IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 367/08**

In the matter between:

SANDILE KUBHEKA **APPLICANT**

and

SP1NTEX SWAZILAND (PTY) LTD **RESPONDENT**

CORAM:

S. NSIBANDE JOSIAH **PRESIDENT**
YENDE PHUMELELE **MEMBER**
THWALA **MEMBER**

MR. N. DLAMINI MR. **FOR APPLICANT**
B.MAGAGULA **FOR RESPONDENT**

J U D G E M E N T - 6th JULY 2009

1. The Applicant applied to the Industrial Court on Notice of Motion supported by an affidavit claiming payment of his terminal benefits amounting to E5 135.59 (Five Thousand One Hundred and Thirty-Five Emalangeni Fifty Cents) being Notice pay, Additional Notice Pay, Severance Allowance and 26 days Leave pay.

Applicant bases his claim on a memorandum of agreement entered into between himself and the Respondent on 30th August 2007. In terms of clause 5 of the agreement the Respondent undertook "to pay *to the employee terminal benefits as if the employee had been made redundant in terms of section 36 (I)*

of the Employment Act in particular:

13.1 *Notice Pay (including additional notice);*

13.2 *Severance Allowance;*

13.3 *Leave Pay; and*

13.4 *Days worked to last date of employment (if any)."*

It was agreed that payment would be made upon termination of the employment services of the Applicant by consent on 30th September 2007.

The application is opposed by the Respondent which has filed an opposing affidavit in which it raises a preliminary point of law. The Respondent however acknowledges its liability to pay to Applicant severance allowance and additional notice and has tendered payment in the sum of E1008 (E288.00 for additional notice and E720.00 for severance allowance). The tender has been accepted by the applicant and the court enters judgement on behalf of the Applicant in the sum tendered being E1008.

Apart from the preliminary point of law raised, the Respondent denies liability for the payment of Notice Pay and Leave Pay. The parties agreed at the hearing of the matter to argue the merits together with the preliminary point of law raised.

13.5 The Respondent's point of law is that the Applicant has not complied with the dispute resolution procedure outlined in Part V111 of the. Industrial Relations Act 2000 (as amended) before approaching the court and his application ought to be dismissed for that non-compliance.

13.6 It is common cause that the Applicant has not reported a dispute to the Conciliation Mediation and Arbitration Commission and that the Commission has not issued a certificate of unresolved dispute. It is further common cause that Applicant's application is not brought on a certificate of urgency with a request for a waiver of the provisions of Part V111 of the Industrial Relations Act 2000 (as amended).

13.7 Applicant's counsel submitted that Rule 14 of the Industrial Court Rules 2007. in particular Rule 14 (1) and 14 (6) (b), allows a party to institute application proceedings on notice of motion without having to follow the provisions of Part V111 of the Act where there is no

material dispute of fact foreseeable and the issue being brought to court is one of law only.

13.8 Rules 14 (1) reads: *"where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of notice of motion supported by affidavit."*

Rule 14 (6) (b) reads: *"The applicant shall attach to the affidavit:*

(b) in the case of an application involving a dispute which requires to be dealt with under Part V111 of the Act, a certificate of unresolved dispute issued by the Commission unless the application is solely for the determination of a question of law."

Applicant's counsel submitted that the issue before court was an issue of law thus Applicant was not required to have a certificate of unresolved dispute and to comply with Part 'V1.11 of the Act. He submitted that the issue involved Respondent's liability to pay terminal benefits under the agreement of 30th August 2007. That issue presented no material dispute of fact that could have been foreseen Further Applicant submitted that the only issue in dispute is that of leave pay but that dispute was not material. The court was urged to deal with the matter on its merits.

The Respondent's denial of liability to pay Notice pay is based on minutes of a meeting it held with employee representatives on 21st August 2007. In terms of those minutes, it was agreed that the employees (including Applicant) would work the month of September 2007 as a notice month. As a result, Respondent submits it is not bound to pay Notice Pay to the Applicant despite having undertaken to do so 9 days after that meeting on 30th August 2007.

It is our view that the issue of liability to pay Notice Pay is a question of law and can be determined by the Court in terms of Rule 14 of the Industrial Court Rules 2007. The crisp issue is whether the minutes of the 21st August 2007 absolve the Respondent from liability to pay Notice Pay in terms of the memorandum of 30th August 2007. The Respondent does not explain, in its papers, how it came to bind itself to pay notice pay when it had earlier agreed

with employee representatives that September 2007 would be the notice month. It does not plead that it mistakenly agreed to pay the notice pay nor that it was fraudulently induced to agree to do so. The agreement is on the Respondent's letterheads and the court can only conclude that the Respondent deliberately agreed to pay the notice pay to the Applicant. In any event in terms of our law, where the other party has not made a misrepresentation, the scope for a defence of unilateral mistake is very narrow if it exists at all (See **National & Overseas Distributors Cooperation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A)**). In view thereof it is our conclusion that the Respondent is liable to pay the Notice pay as claimed.

With respect to the leave pay claim, our view is that this claim is not solely a matter of law but is a matter that requires evidence, The Applicant has the onus of showing that leave pay is due. He has not set out in his founding affidavit how the days of leave due to him arise and for what period this leave is sought. He does so in his replying affidavit where the Respondent has no opportunity to respond. The claim is denied and must in our view be dealt with in terms of Part V111 of the Industrial Court Act before the matter comes to this court or goes to arbitration as parties may wish.

In the circumstances the court will make the following order:

13.9 **The Respondent is directed to pay to the Applicant the tendered amount of E1008.00 (E288.00 being additional notice and E720.00 being severance allowance).**

13.10 **The Respondent is ordered to pay to the Applicant the sum of E1645.50 being notice pay.**

On the issue of costs, the court directs that each party pays its own costs as they have been both partially successful. Further it is our view that they could have both done more to avoid litigation.
The members agree.

S. NSIBANDE
PRESIDENT OF THE INDUSTRIAL COURT