

**IN THE INDUSTRIAL COURT OF ESWATINI**

HELD AT MBABANE

Case No. 123/2022

In the matter between:-

**HENRY KWAME OVA AGYEMAN**

APPLICANT

**And**

**RALSTON SMITH**

1<sup>st</sup> RESPONDENT

**ALLEGIANCE INVESTMENT (PTY) LTD**

2<sup>nd</sup> RESPONDENT

**FIRST NATIONAL BANK**

3<sup>rd</sup> RESPONDENT

**THE REGISTRAR OF DEEDS**

4<sup>th</sup> RESPONDENT

**THE ROYAL ESWATINI POLICE**

5<sup>th</sup> RESPONDENT

**THE ATTORNEY GENERAL**

6<sup>th</sup> RESPONDENT

**Neutral citation:** Henry Kwame Ova Agyeman v Ralston Smith & 5 Others

(123/2022) [2022] SZIC 85 (27 July 2022)

**Coram:** **DLAMINI NGA'NDU - JUDGE**

(Sitting with Ms N. Dlamini and Mr. S.Mvubu,

Nominated Members of the Court)

**Heard:** 28 JUNE 2022

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## RULING ON POINTS IN LIMINE

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[1] Applicant, on the 27<sup>th</sup> of April 2022, filed an urgent application seeking the following relief;

- a) The matter to be treated as urgent and accordingly dealt with such and as a result condone the non-compliance with time limits and manner of service.
- b) Payment of arrear salaries by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the sum of E 91, 761, 00 (Ninety-one thousand and seven hundred and sixty one emalangeni) for the months of January, February and March 2022.
- c) Declaring the purported letter terminating Applicants services dated 11<sup>th</sup> January 2022 invalid.
- d) Interdicting the 1<sup>st</sup> Respondent forthwith from utilizing, withdrawing, transferring and/ or alienating in any manner any amount of money held by the 3<sup>rd</sup> Respondent in Matsapha branch under call account No. 62379728466 or any branch in the country.
- e) Freezing all of 2<sup>nd</sup> Respondent's funds held by the 3<sup>rd</sup> Respondent with immediate effect.
- f) Directing the members of Royal Eswatini Police to assist in the enforcement of the orders.
- g) Interdicting 1<sup>st</sup> and 2<sup>nd</sup> Respondents from selling, alienating, encumbering and or transferring shares of the of the 2<sup>nd</sup> Respondent held by the 1<sup>st</sup> Respondent as well as Portion 10 of farm Number 281 situated in Manzini, Ezulwini pending the institution and finalization of

Applicant's claim for the terminal benefits from the estate of late Ronny Jonny Smith.

- h) Declaring unlawful the withholding of Applicant's salary for January, February and March 2022.
- i) Ordering 3<sup>rd</sup> Respondent (FNB) to pay Applicant's salary from the credit balance if any to Applicant's Attorney's Trust Account.
- j) Respondent to pay costs of this application on a punitive scale.

[2] 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed their replying affidavits and also raised the following points in limine;

- a) That the matter was not urgent and should not have been brought exparte as it was originally brought.
- b) There exists material disputes of facts and as such the matter could not be dealt with on motion proceedings in an affidavit.
- c) The applicant has approached the Court with dirty hands.
- d) Applicant's case fails to meet the standards for an interdict.

[3] As per the standard procedure and practice, the points in limine had to be argued prior to the determination of the main application as it has the effect of determining the case before the merits can even be dealt with consequent the parties argued on the 28<sup>th</sup> of June 2022.

### Urgency

[4] The Applicant argued that the matter is urgent for the following reasons;

- a) He had not been dismissed from work as the letter that terminated his services does not bear strutting and it is invalid as it come from a company based in the Republic of South Africa;

- b) His salary was due as the Respondent 1 and 2 had failed to pay him;
- c) His financial obligations were impossible to fulfil and he was experiencing economic hardship.
- d) He did not delay in bringing the matter before Court as he had been trying to reason with the Respondent but his efforts proved futile as 1<sup>st</sup> Respondent does not respond to correspondence or show up for meetings.

[5] It is worth noting that it is trite law that matters dealing with salaries in their very nature are urgent and the Court will more often than not; not turn a blind eye to such matters as they deal with the livelihood of the Applicant this was pointed out also in the cases of **Bonke Lukhele vs S D F Industrial Court Case No 30/2008** as well as in the case of **Graham Rudolph v Mananga College Industrial Case No. 94/2007.**

[6] In this case however it is noted that there is a dispute on whether or not the Applicant is an employee of either the 1<sup>st</sup> or the 2<sup>nd</sup> Respondent from whom he is claiming the said salary arrears from; a dispute of fact that cannot be dealt with or resolved only on paper, that is to say on the affidavits presented before Court. There is filed Annexure "TL" purporting to be the termination of the independent contractor's contract addressed to the Applicant herein dated 11<sup>th</sup> of January 2022. It has not been set aside; which therefore means it still stands.

[7] It has been held in **Graham Rudolph vs Mananga College IC 94/2007 followed as well in Bonkhe Lukhele vs SDF IC 39/2008** that salary non payment only a ground of urgency where the employment contract still subsist. It would therefore follow that where there exists no contract of employment or there has been termination of such for whatever reason including dismissal, loss

of income is inevitable consequence as was also stated in the case of Bernadate Balkisson vs Waterford Kamhlaba UWC IC 308/2009.

Needless to state that the onus would be on the employee who alleges such an employment contract to prove Samuel Msibi vs Chemlog IC 375/2005.

[8] It is therefore the Court's finding that;

- This matter is indeed not urgent. If it had been the Applicant would not have received annexure "TL" on the 11<sup>th</sup> of January 2022 and do nothing about it up until April 2022 when he suddenly moved this application. Further several months of nonpayment passed and choose not to move the court even then up until April 2022, this point therefore succeeds.

#### Material Disputes of Facts

[9] I have already pointed out annexure "TL" which is in issue and there is also further reference to a disputed payslip purported to have been from the Respondents 1<sup>st</sup> and 2<sup>nd</sup> these the court considers to be material dispute that cannot be resolved on paper as already highlighted in Malunge Dlamini vs Umkhangiso Investment (Pty) Ltd IC 223/2022 cited by the Respondents herein and have accordingly align ourselves with that dictum as well.

This point in limine also accordingly succeeds to add to that one needs to mention that if the issue still stands that there is or there is not a contract of employment or whether or not such has been terminated then **Part 8 of the Industrial Relations Act** ought to apply according it is so ordered.

[10] The lawfulness or otherwise of the termination of the relationship between the Applicant and the Respondent has to be determined first and foremost by

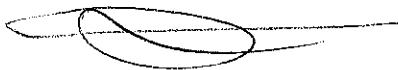
Conciliation Mediation and Arbitration Commission (CMAC) in terms of **Part 8 of the Industrial Relations Act.**

[11] Consequently, the Courts finding on the above points in limine has the effect of ending this matter and it is therefore needless to point that the rest of the points in limine are merely mute points.

[12] In conclusion therefore the Respondents points in limine above succeed and the application is dismissed. No order costs for costs. The Applicant is ordered to comply with **Part 8 of the Industrial Relations Act** if their desire is still to pursue this matter further.

Thus delivered this <sup>27<sup>th</sup></sup>.....day of <sup>July</sup>.....2022 at the Industrial Court of Eswatini in Mbabane.

The Members Agree.



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**D. F. DLAMINI-NGA'NDU**  
**JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

For Applicant : L. Dlamini

For Respondents : H. Magagula