



9. That the 1st Respondent no later than the 29th September 1999 conduct a hearing against the Applicant and that the decision be rendered no later that the close of business on the 30th September 1999 or that the 1st Respondent withdraw its allegations against the Applicant.
10. Granting further and / or alternative relief.

The Respondent has filed an Answering Affidavit deponed to by Mr. Terry Parker the 2nd Respondent herein in his capacity as the Chief Executive Officer of the 1 st Respondent wherein he has raised preliminary objections couched as follows :

2.1 I am advised and do verily believe that this Honourable Court does not have jurisdiction to entertain this mater. Full argument will be addressed to the Court at the hearing hereof.

2.2 The Applicant has failed to make out a proper case for urgency.

2.3 The Applicant has failed in her affidavit to make out a proper case for the release of the minutes.

2.4 The Applicant is requesting the court to grant an Order which will be impossible to execute.

2.5 The Applicant has failed to join the Mayor against who she alleges personal differences.

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For convenience we will first consider whether the Applicant has made out a case on the papers for this Application to be entertained on an urgent basis.

As was submitted by Mr. Earnshaw for the Respondent, the Applicant justifies urgency of the Application in paragraph 41 of the Founding Affidavit by Joy Dumsile Ndwandwe as follows:

"I submit that the matter is urgent in that despite request to treat this matter with the necessary exigency, the 1st Respondent has delayed for over two months and the date on which I am to leave the employ of the 1st Respondent is now close and I can no longer leave this matter in the hands of the 1st Respondent and trust it to conduct the hearing or to withdraw the allegations against me".

The following issues are common cause :

- (i) That the Applicant is employed by the 1st Respondent as a City Treasurer.
- (ii) That on the 1 st June 1999 the 2nd Respondent directed a letter on behalf of the 1 st Respondent to the Applicant in terms of Section 111 (6) of the Standing Orders of the 1st Respondent, calling upon the Applicant to give an explanation in respect of six allegations of misconduct against the Applicant.
- (iii) The alleged charges against the Applicant are as follows : "It is alleged:
  1. You have disobeyed or disregarded a lawful order given to you via a Council resolution not to make payment of a balance claimed by KPMG Management Services; contrary to Council resolution you went ahead and made payment of the amount of E13, 520 on 25th January 1999.
  2. You acted beyond your authority in that you authorised a payment in excess of the approved tender amount to G. S. Chiyanda Property Consultants for valuation services, in the amount of E35, 000 on 4 March 1998.
  3. You have acted in a manner detrimental to the City Council and you have been negligent in the discharge of your duties in that you arranged and operated an overdraft in Council's name in December 1998 in excess of the agreed limits and without proper sanction or authority.
  4. You have contravened or failed to comply with the provisions of the Staff Standing Orders Section X Subsection 2 (3) in that you have

made press statements or issued press release that were published by the Swazi Observer in April 1999 without proper authority.

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5. Whilst acting Town Clerk, you acted in a manner detrimental to the Council in that you failed to record and have signed the proceedings of negotiations with the Worker's Union during which decisions affecting the 15% wage and salary increase were taken and hence these decisions could not be put into effect to the loss and prejudice of Council.
6. That you have been negligent in your duties in that you did not implement Tax Directive No. 16415 dated 9 March 1998 in respect to deduction of tax from the early retirement amount payable to Mr. P. B. Nkambule.

In addition, Council has expressed concern in respect to your application and attitude to your duties as head of Treasury department. As an example, the issue of the effecting of payments, on 11 June 1998, to Council employees who had been awarded increments as a result of a certain restructuring, despite the fact that Council has suspended the payments of the increments, is viewed seriously by the Council.

You are invited to submit, within fourteen days of receipt of this notification , any written representations you wish to make in response to these allegations".

- (iv) The Applicant responded to "JN1" on the 16th June 1996 by a letter annexed to the Application and marked "JN2" which seeks to exculpate herself from the charges alleged against her.
- (v) That as early as the 9th July, 1999 in her letter to the Town Council marked "JN4" she demanded disciplinary hearing against her be conducted by an independent panel and also requested to be availed the minutes of the council meeting held on the 28th June, 1999 and that on the 26th July 1999 the Town Clerk made it clear to her in "JN5" that the minutes would not be provided to her and the Council was persistent in the refusal to date.
- (vi) She tendered her resignation by a letter dated 2 August, 1999 marked "JN7" which resignation is effective as at the 30th September 1999 with leave period commencing from the 1st October 1999. The resignation was accepted by the 1st respondent on the 10th August, 1999.

From the submission of both Counsel it is not disputed that in the meeting of the 10th August 1999 it was resolved to agree to the Applicant's request for an independent Chairperson at the Council's expense to chair her inquiry and the decision was made known to her via "JN9" dated the 13th August, 1999. On the 17th August 1999 she proposed that the Respondent does consult IMSSA to provide an independent chairperson. By a letter dated 23rd August, 1999 Council agreed to this request and confirmed having made a request for a chairperson and that Curriculum Vitae of three persons of such independent persons would be provided.

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By the 26th August 1999 she had retained the services of Messrs Millin & Currie to handle this matter on her behalf. In the letter written by the Attorney marked "IN12" Applicant looked forward to the three options from which to select a chairperson. She alleges constructive dismissal therein inter alia. Counsel for the Respondent responded to "JN12" and confirmed the Respondent's wish to hold the inquiry and persisted in the refusal to provide minutes of the Council.

On the 22nd September 1999 Applicant Attorney's demanded a date for the inquiry and that they be advised accordingly by the close of business on the 23rd September. On the 24th September, 1999,

this application was filed.

In the matter between Swaziland and Allied Workers Union and Swazi paper Mills (I C) Case No. 8/99 we referred with approval to the Case of Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & Another 1981 (4) SA 108 (CPD) wherein Friedman J and Fagan J. Outlined three considerations which the court takes into account in exercising its judicial discretion to abridge the times prescribed and to accelerate the hearing of a matter as follows :

"The prejudice that Applicants might suffer by having to wait for a hearing in ordinary course, the prejudice that other litigants might suffer if the applications were given preference, and the prejudice that Respondents might suffer by the abridgement of the prescribed times and an early hearing".

As regards the prejudice that the Applicant might suffer if this application is not heard as a matter of urgency, it was submitted by Mr. Sibandze for the Applicant that the Respondent has deliberately failed to convene a disciplinary hearing since the 1 st June 1999 when it preferred charges of misconduct against the Applicant. That numerous correspondence has changed hands between the parties since then with a view to obtain an independent person to chair the proceedings but to date little effort has come from the Respondent to bring the process to fruition. It was further submitted that the Applicant has since resigned from the Respondent's employ. She is currently serving notice up to the 30th September 1999. That this being the case, the Respondent will no longer have any obligation to convene the inquiry after the Applicant has left its employ on the 30th September, 1999 and therefore it was imperative that the disciplinary hearing is proceeded on before the said date or the charges be withdrawn.

Indeed paragraph 40 of the Applicant's Founding Affidavit reads as follows ;

"40. I submit that in the event that the charges against me are not withdrawn or the hearing conducted before the end of the month of September 1999 the charges against me would never be heard and I would have no remedies other than the remedies sought before the Honourable Court".

It is alleged that the Applicant resigned since her continued employment was rendered intolerable due to the allegations levelled against her by the 1 st Respondent.

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We must state this is an unusual application, wherein, an employee, who has already resigned alleging constructive dismissal insists on a disciplinary hearing be proceeded on against her.

On a proper analysis of the issues of facts that are common cause from the papers filed of record and considering the submissions of both Counsel we have found it difficult to see what irreparable prejudice would be suffered by the Applicant if the inquiry is not proceeded on before the end of September 1999 or at all.

She alleges constructive dismissal from her papers and it is open for her to follow the procedures contained in Part V111 of the Industrial Relations Act by reporting a dispute with the office of the Commissioner of Labour and if the dispute is not resolved at that level she may approach this court for redress.

Once she ceases to be an employee of the 1st respondent on the 30th September 1999 any disciplinary proceedings levelled against her automatically fall away unless by agreement of the parties they are pursued for what the Applicant states would be to clear her name. In our view the remedies open to her in the Industrial Relations Act, if she chooses to pursue them would have the same effect if not a more beneficial result.

Disciplinary hearings are held at the work place to ensure an employee who is faced with charges potentially detrimental to her employment is afforded a fair hearing. On the other hand the employer has an interest in ensuring that set standards are maintained by the employees and deviations thereof are punished according to the disciplinary procedures of the undertaking. In other words, these procedures are not for the purpose of resolving disputes between an employee who for all intent and purpose has ceased to be in employment citing constructive dismissal. The proceedings if held would

be at best, purely academic if not potentially detrimental to any cause of action that may be taken by the Applicant in future regarding her alleged constructive dismissal.

If this court was to proceed and entertain this sort of application on a preferential basis, this no doubt would be prejudicial to all other Applicants before this court who have been patiently waiting their turn in the roll for their applications to be heard for alleged actual and constructive unfair dismissals. We must note, this waiting process sometimes takes a year before the Industrial Court.

Good reason should be advanced on the papers for an Applicant to be given preference in the circumstances outlined above. For this reason, alone, the Applicant's application must fail.

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Save to state that the objection by the Respondent as to the jurisdiction of this court to hear this matter has no merits whatsoever, it is not opportune for the court to consider all the other issues raised in limine thereof.

There will be no order as to costs. The members concur.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT