IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 282/2000

In the matter between:

STEPHEN MHLANGA APPLICANT

and

HVL ASBESTOS (SWAZILAND) LTD RESPONDENT

CORAM

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

MR. B. SIGWANE: FOR APPLICANT

MS. B. MVUBU: FOR RESPONDENT

JUDGEMENT

21. 12. 2000

The Applicant seeks the court to adjudicate the matter as one of urgency, and has also prayed for an order in the following terms:

b) Declaring that the Respondent is obliged and legally bound to pay the Applicant an amount qual to the salary he would have earned for the period he was held in custoly in terms of Section 39 (5) of the Employment Act, 1980.

c) Compelling and directing the Respondent to pay the Applicant his salary arrears and his accrued salary whenever it falls due for payment with effect from the 12th April 2000 to date.

d) Declaring that the matter of the alleged theft of gearboxes belong to the Applicant by the Respondent is now resjudicata and can no longer be reopened by the Applicant and be heard under the guise of a disciplinary hearing.



e) Restraining and inter dieting the Respondent from conducting any disciplinary hearing against the Applicant pertaining to the theft of gearboxes and/or touching upon or otherwise dealing with the facts already dealt with by the Piggs Peak Magistrate Court.

F) Granting further and/or alternate relief.

The Respondent raised preliminary objection to the application namely,

1. The Applicant has failed to satisfy the elements of urgency as required by the law, and by so doing has avoided following the procedures laid down by Part VIII of the Industrial Relations Act 2000. This being a dispute in terms of Section 2 of the Act, the court lacks jurisdiction to entertain it in the circumstances.

The court dismissed this point in limine and the matter was subsequently heard on the merits.

For the record I will state die reasons for dismissing the aforesaid objection.

Firstly, by the time this application was brought, the applicant was out of custody and had resumed his work pursuant to an acquittal by the Magistrate Court.

Upon his resumption of work, he was refused entry into the Respondent's premises and served with a notice of intended disciplinary hearing. The intended hearing was to take place on the 12th September, 2000.

This application was filed on the 13th October, 2000 and by this time, the intended disciplinary hearing had not been proceeded on but the Applicant's salary was withheld. In terms of Section 39 (2) of the Employment Act, an employee shall not be suspended without pay for a period exceeding one month. A month has elapsed since the date he was served with a notice.

The Applicant was effectively being denied his means to a decent livelihood not withstanding that he had not been lawfully dismissed from employment.



This court has held time and again that withholding of a salary of an employee, hinges on the employees right to a decent livelihood and an application to undo such mischief is by its very nature urgent.

An employee whose salary has been unlawfully stopped cannot be expected to follow the rigorous and time consuming procedures provided under Part V111 of the Industrial Relations Act, 2000. Efforts and time taken by the Applicant to try and resolve the issue excuria does not take away the urgency of the matter. See the case of Sean Maher and Standard Bank Swaziland Limited - Case No.2/98

For this reason alone, the point in limine failed. The issues that I must now determine are whether:

(a) the Applicant is enaded to a refund of his arrear wages in terms of Section 39 (5) of the Act.

(b) whether or not the intended disciplinary hearing is lawful.

As concerns the issue of a refund in terms of Section 39 (5) of the Act, upon consideration of the papers filed of record and submission by both counsel, I have no doubt that all the elements of Section 39 (5) have been satisfied.

The Applicant was remanded in custody on the 5th September, 2000 upon a complaint by his employer hat he was involved in the theft of gearboxes from the Respondent's premises. That the chief security officer of the Respondent had specifically named the Applicant as the suspect in the alleged theft and the Applicant was under the instructions of the Chief Engineer Mr. Dekenah, driven in a company car to Bulepiba Police Station subsequent to which he was remanded and held in custody at Piggs Peak prison.

I am satisfied that the submissions by the Respondent that it did not lay any charge against the Applicant is without basis and I reject it.

It is common cause that the Applicant was subsequently acquitted following a criminal trial wherein the Chief Security Officer and Mr. Dekenah the Chief Engineer testified as crown witnesses against the Applicant.



Accordingly, the Respondent is directed to pay to the Applicant not later than the 22nd December, 2000

an amount equal to the remuneration he would have been paid during the period of suspension while he was remanded in custody.

I must point out however, that the phraseology used in Section 39 (5) "naming him as an accused" amounts to a misnomer in the sense that an employee may only become an accused after he has been properly charged before a court of law by a prosecuting authority. The proper wording should have been 'naming him as a suspect."

This ambiguity does not however negate the purport of this provision. I cannot therefore simply fold my hands and blame the draftsman. I have instead constructively found the intend of the legislature from the language used having taken into consideration the mischief that the provision was passed to remedy. (See Lord Denning, The Discipline of the Law, P12 quoting his dictum in Seaford Court Estates Ltd v Asher, (1949)2 KB 481).

On the issue as to whether or not the disciplinary hearing should be proceeded on by the Respondent, I have held in the matter of Simon Mvubu and Ngwane Mills (Pty) Ltd (IC) Case No. 189/99 as follows:

"The urgency in dealing with these two prayers is grounded on the allegations that the Applicant is likely to be dismissed by the Respondent following the disciplinary hearing.

It need not be gain said that if it is correct that the Applicant is likely to be dismissed following the said hearing he has a multiplicity of remedies in terms of the Industrial Relations Act and therefore his averment fall short of the requirements of granting a final interdict. He cannot suffer irreparable harm if it is eventually established that such dismissal, if at all was unfair. There cannot therefore be any justification at this stage to interfere with the internal disciplinary procedures followed at the Respondent's undertaking. "

In the matter of Swaziland Engineering. Metal Automobile and Allied Workers Union and Tracar Division of Swaki Investment Corporation Case No. 211/99, I did find that there are instances where the court may interfere with the disciplinary process at the shop floor. These instances would include cases of blatant disregard of Recognition Agreements and the disciplinary code made pursuant thereto and



as I recently found in the case of Michael Bongani Mashwama and 2 others v Swaziland Electricity Board (IC) Case No. 295/2000

where there has been a lawful intervening circumstance to warrant a suspension of the disciplinary process. In that matter, the Minister for Natural Resources and Energy had set up a commission of enquiry pursuant to the Electricity Act No. 10 of 1965. The commission would investigate matters which had a bearing on the issues to be canvassed in a pending disciplinary hearing against the Applicants. The court found that this was a circumstance that warranted a stoppage of the disciplinary hearing pending the conclusion of the commission of enquiry.

This list is not conclusive but it is difficult to envisage a situation where an employer would be permanently precluded from disciplining its employee. I stated in Tracar's case as follows:

"We have stated many a times that this court is loathe to interfere in the internal regulation machinery in the undertakings especially where the matters complained of are the subject of a recognition agreement by the parties. It is not for us to descend to the level of administrators at the shop floor. It is the prerogative of the management to run their business the way they know how, with due regard to the accepted modern labour practices....."

For the aforesaid reasons, the Application to stop the intended disciplinary hearing against the Applicant must fail.

The Respondent is however cautioned to 'at all times observe the relevant laws that goyern industrial relations' in the conduct of its disciplinary proceedings. It is undesirable for example to appoint a presiding officer to a disciplinary hearing whose involvement in the mater may lead to a real likelihood of bias against the employee. Such conduct will not be countenanced by the court.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT