IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 583/10

In the matter between:

NQOBILE NZIMA	**APPLICANT**
And	
LEROY MOALUSIN.O.	**1st RESPONDENT**
GLENRAND M.I.B. SWAZILAND (Pty) Ltd	**2nd RESPONDENT**

CORAM:

D. MAZIBUKO:	**JUDGE**
A. M. NKAMBULE:	**MEMBER**
M.T.E MTETWA:	**MEMBER**
M. DLAMINI :	**FOR APPLICANT**
M. SIBANDZE :	**FOR RESPONDENT**

RULING - 17th DECEMBER 2010

Urgent application, requirements of Rule 15 (2) (a), (b) and (c) peremptory. Application for final interdict, requirements for an interdict peremptory. Dismissal from work and loss of salary, loss of salary not a ground for urgent hearing of a dismissal claim Dismissal, employee at risk of being replaced at work while matter undergoing conciliation, Court has discretionary power to re-instate unfairly dismissed employee.

1. The Applicant Nqobile Abigail Nzima was employed as Accounts Manager by the Second Respondent since December 2008.

2. The 1st Respondent is Leroy Moalusi who is cited herein as the Chairperson of the disciplinary hearing in which the Applicant was involved. The 2nd Respondent is GLENRAND M.I.B. SWAZILAND (PTY) LTD a company operating as such in Swaziland cited herein in its capacity as employer of the Applicant.

3. From the date of employment aforesaid the Applicant served the 2nd Respondent until the 19th November 2010 when she was dismissed.

4. About the 25th October 2010 the Applicant was served with a notice to attend a disciplinary hearing. A copy of the notice is attached to the Applicant's affidavit and is marked annexure **NN3.** The Applicant was called upon to answer two (2) disciplinary charges. The hearing was scheduled for the 28th October 2010.

5. The Applicant alleges that she was shocked when annexure **NN3** was served on her. She then requested time to prepare herself for the hearing because she considered the charges serious. She states further that she did not get a reply to her request until 28th October 2010.

   On the 28th October 2010 the 2nd Respondent agreed to postpone the hearing to 29th October 2010. The Applicant has to attached a letter to her affidavit dated 28th October 2010 marked **NN4.** Annexure **NN4** is a letter from the 2nd Respondent addressed to the Applicant. According to the Applicant she was informed by letter annexure **NN4** that the

disciplinary hearing has been postponed to the 29th October 2010.

6. The Applicant alleges further that on the 28th October 2010 she went to see a medical doctor before she reported for work. The medical doctor namely Dr J.O. Peleowo declared the Applicant unfit for work for the 28th and 29th October 2010. The Applicant has attached on her affidavit a document with the heading ***Medical Certificate*** dated 28th October 2010. The document is marked **NN5.** According to the Applicant she was entitled to be on sick leave for two (2) days namely 28th and 29th October 2010 on the strength of annexure **NN5.**

7. The Applicant avers further that still on the 28th October 2010 after a consultation with Dr Peleowo she reported for work. After a discussion with the 2nd Respondent concerning the disciplinary hearing, the hearing was postponed to the 29th October 2010. The Respondent confirmed the postponement by letter annexure **NN4.** The Applicant confirms receipts of annexure **NN4** which was served by a courier company called ***DHL.*** Service took place at the Applicant's homestead on the 28th October 2010.

8. The Applicant further alleges that on the 28th October 2010 she instructed her attorneys namely **Mzwandile Dlamini Attorney's** to write to the 2nd Respondent seeking a postponement of the hearing. A letter from the said attorneys dated 28th October 2010 is attached to the Applicant's affidavit marked **NN7.** There is no indication on the Applicant's affidavit whether or not the letter was served on the 2nd Respondent.

9. A disciplinary hearing allegedly took place on the 12th November 2010. At that time the Applicant was allegedly in South Africa. The Applicant was found guilty in absentia on both the charges. The 1st Respondent recommended dismissal with notice.

10. The Applicant avers further that she took some days off on advice from her doctor to rest. She was away from work from the 1st November 2010. The Applicant left Swaziland and went to South Africa allegedly to enjoy some rest. While in South Africa the Applicant states that she consulted another medical doctor namely Dr. Y. Bhoola since she needed further medical treatment.

11. The Applicant alleges that she returned to work on the 16th November 2010. In paragraph 5.9 of her affidavit the Applicant avers that she learnt of her dismissal, the first time on the 19th November 2010. In the latter portion of the same paragraph the Applicant avers that she learnt of her dismissal on the 16th November 2010, the same day she reported for work. The letter of dismissal is attached to the Applicant's founding affidavit marked **NN2.** Since the letter of dismissal is dated 19th November 2010, the court will use the 19th November 2010, as the date in which the Applicant was formally notified of her dismissal.

12. In terms of annexure **NN2** the Applicant was informed of her right to appeal the decision to dismiss her. The Applicant was given five (5) working days to file an appeal from the date of her dismissal. The court will deal with the issue of the Applicant's right to an appeal later in this judgment.

13. On the 3rd of December 2010 the Applicant launched an urgent application before court. The Applicant sought relief on the following terms;

" 2. Dispensing with time limits and manner of service prescribed by rules of the above Honorable Court and hearing this matter as one of urgency.

14. Condoning the Applicants no-compliance [Applicant's non-compliance] with the rules of Court.

15. Setting aside the dismissal of the Applicant by the 2nd Respondent through a Dismissal Notice dated the 19th November 2010, and re-instating the Applicant to her position as an Account Manager

16. Reviewing and/ or setting aside the ruling of the 1st Applicant [1st Respondent] dated the 12th November 2010.

17. (a) Directing the 2nd Respondent to give the Applicant a hearing de novo to determine her guilt or innocence.

or, alternatively

(b) Withdrawing the charges against the Applicant.

18. Directing the 2nd Respondent to remove the 1st Applicant as Chairperson of the disciplinary hearing.

19. That prayer 4 above operates with immediate and interim effect pending finalization of the hearing.

20. Granting Applicant costs of this Application.

10. Further and / alternative relief."

The Application was served the 1st Respondent on the 1st December 2010.

21. The Application is opposed by the 2nd Respondent who raised points *in limine* from the bar. The argument was heard on the 3rd December 2010.

22. The relief that the Applicant is seeking before court can be summarized as follows;

23. to set aside the dismissal and re- instate the Applicant to her former position as Accounts Manager;

24. to set aside the decision of the 1st Respondent in terms of which the Applicant was found guilty of the charges which she was facing and to order 2nd Respondent to commence the disciplinary hearing *de novo;*

25. To remove the 1st Respondent as Chairperson of the disciplinary hearing.

16. In terms of the Industrial Relations (Act) a litigant who desires to have his matter heard by the Industrial Court (court) must comply with part VIII of the Act. The litigant must *inter alia* submit his dispute to CMAC for conciliation. If the dispute remains unresolved despite an attempt by CMAC to conciliate, and the parties do not agree to arbitration, CMAC shall thereafter issue a certificate of 'unresolved dispute' (section 85 (1) (a))of the Act. Any of the parties to the dispute may thereafter file his claim in court for determination. The claim must be accompanied by the certificate of 'unresolved

dispute' (rule 14 (6) (b)) if the claim involves a determination of facts.

17. In the case of an urgent application the provision of rule 14 (6) (b) may be relaxed at the discretion of the court. The court may allow a claim to be heard in court which has not been conciliated upon. A litigant who approaches the court with an urgent application must comply with rule 15 (1), (2) (a), (b) and (c). The rule provides as follows;

"*15 (1) A party that applies for urgent relief shall file an application that so far as possible complies with the requirement of rule (14).*

(2) The affidavit in support of the application shall set forth explicitly-

26. *the circumstances and reasons which render the matter urgent;*

27. *the reasons why the provisions of Part VI11 of the Act should be waived; and*

28. *the reasons why the applicant cannot be afforded substantial relief at a hearing in due course.*"

18. The Applicant has advanced several reasons for bringing her claim to court by way of urgency. The Applicant states that she fears that the 2nd Respondent may hire someone else to replace her as accounts manager if she were to follow the CMAC route. By the time her claim is heard in court it may prove to be extremely difficult to get an order for re-instatement if an innocent third party is already hired to replace her.

19. The Applicant loses sight of the fact that all litigants who intend to approach the court for relief and claim *inter alia* re- instatement run the same risk of being replaced at work while their disputes are pending at CMAC. The Applicant's argument would mean that all litigants who claim *inter alia* re-instatement should be heard on an urgent basis to avoid being replaced. That would make the work of court unmanageable. The risk of being replaced is not peculiar to the Applicant. It is common to all litigants who claim to have been unfairly dismissed and have prayed for re-instatement as part of their relief.

20. The court is empowered by sections 16 (1) (a) and 16 (3) of the Act to

order re-instatement of an employee who has been unfairly dismissed. The court exercised its power under section 16 (1) (a) of the Act in the matter of **COLLIE DLAMINI V SWAZILAND ELECTRICITY BOARD CASE NO 105/05 (IC)** (unreported). The court found *inter alia* that the Applicant (employee) had been unfairly dismissed. The court ordered the Respondent (employer) to re-instate the Applicant. Further the court ordered the Respondent to pay the Applicant arrear wages equal to one and a half years pay. The court's decision was confirmed on appeal under case No. 2/2007 (ICA).

