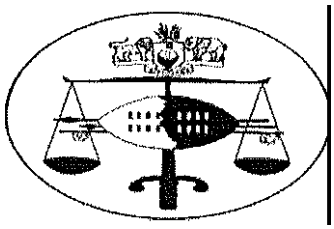

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. **182/2019**

In the matter between:

SWAZILAND CHRISTIAN UNIVERSITY Applicant

And

SIBONILE DLAMINI Respondent

In Re:

SWAZILAND CHRISTIAN UNIVERSITY Applicant

And

SIBONILE DLAMINI Respondent

Neutral Citation : Swaziland Christian University V Sibonile Dlamini In re Swaziland Christian University V Sibonile Dlamini (182/19) [2021] SZIC 92 (30 November, 2021)

Coram **:HLATSHWAYO-MABUZA AJ**

(Sitting with Mr.D.P.M Mmango and Mr. A.S Ntiwane Nominated Members of the Court)

DATE HEARD : **11th November 2021**

DATE DELIVERED : **30th November 2021**

Summary : *Application for leave to appeal a ruling dismissing application of absolution from the instance.*

RULING

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1. Before court is an app,lication in which the current Applicant is the Respondent in the main matter and vice versa. The current application was brought under Certificate of Urgency for the following orders;

    1. *Dispensing with the normal form and time limits prescribed by the Rules of the above Honorable Court and directing that the matter be heard as one of urgency.*
    2. *Condoning the Applicant's non-compliance with the said Rules of Court.*
    3. *Granting the Applicant leave to appeal the judgment of this Honorable Court handed down on the 16th September 2021.*
    4. *Costs*
    5. *Further and/or alternative relief*

2. As is apparent from the prayers sought, the matter is an application within a pending matter.

3. The main matter is pending completion of trial, the Applicant's case having been closed after oral evidence of one witness and cross-examination, the Applicant in the main matter herself (hereinafter referred to as the Respondent).

4. At the close of Respondent's case, the Applicant moved an application for absolution from the instance.

5. The application for absolution from the instance was opposed by the Respondent and the Court dismissed the application and ordered the matter to proceed to trial for presentation of Applicant's case.

6. In dismissing the application for absolution from the instance the court found as follows:

"Having applied our minds to all the arguments made by the parties, the applicable legal principles and the evidence given in Court thus far, we make the following order;

(a) The Applicant has made out a prima facie case of constructive dismissal against the Respondent;
(b) The Application for absolution from the instance is therefore dismissed;
(c) The Respondent is called upon to open its defence in this matter;
(d) The trial shall proceed on dates to be allocated by the Registrar of this Court
(e) No order as to costs"

7. The gravamen of the main matter is a claim for constructive dismissal, which is provided for in **Section 37 of the Employment Act 1980 (as amended)** as follows:

Termination of services due to employer's conduct.

37. When the conduct of an emnloyer towards an employee is proved by that employee to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves !us employment whether with or without notice, then the services of the employee sn[1] all be deemed to have been unfairly terminated by his employer.

8. This court dismissed the application for absolution from the instance on the strength that the Respondent had made a *prima facie* case in proof of Section 37 above.

9. The Applicant herein is applying for leave to appeal that ruling because of the following arguments:

(i) Cross-examination of the Respondent showed that alternative remedies were not exhausted before she resigned.

(ii) It was not the terms and conditions of her employment which rendered it intolerable for her to continue with the employment relationship but the financial situation.

10. The court was taken through the background of the matter to enable it to comprehend the arguments as some of them touch on the facts of the main matter.

11. From the presentation of the background, the Applicant reiterated the argument advanced during the application for absolution from the instance, that is, the Respondent, with others, had helped herself to alternative remedy available, being court process. That court process is still pending.

12. The Applicant expanding the argument in exhaustion of alternative remedies, argued that the Respondent when perceiving the terms and conditions to be intolerable, should have approached the Labour Commissioner as provided by **Section 26 of the Employment Act (as amended),** which option she conceded not to have pursued, yet it is not to be pursued out or choice/ election. The court was referred to the case of **Jameson Thwala v Neopack Swaziland IC 18/1998** wherein the court emphasized the exhaustion of alternative remedies before resorting to resignation. Applicant quoted page 8 of the **Jameson** case whereat the court stated that *"mere unreasonableness or illegitimate demands by the employer according to this approach do not amount to constructive dismissal as long as the employee retains a remedy against the employer's conduct short of terminating the employment relationship ..."*

13. The remedy available to the Respondent, according to Applicant, as provided in **Section 26 of the Employment Act 1980 (as amended)** is as follows:

Changes in terms of employment.

26. (1) Where the terms of employment specified in the copy of the form in the Second Schedule given to the employee under section 22 are changed, the employer shall notify the employee in writing specifying the changes which are being made and subject to the following subsections, the changed terms set out in the notification shall be deemed to be effective and to be part of the terms of service of that employee.

(2) Where, in the employee's opinion, the changes notified to him under subsection (1) would result in less favourable terms and conditions of employment than those previously enjoyed by him, the employee may, within fourteen days of such notification, request his employer, in writing, (sending a copy of the request to the Labour Commissioner), to submit to the Labour Commissioner a copy of the form given to him, under Section 22, together with the notification provided under subsection[]) and the employer shall comply with the request within three days of it being received by him.

(3) On receipt of the copy of the documents sent to him under subsection (2), the Labour Commissioner shall examine the changes in the terms of employment contained in the notification. Where, in his opinion, the changes would result in less favourable terms and conditions of employment than those enjoyed by the employee in question prior to the changes set out in the notification, the Labour Commissioner shall, within fourteen days of the receipt of the notification, iriform the employer in writing of this opinion and the notification given to the employee under subsection (1) shall be void and of no effect.

(4) Any person dissatisfied with any decision made by the Labour

. Commissioner under subsection (3) may apply in writing for

> *a review to the Labour Commissioner, who using the powers accorded to him under Part II, shall endeavour to settle the matter. Where he is unable to do so within fourteen days of the receipt of the application being made to him, he shall refer the matter to the Industrial Court which may make an order.*

14. Applicant argued that the Labour Commissioner could have set aside the less favourable terms and conditions as empowered by Section 26(3), and if dissatisfied with the Labour Commissioner's decision, it is argued, it is only then, that the matter should be brought to this court.

15. The argument, ultimately, is that the matter is prematurely before court, and the court in the ruling dismissing the application for absolution from the instance erred in downplaying the role of Section 26 and holding that the matter would have found itself before court in any case. It was pointed that it should be before court in terms of Section 26(4) and not due to an unresolved dispute arising from the' resignation par constructive dismissal.

16. The court was also refen-ed to **Strategic Liquor Services v Mvumbi (CCT 33/09) [2009] ZACC 17** in which Applicant submitted that the Constitutional Court found that the test for constructive dismissal is often misconstrued. According to Applicant's argument the court held that the test *"does not require that the employee have no choice but to resign, but only that the employer should have made continued employment intolerable"*.

17. According to the Applicant, the cause for resignation was not intolerable terms and conditions but financial disadvantage occasioned by the second letter of offer, and salary accordingly paid consequently. The court was directed to page 40-41 of the Transcript wherein the Respondent was

cross examined as fo!lows ;-

"RC- Miss Dlamini let me put this to you. Before this honourable court there is no evidence to prove that you were constructively dismissed.

A- To what my lord

RC- To the effect that you were constructively dismissed. That there was a deliberate intention on the part of the employer to make the work environment intolerable.

A- Yes my lord I think I would say that in not so many terms and in not so many evidences they didn't do that. However one would say there is no way you can measure my financial constraints. There was not a single time. There was also no way they could measure the emotional part of how that affected me financially as well. My lord may I refer you to the pay slip for Christian University and Good Shepherd College. That is Page 15 for Christian University. Apologies my lord I am still looking for Good Shepherd pay-slip. May I use the B2 document page 8 and the minutes document page 15. Do you have this document. "

18. The Applicant further referred the court to paragraph 20 **ofNicholas Motsa v OK Bazaars (Pty) Ltd IC 55/2012** where the court pointed that where there is an issue, the employee has to utilize available remedies before resignation.

19. The Respondent argued that the primary consideration in constructive dismissal is whether or not the employee gave the employer sufficient opportunity to remedy the situation complained of. Further, that the existence of internal grievance procedures does not live harmoniously with the provisions of Section 26 which provides for a time limit of Fourteen (14) days. Further, still that the procedure in terms of Section 26 is one of many elective courses hence the election of the internal grievance

process by the Respondent does not make it wrong choice. In this regard, the court was referred to **Pinky Toi Mngadi v CONCO (Pty) Ltd t/a Coca Cola IC199/2008.**

20. The Respondent argued that it did explore available remedies available such as engaging with the Applicant.

21. The Respondent's submission was the appealability of the interlocutory order. The argument was that the order which Applicant seeks leave to appeal, is not a final order but interlocutory in nature hence it, ordinarily, is not appealable without leave. Th\! interlocutory ord('.r has to have an effect that is final to qualify to be appealable. The court was referred to **Temahlubi Investments (Pty) Ltd v Standard Bank CA 35/2008 in** which leave to appeal a summary judgment order was dismissed because the court had not made a final order and the matter is still to be determined. The submission was that the **Temahlubijudgment** was the *locus classicus* in the country and in order for leave to be granted to appeal against an interlocutory order, one has to distinguish that case from it such that it may be said that the former is inapplicable to it. It was argued that the present case is not distinguishable and to succeed in its application the Applicant must make a case that the dismissal of the application for absolution from the instance is actually final and definitive.

22. The court was also referred to **Steyler NO v Fitzgerald 1911 AD 295** in support of the contention that the final decision has not be made and the court is still to determine the matter, which may very well be in favour of the Applicant.

23. The Respopdent also referred to the **National Treasury and Others v Opposition To Urban Tolling Alliance and Others CCT 38/12 [2012] ZACC 18 (OUTA judgment)** in support the submission that leave to

appeal interim orders have been granted where it is in the interest of justice. At paragraph 25 Moseneke DCJ stated that *"this court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is "the interests of justice". To that end, it must have regard to and weigh carefitlly all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable".*

24. The Respondent argued that the Applicant's argument about failure to avail itself of Section 26 is unimportant in this application because the court has not made a final order in the matter, as such there is no harm or prejudice occasioned to it. Respondent further argued that there has to be a pressing need, which occasions irreparable harm, like an interim order with a final effect.

25. The Respondent also argued that the Applicant has to demonstrate that there exists prospects of success at appeal, but they have failed in that, they have not demonstrated that Section 26 is a prerequisite for a claim for constructive dismissal occasioned by altering terms and conditions of employment.

26. The Applicant argued that the Court's interpretation and conclusion regarding Section 26(3) is wrong and that is a final determination. The court's finding that ruled out Section 26 as a remedy, is a final determination, hence Applicant's eligibility to appeal against the ruling as of right.

27. The court in **Amos Mabuza v Swazi Plastics Industries IC 15/2011** clarified the purpose of the Section 26(2) procedure as follows:

33.1 It gives the employer notice that the employee is dissatisfied with the changes which the employer has introduced in the employment contract. The employer is fi1rther notified that the employee is *challenging those changes before the Labour Commissioner.*

33.2 It further gives the employer 3 (three) days, (after receiving the notification from the employee), to consider the changes it has introduced in the employment contract. After due consideration, the employer may be persuaded to withdraw the changes it has made, in which case the status quo ante would be restored.

33.3 If the employer is not persuaded to withdraw the changes, the notice further gives the employer time to make the necessary preparation to defend the changes at a hearing before the Labour Commissioner.

33.4. The notification further gives the Commissioner an opportunity to receive the necessary documentation relating to the changes, and further listen to arguments from both sides pertaining to the matter before him, in order to make an informed decision.

28. This court is reluctant to delve much into the vast arguments and submissions advanced relating to the application of Section 26, however will only involve itself in so much as to enable it to address whether leave to appeal should be granted or not. From the **Mabuza** case quoted above, this court is convinced of the purpose of Section 26 procedure as stated and concludes that the effect of failure to pursue Section 26 would best be addressed by the court after the trial has been concluded. The court is loathe dealing with matters piecemeal (see **Small Enterprise Development Company v Phyllis Ntshalintshali ICA 8/2007)** as it is not in the interest of justice especially in this court which should deal with matters expediently and cheaply. This court has not been taken into confidence with regards to the interest of justice that would be served by pursuing the appeal, especially the prejudice and ineparable hmm that is suffered by the Applicant as a result of the dismissal order.

29. Prospects of success were considered by the Supreme Court in refusing to grant leave to appeal in the matter of **Advocate Ernest Thwala v Titus Mlangeni t/a Mlangeni** & **Co CA 48/2001,** as such this court will dare to venture into the prospects of success at appeal in this matter. Without probing deep into the facts, merits and demerits of Applicant's case, and in no way revisiting the pending trial, a browse of the record *ex facie* shows that the Respondent was employed by Applicant, that there was an offer which she accepted, she joined the Applicant, she started work, she received another offer which was less favorable than the first one (in respect of finances), that she engaged Applicant numerous times, that her complaint did not bear fruit, that she has another pending case resulting from to the complaint, she secured another job and resigned alleging constructive dismissal. It is the considered view of this court that there are no prospects of success of the appeal against the dismissal of the application for absolution from the instance. The reason for this view is that from the brief summary as contained in the testimony of the Respondent, all elements of **Section 37 of the Employment Act (as amended)** have *primafacie* been met.

30. In **Small Enterprises Development Company v Phyllis Ntshalintshali ICA 8/2007** the Court stated that *"there are two types of interlocutory orders being (i) simple interlocutory orders which are not appea/able and (ii) other interlocutory orders that have a definitive and final effect in their application, which can be appealable with leave of court."* This court finds that the dismissal of the application is a simple interlocutory order which has only the effect of channeling the matter to proceed at trial for Applicant's case and has no final effect. It is unlike cases where an order upholding a point of law relating to employees not falling under **Section**

35 of the Employment Act, which has definite effect, see **Swaziland Meat Industries v Mduduzi Nhlabatsi and Others ICA 142/2005.**

31. This Court aligns itself with the finding in **Mmeleli Investments and 2 Others v Standard Bank SC 37/2009** in which the Court dismissed the application for leave to appeal and stated as follows:

> *"]n a number of judgments of this Court, it has been stated that interlocutory orders having no final or definitive effect are not appealable without leave. What is also clear is that where a simple interlocutory order or ruling is challenged, leave to appeal will not be granted since the order is not appealable at all. "* (own emphasis)

32. In light of the above reasons and considerations, the court dismisses the application for leave to appeal.

The members agree.

X HLATSHW AYO-MABUZA
ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT	*B Gamedze*
	(Musa M Sibandze Attorneys)
FOR RESPONDENT	*M Tsambokhulu*
	(Waring Attorneys)