IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 249/2019**

In the matter between:

PENELOPE MANANA- SIFUNDZA	Applicant
And	
VENI (PTY) LTD BRIDECOR HOLDINGS	1st Respondent
MBUSO DVUBA	2nd Respondent

Neutral citation : Penelope Manana – Sifundza and Veni (Pty) Ltd Bridecor Holdings and Mbuso Dvuba [249/2019 [2019] SZIC 249 [2019]

Coram : **B.W. MAGAGULA - ACTING JUDGE**
(Sitting with ELB Dlamini and D. Mango Nominated Members of the Court)

Heard : 29/08/2019

Delivered : 05/09 /2019

SUMMARY –Applicant seeks an order on an urgent basis, declaring that the letter terminating her contract of employment is irregular and that her salaries be paid. The Employer has raised points of law of urgency. On the basis that, the applicant has failed to satisfy the requirement of Rule 15 of the rules of court. Further, that the employee has taken active steps to report a dispute of unfair dismissal at CMAC, in compliance with part VIII of the Indusial Relations Act of 2006 as amended. Point in lime is upheld, No order as to costs.

RULING ON POINTS OF LAW

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1. The Applicant has applied at the Industrial Court on an urgent basis seeking an order in the following terms;

    1. ***That this honorable court dispenses with the normal requirements relating to time limits, manner of service, form and procedure and deal with the matter as one of urgency, in terms of Rule 15 of the Industrial Court Rules.***

    2. ***That the honorable court, condones the applicant's non-compliance with the rules of this Honorable court.***

3. *That a rule nisi do hereby issue, calling upon the respondents to show cause on a date to be fixed by the above honorable court, why an order in the following terms should not be made final;*

3.1 *Declaring the letter purporting termination of the Applicant contract of employment as irregular and in- effective.*

3.2 *That the withholding of a disciplinary verdict, minutes, findings and recommendation by the 2nd Respondent is unlawful and consequently be issued within two working days after the final order of this Honourable court.*

3.3 *That the withholding of applicant salaries by the 1st Respondent for the period from the 25th March 2019 up to date is hereby set aside and declared unlawful.*

3.4 *That the first Respondent is ordered to pay wages (which at present are E11 000.00 for the period from 25 march 2019) and for the subsequent months, until the employment status is resolved.*

4. *That the first and second Respondents pay costs of the application at a punitive scale.*

2. BREIF BACK GROUND

2.1 The Applicant was employed by the 1st Respondent as a cleaner. From the papers filed before court Respondent appears to be in the hospitality business. It appears on the annexure filed by the Applicant"MK1",that she was invited to attend a disciplinary hearing, where certain charges of

absenteeism, gross misconduct dishonesty, bringing the name of the company into disrepute, were leveled against her. The disciplinary hearing was held on the 7th March 2019 and it was chaired by the 2nd Respondent.

2.2 Annexure "MK4" is a letter dated 12th March 2019 which is addressed to the Applicant. It purports to terminate her employment services. Although the Applicant contends that, this letter was not signed and is not on the company letter heads, and that is the basis on which she seeks that the court must set it aside.

2.3 The Applicant in her papers before court, also annexed annexure "MK6" a report of dispute, which she filed at CMAC. Where she reported that she was dismissed on the 12th March 2019 and the nature of her dispute is unfair dismissal. On the part of the form, where she is required to describe if all procedures were followed, she responded to the positive. She further described the procedures followed in the following manner;

" I undergone a partial disciplinary hearing whose results unnecessarily favoured the employer in the absence of evidence and witnesses….."

2.4 The 1st Respondent has filed an answering affidavit where a preliminary point of law has been raised. The first preliminary point of law, is lack of urgency. The Respondent argue that the applicant in her affidavit, has failed to set forth explicitly, the circumstances which she avers, renders the matter urgent; and the reasons why she cannot be afforded substantial redress, at hearing in due course.

2.5 At the hearing, the 1st Respondent's representative, indicated that his client was abandoning the point of law that it had initially taken pertaining to improper citation. We will now consider the point of urgency raised;

2.5.1 Rule 15 (2) of the Industrial Court Rules 2007 requires a party applying for urgent relief in its founding affidavit:-

2.5.1.1 to state the circumstances which it avers, renders the matter urgent .

2.5.1.2 the reasons why the provisions of Part VIII of The Industrial Relations Act (providing for prior Conciliation of the dispute) should be waived.

2.5.1.3 the reason why applicant cannot be afforded substantial redress, at the hearing in due course.

3. The Applicant makes the following averments in her founding affidavit regarding urgency;

> " ***it is submitted that the matter is urgent due to the fact of the Respondent unlawful actions; the very right to administrative justice of the Applicant is at stake. The failure to give a proper termination letter, findings and recommendations has made Applicant's life stall. Furthermore, withholding salaries without due process of the law and suspension without pay, that has exceeded thirty days without recalling Applicant……***".

4. In respect of the first ground, the Applicant does not to detail, what unlawful actions that were committed by the Respondent, to entitle her to come to court on a urgent basis. Most of the cases that are pending in court, which have followed Part VIII of the Industrial Relations Act, the litigants allege that the Respondents have committed one unlawful action or the other.

5. It was incumbent on the Applicant to state explicitly in the paragraph dealing with urgency, why her matter is so urgent that she must jump the que. Also, why her matter should not follow the requirements of Part VIII of The Industrial Relations Act fully. The Applicant should have stated full facts in support of these averments. What Applicant has stated in her affidavit, is only that the Respondents actions are unlawful and her rights of justice are at stake. She has further alleged that the failure to give her a proper termination letter, findings and recommendations by 1st Respondent, has made her life to stall.

6. The alleged improper termination letter that the applicant is challenging is dated the 12th March 2019. There is no explanation on the affidavit, what happened after the 12th March 2019. Why did she delay to bring the matter to court between the 12th March to 22 August 2019, which is the date on which she finally launched the application.

7. The Applicant also contend that, the withholding of her salaries, without due process of the law and the suspension without pay, that has exceeded thirty days without recalling Applicant or deciding otherwise over the matter, is unlawful. We fail to comprehend this assertion. It appears there was a disciplinary hearing. On the face of the letter dated 12th March 2019, which purports to terminate the Applicant's services. It refers to a disciplinary

hearing. The court is also cognizant of the fact that Applicant does not seem to recognize the termination letter, on the basis that it is not on the company letter head and is not signed.

8. Even if she is given the benefit of the doubt, the problem is that she took active steps, to act on the termination, by proceeding to report a dispute for an unfair dismissal at CMAC. She accepted that the employment relationship had terminated. She cannot blow hot and cold. On one hand, she reported a dispute to CMAC. On the other hand, months down the line, she moves an urgent application to this court she seeking an order that her salaries be paid, because the termination letter is defective. That, in our view is being disingenuous.

9. In any event, there is no reason why the applicant cannot obtain redress in due course, against all the issues she has raised with the Respondents. Firstly, with regard to the failure to furnish her with minutes of the disciplinary hearing and at the recommendations of the chairman, she could have approached this court, under normal time limits. Secondly, annexure "MK7" is a memorandum agreement, entered by the parties at CMAC, where the parties recorded a settlement to the effect that, the matter is refereed back to the parties in order to exhaust internal procedures and to report the matter afresh if she is not satisfied with the outcome. That means the door at CMAC is still open for her to ventilate.

10. In the event her issue was failing to furnish her with minutes and recommendations of the Chairman she could have gone back to CMAC and if CMAC could not give her an effective relief, she should have sought relief from this court on a normal application.

11. This court, on numerous decisions has held that; loss of income and financial hardship is not a sufficient legal ground for urgency. This position was held is **SAPWU v United Plantations (Swaziland) Limited (IC Case No. 79/98), Kenneth Makhanya v NFAS (IC Case No. 268/2004.**

11.1 **PR DUNSDEITH,** the president of this court as he then was in the matter of **Makhosini Gamedze vs Fuelogic Swaziland (Pty) Ltd (IC case no.496/2007)** made the following comments in deciding matter similarly to this one;

> *"Most of the litigants presently awaiting the hearing of their claims in the Industrial Court may similarly complain that they are suffering financial hardship or have nothing to live on. This is not per se a ground of urgency. The Applicant must show some exceptional circumstance that renders the matter urgent. He must also convince the court that he will be unable to obtain satisfactory relief in due course if the matter is heard in the normal way".*

11.2 We align ourselves with the sentiments expressed made by President Dunseith (as he then was), they are applicable in the matter at hand. The Applicant before court, has also failed dismissally to demonstrate any exceptional circumstances, that renders her matter urgent. She has taken active steps and complied with part VIII of the Industrial Relation Act by reporting a dispute at CMAC. There is no reason why she has abandoned that process and resorted to tis court on a certificate of urgency.

12. The Applicants counsel has cited a case of **Dlamini v Maloma Colliery Ltd & Other (134/11) [2011] SZIC 22 (17 June 2011)**; in his support that the court had previously intervened and re- instated wages of an employee that were withheld by employer. In this case, The Applicant's contract of employment was not terminated. The employer seemingly took a unilateral decision to withhold his salary, when the employment relationship had not terminated. This case cannot be used to support the contention made by the applicant to be paid salaries when there is no longer an employment relationship.

12.1 The Respondents point of law on lack of urgency succeeds.

12.2 The court is not inclined to grant costs.

12.3 The members agree.

B. W. MAGAGULA

ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. B. Tfwala (Representative)

For Respondent: Mr. A. Fakudze (Representative)