21. The Collie Dlamini case and the Act provide sufficient authority that **Applicant can be afforded substantial relief at a hearing in due course.** There is therefore no need for part VIII of the Act to be waived. The Applicant accordingly fails to satisfy the requirements of rule 15 (2) (b) and (c). The Applicant's failure to satisfy the requirements of rule 15 (2) (b) and (c) means that the matter should not be enrolled by way of urgency but should follow Part VIII of the Act.

22.Another reason advanced by the Applicant in filing an urgent Application is that the dismissal has brought an end to the monthly salary she has been receiving whilst employed by the 2nd Respondent. The loss of salary will result in the Applicant failing to meet her monthly financial commitments.

23. The Applicant loses sight of the fact that all dismissed employees do suffer loss of salary. The loss of salary will necessarily lead to the dismissed employee failing to pay her monthly bills for which she depended on her salary. The Applicant's agreement means that all employees who are dismissed and claim unfair dismissal should approach the court by way of urgent application. That argument is contrary to the spirit of rule 15 (2) (a), (b) and (c).

24.The court has stated in several judgments that **loss of salary is not a ground for bringing a dismissal matter to court on urgency basis.** In the matter of **CINISELA WELCOME DLAMINI V NORMAN SIGWANE** and others Case No. 509/2008 (IC) (unreported) the court states as follows on this subject, at page 4 paragraph 9;

> " *Loss of employment, remuneration and career prospects is an inevitable consequence of the termination of an employee's services, and by itself does not provide a sufficient reason for a matter to be heard as a matter of urgency*"

The same principle has been similarly applied in several cases including the following;

MYENGWA NSIBANDZE V NATIONAL FOOTBALL ASSOCIATION OF SWAZILAND Case No. 104/2006. (IC) (unreported). **SGIDI KHOZA V JEROME XABA** Case No. 541/2006 (IC) (unreported).

25. The reason for urgency as advanced by the Applicant namely the loss of salary and the inconvenience that follows is not sufficient to establish urgency. The Applicant has again failed to satisfy the requirements of rule 15 (2) (a), (b) and (c).

26. Some of the Applicant's prayers are in the form of a final interdict. The court is called upon to order or compel the 2nd Respondent *inter alia* to commence the disciplinary hearing *de novo* and remove the 1st Respondent as chairperson. The Applicant has failed to address the requirements of an interdict both in her affidavit and in the argument before court. The onus is on the Applicant to provide evidence on a balance of probabilities that she is entitled to the interdict sought.

27. In order to obtain a final interdict the Applicant must establish the following requirements;

(1) a clear right,
(2) an injury committed or reasonably apprehended,
(3) The absence of the similar or adequate protection by any order ordinary remedy.

HERBSTEIN AND VAN WINSEN: The Civil Practice of the High Courts of South Africa, 5th edition 2009 (Juta) at Page 1456.

The requirements of an interdict were set out in the case of **SETLOGELO V SETLOGELO 1914 AD 221 at 227.** They have since been applied consistently in subsequent matters before court.

28. In terms of the letter of dismissal dated 19th November 2010 annexure **NN2,** the 2nd Respondent notified the Applicant that she has a right to appeal the dismissal within five working days from the date of dismissal. In her

affidavit the Applicant has indicated clearly that she is dissatisfied with the 2nd Respondent's decision to dismiss her. The Applicant does not state in her affidavit whether or not she filed an appeal against the dismissal. If so, what was the outcome of the appeal?. If not, why was an appeal not filed in the face of the Applicant's clear dissatisfaction with the dismissal ?. The court finds that the availability of an appeal gave the Applicant an opportunity to address the issues raised in the present (urgent) application. The purpose of an appeal in this context is to challenge the decision of the chairperson of the disciplinary hearing both on the technical and the factual issues. At the time of the dismissal the Applicant had an alternative adequate remedy to her grievance in the form of an appeal. The appeal chairperson has jurisdiction to decide the same issues that are before the court.

The Applicant has accordingly failed to satisfy the third requirement of a final interdict namely **the absence of similar or adequate protection by any other ordinary remedy.** That failure is fatal to the Applicant's prayer for an interdict.

29. For the reasons stated above the application cannot succeed. The court makes an order as follows:

1. The application is dismissed.
2. The Applicant is to pay the Respondent's costs.

The members agree.

D MAZIBUKO
JUDGE