

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 464/09

In the matter between:

PENELOPE SHOULDER

Applicant

And

**KHARAFI (PROPRIETARY) LIMITED
T/A WILD WINGZZ**

Respondent

CORAM:

S. NSIBANDE:

PRESIDENT

J. YENDE:

MEMBER

N. MANANA:

MEMBER

MR. D. MSIBI;

FOR APPLICANT

MR. THWALA:

FOR RESPONDENT

JUDGEMENT – 21/01/2010

1. The Applicant, an employee of the Respondent approached the court on a certificate of urgency seeking an order:

"1.1 Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

1.2. That the Respondent be and is hereby directed to pay Applicant's arrear salaries in lieu of May 2009, June 2009, July 2009 in the sum of E12 286.47 and further pay other salaries when they become due.

1.3. That an order be and is hereby issued calling upon the Respondent to declare Applicant's present employment status.

1.4. That the Respondent be and is hereby interdicted and restrained from practicing against the Applicant any form of victimization or unfair labour practice.

1.5. That a Rule nisi do hereby issue returnable on the day to be determined by the Honourable Court calling upon the Respondent to show cause why an order in the terms set out above herein should not be made final.

1.6. Prayers 1.2 and 1.3 to operate with immediate and interim effect pending finalization hereof.

1.7. Costs.

1.8. Further and/or alternative relief."

2. When the matter first came before the court the Respondent raised certain points in limine which were argued and eventually dismissed by the court in its ruling of 30th November 2009. The matter has now been argued on the merits.

3. The Applicant's case is that she was suspended from work on 30th April 2009 pending finalization of an issue involving the embezzlement of Respondent's funds and her resignation from the Respondent.

4. Applicant alleges that she was suspected of having embezzled some company funds and directed to tender her resignation in order to avoid being prosecuted internally for misconduct and in a criminal court. She alleges that since she was innocent of the alleged transgressions she refused to resign.

5. Applicant alleges that she was then charged with embezzlement of Respondent's funds on or about 18th June 2009 and invited to a disciplinary hearing on 23rd June

2009 at 10.00 a.m. The hearing eventually commenced on 9th July 2009 and on 12th August 2009 it was adjourned, by consent to allow Applicant to challenge the Respondent's continued non-payment of her salary. It is Applicant's contention that Respondent had confirmed her status as its employee and had further promised to settle the arrear salary (for May and June 2009) at the end of July 2009. No payments were made by Respondent to the Applicant at the end of July 2009.

6. Applicant alleges further that the Respondent, on 11th August 2009 undertook to pay arrear wages on 12th August 2009, prior to the continuation of the disciplinary hearing. No payment was made and as a result this application was launched.

7. The Respondent's defence is that the Applicant is no longer its employee following that she resigned verbally on 30th April 2009 following a confession Applicant allegedly made regarding the misappropriation of certain amounts from the Respondent.

8. It was Respondent's submission that on 13th August 2009 the Respondent accepted the Applicant's verbal resignation and that having done so, Applicant cannot be said to have remained employed as of that date - 13th August 2009. The Respondent explained that disciplinary hearing took place because (i) Applicant had not tendered a written resignation or confirmed the verbal resignation; (ii) Respondent had ample proof of the embezzlement of its funds together with a written acknowledgement by the Applicant of same.

9. The Respondent further submitted that the issue of the verbal resignation by Applicant constituted a material dispute of facts and ought to be referred to oral evidence in terms of Rule 14 (13) (a) of the Industrial Court Rules 2007.

10. As we set out in our ruling on the points of law, the Applicant denies resigning from her employment with the Respondent and states that an attempt to pressure her to resign was not successful because she was innocent of the misconduct she was being accused of. The Respondent's claim of a written acknowledgement of a misappropriation of funds is in actual fact an undated IOU for E2000 signed by the Applicant on a petty cash voucher. The question that comes to mind regarding this voucher is why would the Applicant sign the voucher if her intention was to embezzle funds? While the note may be an indication of some other misconduct, it cannot be, in our view, an acknowledgment of embezzlement of funds.

11. The Applicant's allegation that she did not resign is supported by the evidence set out in the pleadings herein. Applicant alleges that her employment status was put in issue at the disciplinary hearing and the Respondent, represented by a certain Mr.

Thwala confirmed that she remained an employee of the Respondent and that her outstanding salary for May and June and would be paid with her July salary. To these allegations, the Respondent states "*contents hereof are not in dispute.*"

Significantly, the Respondent does not dispute that it made an undertaking to pay all arrear salaries of Applicant before the disciplinary hearing commenced on 12th August 2009.

12. The Respondent's actions in setting up the disciplinary enquiry and holding it over a period spanning three months and the undenied undertaking to make payment of Applicant's arrear salary show a consistent regard of the Applicant as an employee. It is our view that the allegation that Applicant resigned on 30th April 2009 is an after thought designed to defeat Applicant's claim for arrear salary. We do not consider that the question whether the Applicant resigned or not constitutes a material dispute of fact as the Respondent is unable, on these papers, to produce positive evidence of the Applicant's resignation. On the contrary, Respondent's behaviour is consistent with the view that it considered Applicant to be its employee otherwise it would not have held a disciplinary enquiry and undertaken to pay arrear salaries for a non employee.

13. It is our view that the Applicant has established on a balance of probability that she remains an employee of the Respondent and is entitled to the prayers sought in the notice of motion.

14. The remaining issue is that of Applicant's salary. From the Applicant's payslip it appears that her salary is E2970.94 per month and that in the month of April 2009 she earned E1124.55 as overtime. Having not worked any overtime between May 2009 and January 2010, the Applicant would not be entitled to any overtime pay and the outstanding salary due to her ought to be calculated on the salary of E2970.94 per month.

15. In the circumstances the court will make the following order:

(a) The Respondent is directed to pay Applicant's arrear salary for May 2009 up to December 2009 in the sum of E23, 767.52 (E2970.94 x 8).

(b) The Respondent is directed to pay Applicant's salary as and when it falls due with immediate effect.

(c) The Respondent is directed to pay costs of this application.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT