

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE In the

CASE NO. 687/09

matter between: **PHILLIP**

MBOFANA

Applicant

And

MBABANE HIGHLANDERS F.C.

Respondent

CORAM:

S. NSIBANDE J. YENDE N.

MEMBER

MANANA

MEMBER

PRESIDENT

MR. K. MANAMA MR. E.

FOR APPLICANT FOR

DLAMINI

RESPONDENT

RULING ON POINTS OF LAW - 21/12/09

1. The Applicant has brought an urgent application to the Industrial court seeking an order:

"1.1 Dispensing with the terms and time limits relating to service and allowing this matter to be heard as a matter of urgency.

1.2 Directing the Respondent to pay the Applicant the amount of E 17 500.00 (Seventeen Thousand Five Hundred Emalangen) in respect of arrear wages for the months September, October and November 2009.

1.3 That such amount be paid through the offices of C.J.Littler and Co.
Ground Floor, Embassy House, Dzeliwe Street Mbabane.

1.4 Directing the Respondent to pay costs of this application.

1.5 That Applicant be granted further and/ or alternative relief."

2. The Applicant alleges that he was employed by the Respondent on 20th July 2009 on the promise of a salary of E8000.00 per month inclusive of accommodation and transport. An unsigned contract is attached to Applicant's papers in support of his allegations.

3. Applicant alleges that in August he was paid E8000.00. However at the end of September he was paid E 6500.00 which he received on 13th October 2009. On 31st October 2009, following an altercation with Respondent's followers Applicant was offered leave until 30th November when the situation would be reviewed. Applicant was not paid for October and November.

4. Applicant alleges that the situation has not been reviewed but that he was told on 8th December by the chairperson of Respondent's Board of Directors that his arrear wages would not be paid. He has since brought this application to Court.

5. The Respondent opposes the application and has filed only a notice to raise points of law with which we deal below.

5.1 ***Locus standi in judicio and non-joinder.*** The Respondent alleges that it is a voluntary association with no *locus standi in judicio* and that as such the chairman of its management committee ought to have been joined as a party by virtue of being an a fact of the Respondent.

Although the contract of employment filed by the Applicant is unsigned, we are satisfied that it represents at the very least the basic terms upon which the parties sought to contract and upon which the Applicant started to work. In that contract the Respondent is referred to as the employer. No mention is made of the chairman of the management committee being an agent of the Respondent. In other words, the Respondent held itself out as the Applicant's employer and cannot now be heard to be saying it has no *locus standi in judicio*. In any event the Respondent states it is a voluntary association. **Rule 14** of the **High Court**

Rules states that an association is **any** unincorporated body of persons. The Respondent is therefore an association in terms of this rule. In terms of **Rule 14 (2)**, an association may sue or be sued in its name. In the premises this point of law is dismissed.

6. **Confirmatory affidavit**

The Respondent complains that a confirmatory affidavit filed by Applicant is irregular and defective because Applicant does not state in his founding affidavit that he has attached same to confirm certain facts. Our view is that the affidavit is part of the evidence given on behalf of the Applicant. Any party can give evidence on issues personally known to them and the said **Farai Chada** merely confirms he is staying with Applicant. No injustice will be visited on the Respondent if the affidavit is allowed and the Court allows the affidavit to stand. This technical objection is dismissed.

7. **INTERIM ORDER OR RULE NISI**

The Respondent complains that Applicant has sought a final order instead of an interim order. Nothing in law compels an Applicant to seek an interim order or rule nisi. An Applicant who feels entitled to a final order may make such application as long as he makes the necessary averments to sustain his application for a final order. This point will also be dismissed.

8. **JURISDICTION**

Respondent complains that the Applicant has not made the averment that this court has jurisdiction to hear this matter and that the Applicant has failed to attach his work permit entitling him to protection under **Section 35 of the Employment Act. At page 364 of Herbstein & Van Winsen -The Civil Practice of the Supreme Court of South Africa** the learned authors speaking on the need for the allegation as to jurisdiction, state that *"if the court is not satisfied on the facts stated in the application that it has jurisdiction it will not entertain the proceedings."*

In our view, what the learned authors seem to suggest is that the court can, on the facts stated in the application, decide whether or not it has jurisdiction even where the Applicant has not specifically pleaded that the court has jurisdiction. It is common cause that this court has exclusive jurisdiction in respect of

employment matters. Applicant's affidavit reveals that this is an employment dispute. In this regard the point raised is dismissed.

On the issue of Applicant's work permit it is our view that we will follow the decision in **Thomas Maphosa v Max Enterprises (Pty) Ltd IC CASE NO. 329/03** wherein the court held that "*migrants may be employees to whom section 35 of the Employment Act applies, even if they are not in possession of a valid work permit at the time of their engagement.*"

The point will therefore be dismissed on this basis. In any event the Respondent cannot benefit from its own unlawful act by employing an immigrant without a permit and then seek to avoid paying him his salary by pointing out he has no work permit.

9. **URGENCY**

Respondent states that the urgency herein is self-created. It points out that the founding affidavit was signed on 8th December 2009 and the application instituted in Court on 15th December 2009. On the face of it may appear that Applicant did not prosecute his matter speedily. However when one considers that Applicant states that after numerous promises of payment, the Respondent then told him, on 8th December 2009, that he would not be paid the arrear salary, it seems to us he acted within a reasonable time to prosecute the claim. We do not consider the delay of 4 days to have been unreasonable in the circumstances. In the exercise of our discretion the court allows the matter to be enrolled as one of urgency.

10. The Applicant applied to the court to consider his application on the merits should the points *in limine* be dismissed, the Respondent having not filed any papers in opposition to the application other than the points *in limine*. The Respondent did not seek leave to file any papers in the event the points raised in *limine* were not upheld. In the premises the court will make a decision on the merits.

11. The Applicant holds himself out as an employee of the Respondent whose salary has not been paid. No explanation for the non-payment is given and on the papers as they stand and on a balance of probability the Applicant is entitled to the prayers he seeks. We may point out also that it is a criminal offence, in terms of **Section 64 of the Employment Act 1980** not to pay the salary of an employee.

If the Respondent is no longer interested in Applicant's services it ought to terminate the employment contract in terms of the law rather than pretend to be concerned for his safety by putting him on unpaid leave that has not been agreed to. It is deplorable for a leading soccer team in this country to behave in this manner with callous disregard for the personal circumstances of the Applicant.

12. We make the following order;

(a) **Respondent is directed to pay to Applicant the sum of E 17 500 in respect of arrears wages for the months of September October and November.**

(b) **Such amount to be paid through the Offices of CJ Littler and Co. Ground Floor, Embassy House, Dzeliwe Street, Mbabane.**

(c) **Respondent to pay costs of this application.**

The members agree

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT