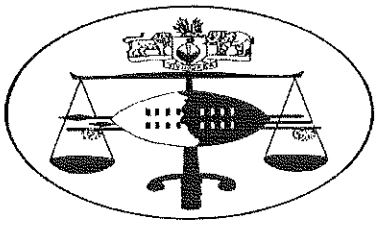

IN THE INDUSTRIAL COURT OF ESWATINI

Case No 296/2023

In the matter between:

DUMSANI DLAMINI Applicant

And

SMC BRANDS SWAZILAND Respondent

Neutral citation: Dumsani Dlamini v SMC Brands Swaziland (Pty) Ltd (296/23)[2023] SZIC 124 (05 December, 2023)

Coram: **NGCAMPHALALA AJ**
(Sitting with Mr.M.P. Dlamini and Mr. E.L.B. Dlamini, Nominated Members of the Court)

Date Heard: 07th November, 2023

Date Delivered: 05th December, 2023

SUMMARY – *The Applicant has moved an urgent application to this Honourable Court seeking that the Respondent letter dated the 20th October, 2023, terminating the employment relationship declared null and void in abi nitio and having no force and effect and be set aside -Further that the Applicant be entitled to monthly full pay salary for the end of November, 2023, until the matter is finalized – the application is opposed by the Respondent- points in limine raised- lack of urgency- matter prematurely before Court- failure to comply with Part VIII of The Industrial Relations Act 2000 (as amended).*

Held –*1. The point in limine as raised by the Respondent that the matter is prematurely before Court for failure to exhaust internal remedies is upheld, and accordingly Applicant's application is dismissed on the point in limine.*

2. The matter is referred back, to the Respondent to exhaust the Respondent's internal disciplinary structures.

3. The Applicant is to be afforded an opportunity to note an appeal as per paragraph six of the letter terminating his services. The seven calendar days as provided for in paragraph six of the letter of termination, is to commence on the date of the issuance of the Courts order

4. There is no order to costs.

JUDGMENT

[1] The Applicant is Dumsani Dlamini an adult Liswati male of Matsapha in the Manzini district.

[2] The Respondent is SMC Branding Swaziland (Pty) Ltd, a limited proprietor with the ability to sue and be sued in its own name, duly incorporated and registered in terms of the company laws of Eswatini and carrying on its business at Matsapha Industrial Site in the Manzini District.

[3] The present application came by way of urgent application wherein the Applicant, seeks Respondent letter dated the 20th October, 2023, terminating the employment relationship be declared null and void *in abi nitio* and force and effect and be set aside. Further that the Applicant be entitled to monthly full pay salary for the end of November, 2023, until the matter is finalized. The Applicant has approached the Court in this regard seeking an order in the following terms:

3.1 Dispensing with the normal and usual requirements relating to the time limits, manner of service and filing of papers set out in the Rules of Court and hearing this matter as one of urgency.

3.2 Condoning any non- compliance with the rules of the above honourable court;

3.3 That the Respondent's letter dated 20th October, 2023 terminating the employment with the Applicant is declared null and void *abi nitio* and be of no force and effect and therefore be set aside;

3.4 That the Applicant is entitled to monthly full pay salary at the end of November, 2023 and the months to follow until finilisation of the matter before the above honourable Court;

3.5 That prayers 3.1 and 3.2 above be of interim and immediate effect and the matter returnable on a date to be determined by the above Honourable Court;

3.6 Cost of suit; and

3.7 Further and/or alternative relief.

BRIEF BACKGROUND

AD POINTS IN LIMINE

[4] The Respondent raised three points of law **ad urgency, application is prematurely before Court, and the application is irregular for failure to comply with Part VIII of The Industrial Relations Act, 2000 (as amended).** During the hearing of the matter, parties agreed to argue the matter holistically, the Applicant was first to make submissions.

APPLICANT'S SUBMISSION

[5] The Applicant was employed on the 15th August, 2022 on a permanent basis by the Respondent as a Warehouse Supervisor. The Applicant alleges that on the 11th September, 2023 he was served with a written final warning by the Respondent, relating to an incident that had taken place in August, 2023. He alleges that he was again served with an invitation to appear before a disciplinary hearing on the 13th September, 2023, and was charged with gross negligence, dishonesty and incompetence in performing his duties, and subsequently appeared before a disciplinary tribunal. It transpired during the disciplinary hearing that the charges as written on the invitation letter were based on the same facts as the written final warning served on him on the 11th September, 2023, and same was raised as a preliminary issue before the Chairperson.

[6] The Applicant avers that the Chairperson issued out his ruling on the 2nd October, 2023 and upheld the preliminary point. The Chairperson then directed that the Respondent prepares fresh charges and that same be served on the Applicant within twenty-four (24) hours. New charges were indeed prepared against him, and the charges were gross negligence, incompetence and dereliction of duty, which charges he pleaded not guilty too. The hearing proceeded and he was found guilty by a Ruling dated the 16th October, 2023 on the charges of incompetence and dereliction of duty. The Chairpersons recommended that he be placed on unpaid leave or made to sign a comprehensive final warning.

[7] It was the Applicants submission that contrary to the recommendation of the Chairperson, on the 20th October, 2023 he was issued with a letter terminating his services. In the letter of termination of his services he was advised that the recommendation as per the Chairperson of the tribunal had not been accepted by the Respondent and as a consequence thereof his services were being summarily terminated with immediate effect, and he would not be required to serve notice. The letter read as follows:

"TERMINATION OF YOUR EMPLOYMENT WITH SMC BRANDS

1. *Reference is made to the matter above and in particular to the external chairperson of your disciplinary hearing which was delivered on the 16th October, 2023.*

2. *In his decision, the chairperson found you guilty of two (2) of the three charges that had been preferred against you. He subsequently, amongst other things, made the recommendation that you be placed on unpaid leave and/ or given a final written warning.*

3. *The recommendation of the chairperson has been duly considered and you are hereby informed that it has not been accepted, due to your poor disciplinary record in the fourteen (14) months that you have been with the company.*

4. *By this correspondence therefore, your services are herby summarily terminated. This means that your dismissal is with immediate effect t and you are not required to serve any notice.*

5. *Following your dismissal, you shall be paid this month's salary, and one month's notice pay including any other benefits that may be due to you in terms of your contract of employment with the company. In the interim and with immediate effect you are required to return all company property that is in your possession.*

6. *Please note that should you wish to appeal this decision, you are advised to make a written appeal directed to the managing Director, within seven calendar days of this letter. In your appeal letter, which is to be hand- delivered at the company premises, you are expected to state the grounds for your appeal.*

7. *We wish you well in all your future endeavours."*

[8] It was the Applicant's submission that the termination amounts to invalid dismissal, and that at the time of his dismissal he was still yet to appeal the Chairpersons recommendation. He averred that the dismissal amounts to invalid dismissal in that it contravenes the *audi alterum partum* rule. It was his argument that before dismissal he should have been afforded an opportunity to be heard. It was his averment that the matter as a consequence is urgent because his right to appeal the decision of the Respondent would have lapsed, if he were to follow Part VIII of the Act. Further that the matter is urgent in that if it is referred to the **Conciliation, Mediation, Arbitration Commission (CMAC),** he will lose his employment and will have no means of supporting himself and his family.

[9] It was his submission that the argument by the Respondent that he has not exhausted the internal remedies available to him, by launching an appeal is misleading to the Court, as the Respondent did not advise him of his right to appeal the decision. The Applicant then proceeded to deal with the point *in limine* as followed; it was his submission in his heads of argument that the issue of urgency is a matter of discretion by the Court, and not about the Court processes before Court. He averred that **Rule 15 (2) of the Rules of Court,** provides that as long as the Applicant is able to show good cause, the Court may direct that a matter be heard as one of urgency.

[10] He further argued that he had only six (6) days to approach the Court. It was his argument that due to the circumstances surrounding his dismissal, he was able to file his application on the 26th October, 2023 and serve same on the Respondent on the 27th October, 2023. He averred that due to national functions and weekends that was the fastest time in which he could approach the Court. It was his further averment that the Courts will not ordinarily entertain an application brought before it which is not accompanied by a Certificate of Unresolved Dispute, however there are several exceptions to the general rule in particular matters of invalid dismissal. In support of his argument the Applicant referred the Court to the case of, **NELISIWE FAKUDZE V SWAZILAND BUSINESS COALITION OF HEALTH AND AIDS I/C CASE NO 339/2016 SZIC 58.**

[11] In closing on this point it was his submission that if the matter is not heard as an urgent one, he will suffer irreparable harm, as the Respondent may resort to employing another person into his position, and argued that in a

similar matter of **XOLILE MNISI SACOLO V LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY AND ANOTHER I/C CASE 14/2023 SZICA**, the Court held that this was a ground to render the matter urgent. Lastly it was his submission that Rule 14 (1) and (6) (b) of the Rules of Court, allow for him to bring the Application directly to this Court, it was his prayer therefore that the Respondent's points *in limine* be dismissed.

AD MERITS

[12] On the merits it was the Applicant's argument that the matter before Court is not one of unfair dismissal, but an issue of invalid dismissal. It was his submission that invalid dismissal was justified by this Court in the case of, **CIVIL AVIATION AUTHORITY V SABELO DLAMINI I/C OF APPEAL CASE NO. 13/2021**. It was his submission that in the case of invalid dismissal, the employee is treated as if he had never been dismissed, and attains the status he had, before the termination.

[13] It was further his argument that the Supreme Court in the case of **SWAZILAND AIRLINK V NONHLANHLA SHONGWE NO & OTHERS SZSC 26,** the Supreme Court emphasized the importance of procedural fairness, and stated that it is a matter of promise, and it did not entertain the issues of substantive fairness, but looked closely at the procedural fairness. In that regard it was its argument that the Respondent in the present matter has failed to follow proper procedure when terminating his services.

[14] In closing it was his submission that this Court in the case of, **BHEKI DLAMINI V NEDBANK SWAZILAND I/C CASE NO. 338/19**, held that where procedural fairness is not present, the substantiveness of the process does not matter. It was his submission that the Respondent has failed to follow proper procedure and has not afforded him an opportunity to state his case before arriving at the sanction of dismissal. It was his prayer therefore that the application before Court be granted in his favour to remedy the irregular conduct of the Respondent.

RESPONDENT'S SUBMISSION

[15] In rebuttal the Respondent began its argument by addressing the points *in limine* as raised by itself. It was its argument that the reasons given in support of the allegations that the matter is urgent as appears in the Certificate of urgency and in the Founding Affidavit are insufficient to factually establish that the matter as urgent. It was its submission that financial hardship and loss of income are not considered to be grounds of urgency.

[16] It was its averment that the urgency is self-created since the Applicant had at least six (6) calendar days to move the present application, however the present application was moved on the 26th October, 2023 wherein the Applicant had only one (1) day left to appeal its decision. It was his submission that the Applicant has failed to set out facts why it didn't move the application earlier.

[17] It was its further submission that in circumstances where the Applicant seeks the review of the letter of terminating his employment, he cannot be heard to say the matter is urgent because he stands to lose his job and salary; in circumstances where the very purpose of the letter complained of, is to communicate to him the very loss of his job. Thus, the loss of such income cannot be a ground for urgency and the Court has articulated this principle in several cases, namely;

PHINEAS VILAKATI V JD GROUP I/C CASE NO. 41/1997, SAPWU & ANOTHER V ROYAL SWAZILAND SUGAR CORPORATION I/C CASE NO. 79/1998, and **KENNETH MANYATHI V USUTHU PULP COMPANY & ANOTHER I/C CASE NO. 245/2002.**

[18] It was the Respondent contention that the Applicant has not raised exceptional circumstances to have the matter heard on an urgent basis. Further it was its averments that the common law principle of invalid dismissal is not a basis to move the matter urgently, particularly since the Applicant was given a complete disciplinary hearing. It was its argument that the cases of invalid dismissal are not on all fours with the application before Court, in the cases as cited by the Applicant in support of its application, the disciplinary process was not completed. Whilst in the present matter the Respondent has afforded the Applicant a proper hearing, and further the right to appeal, which he failed to utilize. Further the Applicant still has an alternative relief to report the dispute at **CMAC.**

[19] It was therefore its submission that it will suffer a grave injustice if the Applicant's application is granted, as it will be paying the Applicant his salary whilst the matter is still ongoing, and it implored the Court to protect its financial interests by dismissing the Applicant's claim on the points *in limine*.

[20] On the second point *in limine* as raised, it was the Respondent's submission that the Applicant's application is prematurely before Court and therefore irregular. It was its averment that it is common cause that when the Applicant's services were terminated, he was given seven (7) days to note an appeal. However instead of noting an appeal the Applicant opted to launch the present application. The Applicant was given the right to appeal, and has failed to do so, and instead rushed to Court. It was its submission that in several cases wherein the Employee has failed to appeal the decision of the Employer, the Court have allowed for the Appeal process to be complied with in the interest of fairness. It was its argument in the present matter the Applicant should be directed to complete the appeal process.

[21] The Respondent submitted that the Applicant failed to appeal and therefore failed to exhaust internal remedies despite being informed of his right to do so. The Applicant's failure to note the appeal is a clear indication on his part that he was not willing to note the appeal. Further it judiciously exercised it prerogative as an employer in rejecting the Chairperson's recommendation, as the Applicant had several written warnings and various counselling sessions afforded to him. It averred that it correctly and fairly applied the law, by affording the Applicant a properly constituted disciplinary hearing

chaired by an independent chairperson. Thus, his failure to pursue alternative remedy to note the appeal against the dismissal is fatal to his urgent application and it stands to be dismissed.

[22] On the last point as raised by itself, it was its submission that it is trite law and practice of this Court that once there has been a dismissal, the employee dismissed is required to follow **Part VIII of the Industrial Relations Act 2000 (as amended)** and have the matter reported at **CMAC**. It was its submission that in circumstances where the Applicant has failed or refused to note an appeal, he cannot legally and procedurally compel it to reinstate him through the filing of the present application, without first having reported a dispute at **CMAC.** It was its argument that the Applicant cannot avoid conciliation on the basis of an alleged common law remedy and therefore cannot receive preference over all other Applicants who have pending unfair dismissal cases before this Court. The Applicant should therefore be directed to follow Part VIII of the Act, and have the matter conciliated before bringing it to this Court, and therefore its application should fail on the basis of this argument.

AD MERITS

[23] On the merits it was the Respondent's argument that its company is relatively small in size, and thus it has a flat structure, in that regard the most senior employee of the Respondent is the Company Manager, who is responsible for hiring and disciplining all employees. It was its averment that in the circumstances the Country Manager was the individual responsible and who was required to discipline the Applicant. Further that

in carrying out his duties the Country Manager afforded the Applicant the right to a fair hearing, and further afforded him the opportunity to make representation in his defense.

[24] Further it was its argument that the Applicant's claim that the matter before Court is invalid dismissal is incorrect, as in the present circumstances the Applicant was given a complete disciplinary hearing, however he opted not to complete the process by failing/ refusing to note an appeal. Therefore, the present application is not on all fours with the judgments that the Applicant has referred to an invalid dismissal, and the application should be dismissed, and a cost order be grated in its favour.

ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[25] Urgent applications in this Court are regulated by **Rule 15(2) of the Industrial Court Rules**. This rule regulates thus;

> *"The affidavit in support of the application shall set forth explicitly-*
> *a) The circumstances and reasons which render the matter urgent;*
> *b) The reasons why the provisions of Part VIII of the Act should be waived; and*
> *c) The reasons why the applicant cannot be afforded substantial relief at a hearing in due course."*

The above is not the end. Rule 15(3) goes on to state that; *'On good cause shown, the court may direct that the matter be heard as one of urgency.'*

[26] The rules of this Court make it peremptory that litigants wanting to be heard on an urgent basis shall expressly state (a) the circumstances and reasons which render the matter urgent, (b) the reasons why the provisions of **Part VIII of the Industrial Relations Act, 2000 as amended** should be waived and c) the reasons why that litigant cannot be afforded substantial relief at a hearing in due course. All this has to be stated in detail. Nothing should be left implied. And once the Court is satisfied that good cause has been shown for the matter to be heard on an urgent basis, it may direct that it be heard as such. The question entailing in this matter therefore is whether good cause has been shown for the Court to direct that this matter be enrolled and heard as one of urgency.

[27] In addressing the issue of urgency the Applicant submits that if the matter was not enrolled as one of urgency, his services will be permanently terminated, and his position filled. Further he would lose his livelihood and the ability to take care of his financial obligations. Thus, if he were to follow Part VIII, of the Act he would suffer irreparable harm. The Applicant further stated that he was not afforded an opportunity to be heard by the Respondent, before he was dismissed. The Court is now seized with the matter, and is required to ensure the harmonious relations exist within the workplace. From the pleadings the Applicant has shown grounds for the Court to intervene in the proceedings. The Court accordingly finds that the Applicant has shown good cause for the matter to be heard as one of urgency. The point *in limine* as raised by the Respondent is therefore accordingly dismissed.

[28] Now to deal with the second point *in limine* as raised by the Respondent, that the matter is irregular due to being premature, for ignoring internal remedies. It is common cause that the Applicant did not appeal the decision to terminate his services. In the case of, **NKOSINGIPHILE DLAMINI V NDZ COMPANY LTD ICA CASE NO. 2/2020**, the Court held;

" The requirements for a fair pre-dismissal hearing were set out in the case Mahlangu v CIM Delkak as follows ; the right to be told of the nature of the offence or misconduct with the relevant particulars of the charge; the right of the hearing to take place timeously; the right to be given adequate notice prior to the hearing; the right to some form of representation; the right to call witnesses, the right to an interpreter; the right to a finding (if found guilty), he should be told the full reasons why; the right to have previous sentences considered; the right to be told the penalty imposed (for instance termination of employment) and the right to appeal... "

Therefore, a fair and complete disciplinary hearing process encompasses these general principles, thus a fair hearing includes the right to appeal to a higher level of management.

[29] The Courts have held that the purpose of an appeal hearing is basically the same as that of the disciplinary hearing, viz to determine whether the employee is guilty of the alleged misconduct, and to decide upon the appropriate penalty or sanction. The Courts have further endorsed the general rule that an employee who has been disciplined or dismissed from work is entitled to challenge his dismissal on appeal, both the decision to

dismiss him, and the procedure that was followed. An opportunity to be heard on appeal is therefore a matter of right for a disciplined or dismissed employee, and not a favour which the employer may grant or withhold at his discretion.

[30] An appeal is a necessary process in examining the substantive and procedural fairness of an employer's decision to terminate the services of the employee. From the pleadings as filed by the Applicant, he did not appeal the decision to terminate his services on two contentions:

1. That the Respondent did not afford him the remedy of appealing the termination;

2. That his services were already terminated by the Respondent therefore rendering the disciplinary process complete, and therefore he did not appeal his dismissal as he was of the view that the only alternative remedy was to approach this Court on an invalid dismissal application.

The Court does not agree with both arguments. A fair and proper disciplinary hearing is one where the matter reaches finality upon exhaustion of the appeal stage. The Applicant has a right to appeal his dismissal, a dismissal on its own does not bar the Applicant from lodging an appeal.

[31] In the letter of termination of services as annexed by the Applicant, paragraph six (6) thereof reads as follows:

"Please *note that should you wish to appeal this decision, you are advised to make a written appeal directed to the managing Director, within seven calendar days of this letter. In your appeal letter, which is to be hand-delivered at the company premises, you are expected to state the grounds for your appeal.*

Meaning the Applicant was afforded an opportunity to appeal the Respondent's decision to terminate his services, contrary to the recommendation of the Chairperson.

[32] In the case of, **THEMBA PHINEAS DLAMINI V CS COMMISSION (324/2012) [2013] SZIC** as cited by the Respondent the Court held:

"An internal appeal gives the Applicant a second chance to prove his innocence and/or expose irregularities that exist in the disciplinary hearings. If the external appeal is successful, the adverse decision will be reversed, and that will bring the matter to an end."

[33] **Section 16(8) of the Industrial Relations Act(supra)** provides the following:

"*Where the Court in settling a dispute or grievance finds that the employer has disciplined or otherwise disadvantaged or prejudiced contrary to a*

registered collective agreement or any other law relating to employment, the Court shall make an Order granting such remedy as it deems fit..."

[34] The Court taking into account issues of fairness and practicality in terms of the above section, may allow the granting of an order it deems fit in the interest of justice. In the present matter the Court is inclined to use its authority as envisaged in **Section 16 (8) of the Industrial Relations Act (supra)** in the interest of fairness and justice. The Court accordingly finds that the matter is prematurely before it, as the disciplinary process in itself has not been completed and as a consequence thereof the Respondent's second point *in limine* is upheld.

[35] The Applicant has not appealed as yet the decision to terminate his services. The Court finds it appropriate therefore in the circumstances to refer the matter back, to exhaust the Respondent's internal disciplinary structures. The Applicant is to be afforded an opportunity to note an appeal as per paragraph six (6) of the letter terminating his services. The seven calendar days as provided for in paragraph six of the letter of termination, is to commence on the date of the issuance of the Court's order. The Court will not proceed to deal with the remaining point *in limine* and the merits.

Accordingly, the Court makes the following Order:

35.1 The point *in limine* as raised by the Respondent that the matter is prematurely before Court for failure to exhaust internal remedies

is upheld, and accordingly Applicant's application is dismissed on the point *in limine*.

35.2 The matter is referred back, to the Respondent to exhaust the Respondent's internal disciplinary structures.

35.3 The Applicant is to be afforded an opportunity to note an appeal as per paragraph six of the letter terminating his services. The seven calendar days as provided for in paragraph six of the letter of termination, is to commence on the date of the issuance of the Court order.

35.4 There is no order as to costs.

The Members Agree.

B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: Mr. M. Nsibande (Mongi Nsibande & Partners)

FOR RESPONDENT: Mr. B. Khumalo (Thwala & Associates)