the Act (Rule 15). On good cause shown the

Court may waive the provisions of Part VIII of the Act (Rule 15 (3)). In order to persuade the Court to exercise its discretion the Applicant shall set forth explicitly in his affidavit the requirements of Rule 15 (2) (a), (b) and (c) namely;

(a) the circumstances and reasons which render the matter urgent;

(b) the reasons why the provisions of Part VIII of the Act should be waived;

(c) the reasons why the Applicant cannot be afforded substantial relief at a hearing in due course.

12. On the 27th May 2010 the Applicant filed an urgent application before Court. The Applicant prayed for relief on 2 (two) principal claims namely arrear salary and a declaration of the Applicant's employment status. There is also prayer for ancillary relief.

12.1 The Applicant complains that he has not been paid his salary for a period of 7 (seven) months starting October 2009 and ending April 2010. In November 2009 the Applicant became aware that his October 2009 salary has not been paid. Also in December 2009 the Applicant became aware that he has not been paid his salary for October and November 2009. The same applies to the subsequent months until the present application before Court. The Applicant did not take the necessary steps to recover the salary arrears. The Applicant could have reported a dispute with CMAC in terms of Part VIII of the Act in October 2009 or soon thereafter. Had the Applicant reported the dispute as suggested, by May 2010 the dispute at CMAC could either have been settled or certified unresolved. In both his affidavits before Court the Applicant has not stated his reason for the delay in taking legal action in this matter. The Court finds that a 7 (seven) month delay by Applicant in instuting legal by action to recover arrear salary is unreasonable. The Court finds further that the Applicant's failure to explain the cause for delay is crucial in the determination of this matter.

12.2 The applicant advanced the reason that the matter is urgent in that failure by Respondent to pay his salary since October 2009 is ruining

him and his family economically. He is unable to support himself and his family without money. The Court accepts that money is the 'oil' that keeps the wheels of the economy running. This principle applies to all economies whether big or small whether state run or family controlled. However if money is that important to the Applicant why did the Applicant fail to take the necessary steps in October 2009 or shortly thereafter to claim his salary or salary arrears? The Applicant has failed to explain the delay in claiming his salary from the Respondent for the period October 2009 to May 2010. The delay may mean that the unpaid salary was not important to or urgently needed by Applicant in October 2009 and shortly thereafter, but became important or needed in May 2010 hence the urgent application. Such urgency is not genuine but is self created and therefore attracts no urgent relief. The Applicant has failed to state the circumstances and reasons that make his application urgent in May 2010 but not urgent in October 2009. The Applicant has therefore failed to comply with Rule 15 (2) (a). The provision of Rule 15 (2) have been a subject of several judgments of this Court. The Court stated as follows in the matter of **Dumisani Dlamini and 16 Others v Swaziland Manufacturing and Allied Workers Union Industrial Court Case No. 23/09 (unreported) at paragraphs 14-15**

> "*Courts have repeatedly stated that a party who takes a lackadaisical attitude towards an infringement of its rights 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. This is what the present Applicants are trying to do, to the disadvantage and inconvenience of the Respondent and the court.*

Since the Applicants have taken no action to challenge the alleged lockout since August 2008, they are clearly in no rush to return to work. The sudden urgency may well be prompted by the need to pay school fees in the new year. This is a self-created urgency."

This Court agrees with the principle stated in the preceding quotation.

12.3 The Court is of the view that the Applicant had an opportunity to report his claim for salary arrears as a dispute at CMAC under Part VIII of the Act by end October 2009 or shortly thereafter. Had the Applicant reported the dispute the likehood is that by May 2010 the dispute would either be resolved or be ready to be referred to Court for determination. The Applicant has failed to explain the reason Part VIII of the Act was not compiled with. One of the requirements of an urgent application is that the Applicant must give reasons why Part VIII of the Act should be waived (Rule 15 (2) (b)). That means that the Applicant must demonstrate that due to the urgency of the matter there was no opportunity to comply with Part VIII of the Act. The Applicant cannot ask the Court to waive Part VIII of the Act in a case where the Applicant had ample opportunity to comply with that provision but neglected to do so. That would amount to an abuse of the discretion of the Court.

12.4 The urgency in an urgent application must be demonstrated not only by the injury which the Applicant seeks to avert but also by the steps

taken by the Applicant from the time the

Applicant perceives the injury to the time he seeks legal redress. The Applicant must not give an impression that he relaxed in between these two (2) points and treated the matter as less than urgent. In the matter before Court the Applicant has failed to take the necessary legal steps to protect his rights when he had an opportunity to do so. The Applicant has further failed to give reasons why the Court should waive Part VIII of the Act. The end result is that the Applicant has failed to comply with Rule 15 (2) (a), (b) and (c). Failure to comply with the requirements of Rule 15 (2) (a), (b) and (c) is fatal to the application for urgent relief.

12.5 The Applicant has not stated why he cannot be afforded substantial redress in due course. The Applicant can still report a dispute in terms of Part VIII of the Act and have his claims resolved at CMAC failing which have the claims determined by Court. Following the proper statutory procedure will not weaken the validity of the Applicant's claim or its result. The Applicant therefore also failed to address the requirements of Rule 15 (2) (c) in his application. The matter cannot be enrolled due to failure by Applicant to comply with Rule 15 (2) (a), (b) and (c).

12.6 A second reason advanced by the Applicant is that the Respondent's conduct constitutes a breach of statutory duty. In terms of the Employment Act No.5 of 1980 section 47 (1) (a), an employer is obliged to pay salary to his employee on a regular and determinable period. The Applicant has alleged that his salary was payable on the 25th day of each month. The Applicant alleged further that his last payment of salary was in September 2009. It

follows therefore that the Applicant could have demanded his salary for October 2009 end of that month or soon thereafter. The Applicant did not demand payment of his salary for October 2009 or any subsequent month thereafter until he launched an urgent application in May 2010. The Applicant has failed to explain in his affidavits the reason he did not invoke the provisions of The Employment Act and claim payment of his salary or arrears at the time that the alleged breach of statute began. If the breach of statutory duty was committed by the Respondent beginning 25th October 2009 and thereafter on the subsequent months the Respondent should have taken the necessary steps end of October 2009 or soon thereafter to get legal redress to avert further occurrence of breach of statute. By May 2010 CMAC could have dealt with the matter and either finalised it or issued a certificate of unresolved dispute. Failure on the Applicant's part to report the alleged breach of statute to CMAC in time cannot suddenly become an urgent matter in May 2010. There is no reason advanced by the Applicant for failing to report this particular claim to CMAC under Part VIII of the Act. The Applicant fails on this reason as well.

12.7 The Applicant submitted further that there are no foreseeable material disputes of fact in the matter before Court. It is an application which could be determined solely on the question of law. According to the Applicant his monthly salary of E 4 500.00 (Four Thousand Five Hundred Emalangeni) payable to him by Respondent is not disputed. The letter of suspension dated 6th July 2009 (annexure **A)** is not in dispute. It is further not disputed that the Applicant was never called back from suspension. It is therefore a matter of simple arithmetic to multiply the monthly salary

with the number of months that the Applicant has not been paid his salary in order to arrive at the total for arrear salary due to the Applicant. The Applicant avers that there is no need to report a dispute to CMAC as required in Part VIII of the Act. There is also no need for a certificate of unresolved dispute. This is a matter that should be dealt with in terms of Rule 14 (6) (b).

Rule 14 (6) (b) reads as follows;

"*The applicant shall attach to the affidavit* **-**

(d) *all material and relevant documents on which the applicant relies; and*

(e) *in the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission,* ***unless the application is solely for the determination of a question of law.*****"**
(Emphasis added)

12.8. In terms of Rule 14 (6) an Applicant is entitled to file an application before Court without attaching a certificate of unresolved dispute if the application is solely for the determination of a question of law. The Applicant however failed to address the provision of Rule 14 (2) which forms the basis of the Respondent's objection. Rule 14 (2) reads as follows;

'*An application on notice of motion shall be brought on* ***least fourteen (14) days notice*** *to all persons who have an interest in the application*'

(Emphasis added)

> The application before Court was brought on the 27th May 2010. Service was effected on the 21st May 2010. The application was therefore brought to Court on three (3) Court days notice to the Respondent. The Applicant has failed to comply with Rule 14 on which his application is based. There is no explanation from the Applicant as so why should Rule 14 (2) be dispensed with. The Applicant has failed to comply with Rule 14 (2). The matter is therefore not properly before Court in terms of Rule 14 (2). If indeed the matter is brought to Court on the basis that it is urgent then the Applicant should invoke Rule 15 which the Applicant has failed to comply with as aforementioned.

13. The Applicant has another difficulty concerning the provision of Rule 14. The matter before Court has a material dispute of fact on whether or not the Applicant was employed by the Respondent on a fixed term contract which began 1st October 2008 and ended 31st September 2009. There is a further dispute of fact regarding whether or not the Respondent's letters marked **Ul and U2** annexed to the answering affidavit were brought to the attention of the Applicant. The Court finds that the said dispute of fact cannot be resolved by evidence as contained in the affidavits. Instead the parties will have to lead oral evidence and be subjected to cross examination. It is proper that the parties should have the issues ventilated in a trial. The latter part of the Rule 14 (6) (b) applies in a case where an application before Court is solely for the determination of a question of law. As pointed out above this application before Court requires a determination of fact and law. The disputes of fact that have been raised by the Respondent require a trial of fact. The Court will not disregard the Respondents' annexures **U l** and **U2** simply

because the Applicant alleges that these documents are fabricated. So far no evidence has been led to prove that these documents are fabricated. The Applicant will have to file proper pleadings dealing with this allegation and lead the necessary evidence at the trial. It is after the trial that the Court will be in a position to make an analysis of the evidence and draw its own conclusions on whether or not annexures **U1** and **U2** are admissible as evidence or are thrown out of Court. The latter part of Rule 14 (6) (b) does not therefore apply in this application. The first portion of Rule 14 (6) (b) also does not assist the Applicant. This sub-rule requires that the application should be accompanied by a certificate of unresolved dispute. The application before Court does not have a certificate of unresolved dispute. Further Rule 15 will not assist the Applicant either as the Applicant has failed to comply with the requirements of Rule 15 (2) (a), (b) and (c) as aforementioned.

14. The Applicant argued further that the dispute of fact that exists in the matter though material was not reasonably foreseeable. This argument is based on the premise that the Applicant denies that annexures **U1** and **U2** were brought to his attention. The Applicant stated in his affidavit that he saw annexures **U1** and **U2** for the first time as they were attached to the answering affidavit. The question whether or not the dispute of fact was reasonably foreseeable depends on which version does the Court believe. The version of the Applicant and that of the Respondent are mutually destructive. The Court is not in a position to determine at this stage which of the 2 (two) versions is plausible. That determination can be made by Court after the trial. As the matters stand, the Court is not in a position to determine whether the dispute of fact that exists in the matter is reasonably foreseeable or not. The presence of the material disputes of fact creates an obstacle in the Applicant's way. The

Applicant's failure to comply with the 14 (fourteen) days notice as required by Rule 14 (2) created an additional obstacle. The Applicant has failed to overcome these obstacles. The end result is that the application fails in terms of Rule 14 as well.

15. In the cause of the argument the Applicant's Counsel realised the difficulty he is facing. He then suggested that the matter be referred to oral evidence to determine the validity or otherwise of annexures **U l** and **U2.** The prayer by the Applicant to have the matter enrolled as an urgent application has failed. It follows therefore that the latter request by Applicant's Counsel has no basis. The

Court cannot refer to oral evidence a matter which has not be enrolled.

16. Another prayer in the application is that the Respondent should be ordered to declare the Applicants' present employment status. The Applicant has failed to disclose when did his employment status with Respondent become an issue that requires judicial intervention. In addition, the Applicant has failed to state why the issue of his employment status with Respondent should be dealt with urgently in May 2010. The Applicant has failed to state why this issue was not reported to CMAC under Part VIII of the Act before May 2010. Further there is no indication as to what prejudice does the Applicant suffer if the Applicant were to report the matter to CMAC for determination as opposed to filing an urgent application.

16.1. The Respondent has alleged in her affidavit that she entered into a fixed term contract with Applicant for one (1) year starting 1st October 2008 and ending 31st September 2009. The Respondent has attached a letter marked **U l** which allegedly contains terms of the contract. The Respondent has attached

another letter marked **U2** which according to the Respondent confirms that the employment contract has terminated by effluxion of time. According to the Respondent the Applicant is no longer an employee of Respondent since 31st September 2009. As aforementioned this is not a dispute that can be resolved on the papers as they stand.

16.2. The Court finds that the Applicant has also failed to satisfy the requirements of Rule 15 (2) (a), (b) and (c) in respect of his second prayer. In the absence of compliance with Rule 15 the matter cannot be enrolled as an urgent application but should follow the normal route of dispute reporting. The material disputes of fact that exist are real disputes and require that they be properly ventilated in the pleadings and be dealt with in detail at the trial.

The Applicant has failed in both prayers to have the matter enrolled as urgent.

17. The Court accordingly makes the following order;

> (a) The application is dismissed with costs.
>
> (b) The Applicant is granted leave to file a proper application in accordance with Part VIII of the Industrial Relations Act No. 1 /2000 as amended.

The members agree.

DUMSANI MAZIBUKO

JUDGE OF THE INDUSTRIAL COURT