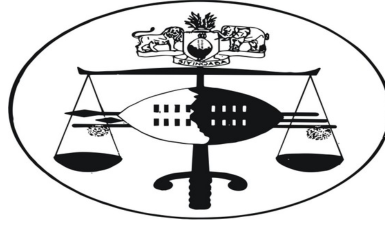

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 92/13

In the matter between:

PARTY MAMBA	**1st Applicant**
JACKSON MAMBA	**2nd Applicant**
LUNGILE DLAMINI	**3rd Applicant**
ZAZI DLAMINI	**4th Applicant**
NKOSINATHI MHLANGA	**5th Applicant**
NOZIPHO NDZINISA	**6th Applicant**
SIPHELELE MNDZEBELE	**7th Applicant**
ROGERS MUGISHA	**8th Applicant**
MICHAEL MASSAI	**9th Applicant**

And

OXFORD BUSINESS INSTITUTE t/a

SWAZILAND TECHNIKON PTY LTD **Respondent**

Neutral citation: *Party Mamba & 8 Others v Oxford Business Institute t/a Swaziland Technikon Pty Ltd (92/13) [2013]* SZIC 15 (MAY 3 2013**)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)

Heard : **26 APRIL 2013**

Judgment delivered: **3 MAY 2013**

Summary:
The Applicants brought an urgent application claiming payment of their outstanding salaries.

Held : Failure by an employer to pay salaries due is a ground for urgency in the Industrial Court.

JUDGMENT
03.05.13

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[1] The nine Applicants in this application are employed by the Respondent as lecturers. The Respondent is an Institute of learning based in Manzini having its principal place of business at Plot 12, Meintjies Street, President's Place.

[2] Towards the end of the academic year in 2012, the Respondent started to delay the payment of salaries of the Applicants. The Respondent said it was experiencing financial difficulties, which problem was divulged to the Applicants during a staff meeting in November 2012.

[3] The situation worsened in January 2013 as not only were the Applicants not paid on time, but their salaries were not paid in full. The Applicants were then prompted to move the present application before the court on an urgent basis. The Applicants are seeking an order in the following terms:

"1. Condoning the Applicant's non-compliance with the Rules of court relating to notice and service of court process and enrolling this matter as one of urgency.

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

2.1 *Ordering and directing the Respondent to punctiliously and punctually pay the Applicants their wages and salaries on the due date, being the 30th of each month;*

2.2 *Directing Respondent to pay the Applicants the sum of Fifty Two Thousand Seven Hundred and Seventy Three Emalangeni and Fifty Eight cents (E52,773.58) being the total unpaid remuneration by reason of the delay in paying wages and salaries;*

3. *That prayers 2.1 and 2.2 operate with interim and immediate effect pending finalization of the matter.*

4. *Punitive costs be awarded against the Respondent.*

5. *Further and/or alternative relief."*

[4] The application came before the court on 08.03.13. On this day a consent order in terms of prayer 2.1 was granted and the matter was postponed until 18.03.13 pending the filing of an Answering Affidavit by the Respondent and filing of a Replying Affidavit by the Applicants. When the matter appeared before the court on 18.03.13 the Respondent's attorney informed the court that the Applicants have since been paid their December 2012 salary, but that their contracts have not been renewed.

[5] The evidence before the court revealed that in January 2012 the Applicants and the Respondent signed twelve months' fixed term contracts. When the contracts expired in December 2012, the Respondent offered the Applicants new contracts with less favourable conditions of employment. The Applicants refused to sign these new contracts. The Respondent however continued to keep the Applicants under its employ. Again the Respondent in February 2013 tried to get the Applicants to sign the new contracts of employment with improved terms. The Applicants refused to do on the basis that the new contracts still offer less favourable terms and conditions of employment than what they previously enjoyed.

[6] As a result of the Applicants failing to sign the new contracts of employment, the Respondent by letters dated 25th March 2013 terminated the Applicants' employment with it. The Applicants filed another urgent application before the court on 28.03.13 for an order in the following terms:-

"1. Condoning any non-compliance with the Rules of Court relating to notice and service of court process and enrolling this matter as one of urgency.

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

2.1 Interdicting and restraining the Respondent from terminating services of the Applicants pending finalization of this mater;

2.2 Interdicting and restraining the Respondent from making the Applicants to sign any and/or further and detrimental contracts of employment.

2.3 Interdicting and restraining the Respondent from computing any of Applicants' monies arising from their employment relationship with Respondent based on the purportedly new payment system pending finalization of the application filed on the 7th March 2013 or this matter.

2.4 Declaring that the Applicants are entitled to terminal benefits in terms of the Employment Act 1980 (as amended), being one month notice; additional notice; severance allowance and leave.

