IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 193//2009**

In the matter between:

MNAKILE ZWANE **Applicant**

and

FIRST NATIONAL BANK OF SWAZILAND **Respondent**

CORAM: S. NSIBANDE **PRESIDENT**

JOSIAH YENDE PHUfi**/SELELE** **MEMBER**

THWALA MR. B. S. DLAMINI **MEMBER**

MISS L. MNGOMEZULU **FOR APPLICANT**

FOR RESPONDENT

RULING ON POINTS OF LAW -12/06/2009

1. The Applicant applied to court on an urgent basis for an order in the following terms:

"1. Dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis.

2. Pending finalization of this matter, that a rule nisi be and is hereby issued calling upon the respondent to show cause why:

3. *the respondent's decision of suspending the applicant from work should not be reviewed, corrected and /or set aside as being irregular and unlawful;*

4. *the respondent should not be directed to allow the applicant to return to work forthwith;*

5. *the respondent should not be ordered to pay costs of the application.*

6. *That prayer 2.1, 2.2 and 2.3 above should operate with interim relief pending the return date as may be determined by the above Honourable Court.*

7. *Granting further and/or alternative relief as the above Honourable Court may deem fit."*

2. When the matter came to court on 30th April 2009, the Respondent appeared and raised preliminary points of law namely: that the Applicant had failed to set out in her papers why the matter was urgent and that the application was not properly before court because the Applicant had failed to satisfy the provisions of Rule 15 (1) and (2) of the Industrial Court Rules; secondly that the Applicant had failed to establish **a** clear prima facie right to the relief sought; thirdly, that the Applicant has failed to state what irreparable harm she will suffer if the interim relief is not granted; and fourthly that the Applicant has further remedies available to her in that she can use the provisions of Part V111 of the **Industrial Relations Act** 2000.

8. The Applicant sets out at paragraph 12 of her Founding Affidavit why she considers the matter to be urgent. She states that *"the matter is urgent by virtue of the fact that I have a right in law to be at work according to my contract of employment with the Respondent. The Respondent's action is depriving me of the opportunity to apply my skills at work in accordance with my contract. This in turn is causing me emotional distress on an everyday basis and directly affects my reputation."*

9. Emotional distress is one of the inevitable consequences of a suspension or a termination of employment and does not, by itself, provide sufficient reason for a matter to be heard as a matter of urgency. Without seeming to take lightly the Applicant's predicament, most litigants who bring applications to the court suffer some level of emotional distress brought about by whatever workplace strife has brought such employee to the court.

10. In her Founding Affidavit Applicant alleges that the letter of suspension Is silent as to the basis of her suspension and the basis and nature of the investigation referred to therein. Applicant states further that at no stage was she required to give an explanation on any issue raised by the Respondent prior to her suspension that may have alerted her of any allegations against her resulting in her suspension.

11. The Applicant's letter of suspension dated 23rd April 2009 in part reads: *"You are hereby notified that you have been suspended from duty with immediate effect, pending finalization of the investigation. You will receive your normal emoluments during the period of suspension....."*

The Applicant is not told anything further regarding the suspension save for conditions that apply to the suspension. She was therefore surprised by the suspension.

7. In its argument before court, the Respondent submitted that the suspension of the Applicant was in the form described by **Grogan** in his book **Workplace Law** as a 'holding operation' pending further enquiry. It was argued that the

common law allows for an employee to be suspended on a holding operation as long as it is with full pay.

In **Nkosingiphile Simelane v Spectrum (Pty) Ltd t/a Master Hardware IC Case No. 681/06** the court, while agreeing that the common law permits an employer to suspend as a "holding operation," stated that such suspension must be done fairly and must not be oppressive to the employee. Although the Respondent in this case, does not state the basis of the suspension, nor the cause and nature of the investigation the Applicant's suspension was with pay. While the Respondent's action in this regard may be unfair and may be regarded as an unfair labour practice, this does not entitle the Applicant to be heard as a matter of urgency. No doubt it is the function and duty of this court to grant relief to the victims of injustice and unfair labour practices, but this can equally be achieved in terms of the normal procedures and time limits.

The Applicant is being pai^ ^ salary during the period of suspension and is not, in our view, so substantially prejudiced as to be entitled to ignore the provisions of Part V111 of the **Industrial Relations Act.** It is not clear to the court why the Applicant did not report a dispute and put into motion the dispute resolution process before CMAC. In terms of section 81 of the Industrial Relations Act a commissioner appointed to conciliate in a dispute *"shall conciliate within twenty-one (21) days of the date of appointment."* The Applicant ought to have taken advantage of this process which could have curtailed the resolution of the dispute.

In the exercise of our discretion, the court holds that there is no reason to dispense with the

usual procedures and time limits and hear the matter as one or urgency. In the premises the application is dismissed. There will be order for costs.

The members agree. **S. NS1BANDE**

PRESIDENT OF THE INDUSTRIAL COURT