IN THE HIGH COURT OF SWAZILAND

Themba Nkambule

Applicant

V

Waterford Kamhlaba United World College of Southern Africa

Respondent

Civ. Case No. 1872/99

Coram S.B. MAPHALALA – J

For the Applicant Mr. Mabila

For the Respondent Mr. P. Dlamini

RULING ON POINTS OF LAW

(10/09/99)

Maphalala J:

The applicant in this case moved an application on urgent basis for an order in the following terms:

a) Waiving the usual requirements of the rules of court regarding service and form of application and hearing the matter as one of urgency.
b) That the respondent's decision to suspend the applicant without pay indefinitely be reviewed, corrected and/or set aside.
c) That the respondent be called upon on a date to be determined by the above court to show cause why order b) should not be made final.
d) Costs of suit
e) Further and/or alternative relief.

The parties have joined issue by the exchange of the relevant affidavits.

The applicant's case briefly put is that he is employed by the respondent and that on the 9th July 1999, the respondent unlawfully and wrongfully suspended him from duty without pay through a letter. The said suspension was procedurally and substantially unfair in that it does not have any legal justification. He has not been served with any disciplinary action summons. He was not given any hearing. The suspension does not comply with Section 39 of the Employment Act of 1990 as amended in 1997. He will suffer great prejudice if the decision of the respondent is not set aside as it is indefinite. He alleges urgency in paragraph 5.1, 5.1.1, 5.2 and 5.3 of his founding affidavit.

The respondent in its answering affidavit of its Principal Lawrence Napier Nodder raises a number of points in limine.

Firstly, that the application is not urgent alternatively not sufficiently urgent to justify the court dispensing with the normal time limits, forms and service provided for in the rules of court for the following reasons:

2.1.1 That the action complained of and which is the subject of the application was taken on 12th July 1999. The applicant in fact accepted the suspension now complained of and only approaches the court as a matter of urgency weeks later.

2.1.2 That the reasons alleged by the applicant as basis for urgency are not sufficient to justify urgency. That his reasonable belief that he may be suspended indefinitely by the respondent has no basis.

Further the respondent is desirous in having this matter finalized

2.2 Respondent is advised that the decision to suspend the applicant on the 12th July 1999, is not reviewable in terms of the provisions of Rule 53 of the High Court or accordingly the relief sought by the applicant in this application cannot be granted by the court.

2.3 To the extent that it may be found that the suspension of the applicant is reviewable, then in that event the respondent will contend that;

2.3.1 There has been no compliance with the provisions of Rule 53 of the court.

2.3.2 No case for review has been made out in the founding affidavit

2.3.3 The application constitutes a gross abuse of the process of the court

2.4 With regards to the abuse of the process of the above honourable court, respondent wishes to bring the following to the attention of the honourable court namely that:

2.4.1. It is patently obvious from the contents of the applicant's founding affidavit that the court here is being called upon to adjudicate a labour dispute.

2.4.2 A forum namely the Industrial Court of Swaziland has been created exclusively for purposes of dealing with the issue now being raised in this application. Section 5 of the Industrial Relations Act No. 1 of 1996, gives the Industrial Court exclusive jurisdiction to hear and determine labour disputes.

2.4.3. The applicant has chosen to usurp the exclusive jurisdiction of the Industrial Court.
The applicant has replied to the points in limine in his replying affidavit.

The court heard submissions on the points on the 20th August 1999, and I shall proceed to deal with them in seriatim:

a) Urgency: The approach was adequately dealt with by Dunn J (as he then was) in the case of Humprey H. Henwood vs Maloma Colliery Ltd and others/Swaziland High Court case no. 1623/94 which is regarded as a locus classicus on Rule 6 where the learned judge made this trenchant observation:

"The existence of some urgency does not permit an application to disregard the provisions of this rule, for the court is called upon to disposed of urgent application in such a manner and in accordance with such procedure which shall as far as practicable be in terms of these rules the proper application of the corresponding South African Rule 6 (12) has been subject of numerous instructive decisions to which I was referred in court in arguments"

The learned Chief Justice Sapire in the recent case of H. P, Enterprises (Pty) Ltd vs Nedbank (Swaziland) Civil Case No, 788/98 expressed the same sentiments, thus:

"Litigants must guard against abuse of the urgency procedure more especially where it is calculated to produce an unfair result. If practictioners (whether they be attorneys or advocates) issue certificates of urgency without regard to the objective urgency of the matter, the certificate becomes meaningless and no credence can be given to such documents. Practictioners owe a duty to the court in certifying matters as urgent, to have satisfied themselves to objective assessment that the matter is indeed urgent. A litigant seeking to invoke the urgency procedure, must make specific allegations of tact which demonstrate that observance of normal procedures and time limits prescribed by the rules will result in irreparable loss or irreversible deterioration to his prejudice in the situation giving rise to the

litigation The facts so

alleged must not be contrived or fanciful, but give rise to a reasonable fear that if immediate relief is not afforded, irreparable harm will follow".

In the present case applicant's attorney conceded in argument that the delay in bringing the application lay with them as a legal firm and not the applicant. Thus the applicant should not be penalized in these circumstances. However, legal authority does not agree with the proposition advanced by Mr. Mabila. In Ferreira vs Ntshingila 1990 (4) S.A. 271 (A) 281 Friedman A J A at D - E said.

"Negligence on the part of a litigant's attorney will not necessarily exonerate the litigant (see Saloojee and another NND vs Minister of Community Development 1965 (2) SLA. 135 (A) at 141 see also Finbro Furnishers (Pty) Ltd vs Registrar of Deeds, Bloemfontein and others 1985 (4) SA. 773 (A) at 787 G - H where Hoexter J A referred to:

"The oft repeated judicial warning that there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered"

An attorney instructed to note an appeal is duty bound to acquaint himself with the rules of court in which the appeal is to be prosecuted"

The matter was recently dealt with by this court in Unitrans Swaziland Ltd vs Inyatsi Construction Limited, Swaziland Court of Appeal delivered on the 7th November 1997, where Kotze P delivering the majority judgement cited with approval Steyn CJ in Salootee and another (supra) at 141 C - E namely:

"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficient of the explanation tendered to hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations ad misericordiam should not be allowed to become an invitation to laxity"

The case of Michael Mabundm vs Vinah Mamba Civil Case No. 1124/99

(unreported) cited by Mr. Mabila, with respect does not assist the applicant in any way.

My view is that applicant has failed to satisfy the peremptory requirements of Rule 6 (25) and thus the point in limine succeds.

b) Jurisdiction:

I agree with Mr. Dlamini that a forum namely the Industrial Court of Swaziland has been created exclusively for purposes of dealing with the issue now raised in this application. Section 5 of the Industrial Relations Act No. 1 of 1996, gives the Industrial Court exclusive jurisdiction to hear and determine labour disputes. The applicant has chosen to usurp the exclusive jurisdiction of the Industrial Court. To support this view I refer to the case of Sibongile Nxumalo and three others vs Attorney General and two others Appeal Court Case Nos. 25/96, 30/96, 28/96/9/96 where Tebbutt JA at page 12 has this to say:
"A dispute is defined in Section 2 of the Act as including "a grievance, a trade dispute and means any dispute over;

a) .....
b) .....
c) Disciplinary act, dismissal, employment, suspension from employment, re-employment of any person or group of persons.

d) .....
e) .....
f)

From this defination it is clear that what the legislative had in mind, when enacting that the Industrial Court should adjudicate the disputes, was those disputes should be of the type set out in the definition.....In other words those matters which fail under

what may be generally be described as industrial or trade disputes".
I hold in respect of this point in limine that it is good and ought to succeed. b) Review in terms of Rule 53

The determination of this aspect of the matter would be purely academic although it is an interesting debate but because of the view I have taken on the question of jurisdiction, it is not necessary to decide the full implications of Rule 53 for the purposes of this judgement.

In the result, I dismiss the application with costs.

S. B. MAPHALALA

JUDGE