2.5 Ordering and directing the Respondent to pay Applicants all their terminal benefits on or by the termination date of their services, calculated based on annexed Applicants pay advice slips. Marked ***"AAA1"***

2.6 Ordering and directing Respondent to pay the 7th and 8th Applicants repatriation expenses.

2.7 That prayer 2.1, 2.2 and 2.3 operate with interim and immediate effect pending finalization of the matter.

3. Punitive costs be awarded against the Respondent.

4. Further and/or alternative relief."

[7] When the matter appeared before court on 28.03.13 the Applicants' representative advised the court that he has liaised with the Respondent's attorney and that the Respondent has no objection to orders being granted in terms of prayers 2.1, 2.2 and 2.3. A *rule nisi* was accordingly granted by the court returnable on 10.04.13. On this date when the matter appeared before the court, the parties agreed that the matter be referred to argument on the initial

application. No papers were filed by the Respondent in opposition of the second application. The rule nisi will accordingly be confirmed and the application be granted in its entirety as it is unopposed. The matter was finally argued in court on 26.04.13 after both parties filed heads of argument.

[8] The Applicants, have, in the meantime again filed an application dated 15.04.13 in which they want the Managing Director of the Respondent to be committed to prison for contempt of court. They allege that he has failed to abide by the court order issued by the court by consent of the parties on 08.03.13. The Respondent's attorney however informed the court that the Respondent has since complied with the court's order. In their heads of argument however, both parties do not address themselves to this application. The Respondent's attorney further told the court that the Applicants have since been paid all their monies except the salaries for April 2013 because the pay day is not yet due. The court will therefore safely assume that the contempt application is no longer a live issue between the parties and will make no order with regards to that application.

[9] **ARGUMENTS BEFORE THE COURT:-**

On behalf of the Respondent, the Respondent's attorney in the heads of arguments raised two points of law, namely:- lack of urgency and lack of jurisdiction.

9.1 **URGENCY:-**

It was argued on behalf of the Respondent that the matter should not be heard by the court on an urgent basis because the Applicants are citing financial loss which is not a ground for urgency. It was argued further that the Applicants were told as early as November 2012 that the Respondent was experiencing financial difficulties and that therefore their salaries was not going to be paid on time.

[10] This point of law will be dismissed by the court. The evidence before the court revealed that the Applicants did not sit by and do nothing about their predicament. They engaged the Respondent's management with a view to find a solution to the problem. A party who first engages in extracurial efforts to settle a dispute does not lose his right to thereafter approach the court on an urgent basis. In fact the court encourages litigants to first try to settle a dispute between themselves and to approach the court as a last resort.

See:- **Vusi Gamedze v. Mananga College case No. 267/06 (IC)**

[11] **LOCUS STANDI IN JUDICIO:-**

It was argued on behalf of the Respondent that the Applicants were employed on fixed term contracts that expired on 31st December 2012 and that therefore they

are no longer employees of the Respondent as they have not signed the new contracts with the Respondent.

[12] The evidence before the court however revealed that the Applicants were employed by the Respondent on permanent basis long before they signed the one year fixed contracts in January 2012. There being evidence that the Applicants were in permanent employment with the Respondent before their terms and conditions of employment were changed in January 2012, the question is whether such a change in the terms of the employment relationship was lawful. **Section 27 of the Employment Act No.5 of 1980** provides that:-

"Contracts not to conflict with law.

27. No contract of employment shall provide for any employee any less favourable condition than is required by any law. Any condition in a contract of employment which does not conform with this Act or any other law shall be null and void and the contract shall be interpreted as if for that condition there were substituted the appropriate condition required by law."

[13] To change the terms and conditions of employment of the Applicants from permanent to fixed term was clearly unlawful as it resulted in a less favourable condition of employment.

[14] The evidence before the court also revealed that the Applicants are still in the employ of the Respondent. The Respondent cannot be allowed to approbate and reprobate.

[15] Although there was no documentary evidence before the court that indeed the Respondent is having financial difficulties as alleged in the papers, if it is true the Respondent should simply declare redundancy and follow the provisions of **Section 40 of the Employment Act** instead of using unlawful methods to deal with the problem.

[16] This country's economy is based on the free market model. An employer is therefore free to employ any employee that he/she chooses. If the Respondent is no longer interested in the services of the Applicants, on termination of their contracts of employment it must be prepared to pay all their terminal benefits including compensation for unfair dismissal because, *prima facie*, there is no fault on their part entitling the employer to terminate their employment contracts.

[17] The matter before the court is a fairly simple one. The Respondent must decide either to declare redundancy if there is a legal basis for this, or pay the terminal benefits of the Applicants if it opts to go ahead with the termination of their contracts.

[18] Taking into account all the evidence and submissions before the court, and also all the circumstances of this case, the court will make the following order;

a) The rule nisi granted by consent in terms of prayer 2.1 is hereby confirmed.

b) The respondent is directed to pay to the Applicants all outstanding remuneration.

c) The Respondent is to pay the costs of suit on the ordinary scale.

[19] The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

NKONYANE J

FOR APPLICANTS: MR. A. FAKUDZE
(LABOUR LAW PRACTITIONER)

FOR RESPONDENT: MR. M. MTHETHWA
(C.J. LITTLER & COMPANY)