

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.239/2010

In the matter between:

PETROS MHLANGA	1st APPLICANT
NTOKOZO NKAMBULE	2nd APPLICANT
SICELO SHIFU NCONGWANE	3RD APPLICANT

AND

KHULAMTUKULU WAMAFOLOSI MILLING	RESPONDENT
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CORAM:

D. MAZIBUKO:	JUDGE
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A. M. NKAMBULE:	MEMBER
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M. MTETWA:	MEMBER
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MR. D. MSIBI:	FOR APPLICANT
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MR. B. MKOKO:	FOR RESPONDENT
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JUDGEMENT - 31st AUGUST 2010

Urgent application - provisions of Rule 15(2) (a), (b) (c) mandatory, a matter brought to Court in which CM AC has competent jurisdiction to hear will be referred to CM AC. Applicant avoiding disciplinary hearing-Industrial Court does not usurp the function of the Chairperson of the disciplinary hearing.

1. There are 3 (three) Applicants before Court: All 3 (three) are employees of the Respondent. The Applicants have approached the Court by way of an urgent application for relief as follows;

'1 Dispensing with the usual forms and procedures and time limits relating to institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a rule nisi be issued calling in the Respondent to show cause if any, on a date to be fixed term [sic], and determined by this honourable court, why:

2.1. The letters dated 26th May 2010 calling the Applicants to appear or attend the purportedly [purported] disciplinary hearing scheduled 3rd June 2010 should not be declared null and void and of no force and effect.

2.2. Declaring the verbal instruction by the Respondent purportedly transferring the Applicants from their work station at Ngwane Park and directing them to work at the Respondent Director's homestead at Malindza area null and void and of no force and effect.

2.3. That paragraphs 2.1 and 2.2 above operate as an interim order with immediate effect pending the return date.

3. Restraining and interdicting the Respondent from interfering or and denying Applicants to pursue their work at Ngwane Park premises.

4. Ordering the Respondent paying [to pay] the costs of this application on punitive scale.

5. Further or alternative relief as this honourable court deems fit'.

2. The 1st Applicant Petros Mhlanga alleges that he was employed by the Respondent in February 2004 as a machine operator. He alleges that he continued working for the Respondent as a machine operator up to the time of the present application (June 2010).

3. The 2nd Applicant Ntokozo Nkambule alleges that he was employed by the Respondent in January 2000 as a machine operator. The 2nd Applicant continues working for the Respondent as a machine operator up the time of the present application.

4. The 3rd Applicant Sicelo Shifu Ncongwane alleges that he was employed by the Respondent on the 2nd March 2009 as a general labourer. He alleges that at the time of launching this application he was and still is employed by the Respondent but now as a machine operator. It is not clear as to when and how the 3rd Applicant changed from general labourer to machine operator.

5. The Respondent is Khulamtukulu Warnafolosi Milling a company registered in Swaziland trading as such at Ngwane Park in Manzini.

6. The Applicants aver that about 3rd May 2010 the Respondent acting through its director instructed all 3 (three) Applicants to leave their work station at Ngwane Park in Manzini and proceed to the director's place of residence in Malindza area. On arrival at Malindza area the Applicants were instructed by the same director (whose name has not been disclosed) to clear a nearby bush and erect a barbed wire fence around the director's homestead and fields.

7. The Applicants aver that the new instruction given by the director at Malindza area is outside their scope of duty and that they have no knowledge in carrying out that assignment.

7.1. While at Malindza it is averred that the director notified the Applicants that they have been transferred to Malindza permanently. The director provided them with accommodation which is a one room dwelling in which all three are expected to sleep and cook their meals in. The director has not provided the Applicants with blankets.

7.2. It is alleged further that the director failed to provide the Applicants with tools and protective clothing for safe and effective execution.

7.3. The Applicants alleged further that the Respondent failed to provide them transport to Manzini where they have been stationed prior to their transfer to Malindza.

7.4. Further it is alleged that the Respondent failed to give the Applicants sufficient notice that they were being transferred permanently to Malindza. They expected adequate notice from the Respondent owing to the fact that the Applicants have all along resided in a rented accommodation in Manzini. They needed time to make arrangements regarding their rented accommodation in Manzini before they could relocate to another area, in particular, Malindza.

8. The Applicants are resisting the transfer to Malindza. They claim that they were stationed at Ngwane Park at the time they were employed by the Respondent. They consider Ngwane Park as their principal place of work. If there is a need for the Respondent to transfer them to Malindza that transfer can only be done by agreement between the Applicants and the Respondent. So far there is no agreement between the parties concerning the Applicants' transfer to Malindza. According to the Applicants it is irregular for the Respondent to transfer the Applicants from Manzini to Malindza without consultation and the consent of the Applicants.

9. The Applicants allege that they have been prevented by the Respondent from gaining access to their workplace at Ngwane Park. On a date which is not stated in the affidavits, the Applicants aver that they attempted to go to their workplace at Ngwane Park where they used to work prior to the transfer to Malindza. The Applicants allege that they were denied access to the workplace by the Respondent. Instead the Respondent's director directed the Applicants to go and work in Malindza. As employees the Applicants are being frustrated by the conduct of the Respondent. The Applicants could not work at Malindza for reasons stated in paragraphs 7 to 7.4 of this judgement. Further the Applicants are unable to work at Ngwane Park as they are being denied access to the workplace by the

Respondent. As a result thereof, the Applicants caused a letter to be written to the Respondent dated 22nd May 2010. That letter is attached to the founding affidavit marked PNS. In that letter the Applicants raised the following issues with the Respondent;

9.1. That all 3 (three) Applicants are employees of the Respondent and that they are all based at Ngwane Park, where the Respondent's business premises are situate.

9.2. That the Respondent has unilaterally changed the terms and conditions of their employment contract. They were not consulted before the change was introduced.

9.3. That due to the change in the employment contract the Applicants have been transferred from Ngwane Park to Malindza area to work as general labourers.

9.4. That the change from Ngwane Park to Malindza area calls upon the Applicants to spend money on transport daily in order to travel from their places of residence in Manzini to their new place of work. The Applicants have ran out of money for transport.

9.5. The Applicants cannot sleep over in Malindza because they are not paid sleep-out allowance and they are not provided with food and blankets.

9.6. The Applicants have tendered their services at Ngwane Park at the Respondent's workplace but the Respondent declined to receive them.

The above is the Applicants' argument.

10. The Applicants allege that the Respondent has called them by letter to a disciplinary enquiry scheduled for the 3rd June 2010 for being absent from work without lawful excuse. Letters which were addressed to the Applicants individually are attached. The letters are marked PNS1, PNS2

and PNS3.

11. The relief that the applicants are seeking before this court is three fold.

11.1. Firstly the Applicants seek an order to interdict the disciplinary enquiry that was scheduled for the 3rd June 2010 but postponed indefinitely pending finalisation of this matter in Court.

11.2. Secondly the Applicants seek an order reversing their transfer from Ngwane Park business premises of the Respondent to Malindza. Further the order should restore their status as machine operators as opposed to general labourers.

11.3. Thirdly, the Applicants seek an order restraining the Respondent from denying them access to the Respondent's business premises at Ngwane Park.

11.4. The Applicants have asked for costs and any alternative relief which the Court deems fit.

12. The application is opposed. The Respondent has raised points of law. The Respondent has challenged *inter alia* urgency in the matter. According to the Respondent the Applicant has not satisfied the requirements of Rule 15 (2) a), b), and c). The matter should not be enrolled as urgent. The second point as raised by the Respondent is that the Applicants have failed to satisfy the requirements of an interdict. The Applicants are therefore not entitled to the interdict sought before court.

13. Besides the points in limine the Respondent has challenged the Applicants on the merits. The Respondent denies that the Applicants are employed as machine operators. According to the Respondent the Applicants are employed as general labourers. As the Applicants are general labourers the Respondent believed that she had a right to use the services of the Applicants in doing work requiring manual labour at the

time complained of namely about May 2010. According to the Respondent the work that the Applicants were assigned to do at Malindza area, is work that should be done by a general labourer.

13.1. In paragraph 18 of the replying affidavit it is admitted that the 2nd Applicant was previously employed as a domestic servant at the homestead of the Respondent's director at Malindza. It is alleged that the 2nd Applicant was subsequently employed by the Respondent at Ngwane Park about the year 2000. It is not clear though whether the 2nd Applicant was an employee of the Respondent while working at Malindza or was he employed by the Respondent's director in his private capacity.

13.2. In paragraph 15 of the replying affidavit the Applicants admit further that while working at Ngwane Park for the Respondent, they were called or referred to as general labourers. However the work that they did for the Respondents included operating a machine.

13.3. The court notes that these allegations contained in paragraphs 14.1 and 14.2 above were made for the first time in the Applicants' replying affidavit. The Respondent did not have an opportunity to respond to them.

14. The Respondent further denies that the Applicants were based at Ngwane Park as their duty station. According to the Respondent the Applicants were employed as general labourers in its business. The work that the Applicants were assigned to do at Malindza is part of the Respondent's business and is work of a general labourer. The Respondent, avers that the Applicants' failure to take instruction to go and work at Malindza area amounted to desertion which the Respondent treats as an offence. The Respondent argues further that there is a dispute of fact in this matter regarding the job grading of the Applicants which dispute cannot be resolved on affidavit. Instead oral evidence should be led on this issue at a trial.

15. The Respondent has denied the allegation made by the Applicants that the latter reported for duty at Ngwane Park in May 2010 but were refused entry by the Respondent's director. According to the Respondent the Applicants were instructed to work at Malindza about the 3rd May 2010. All 3 (three) Applicants disappeared without trace until the 22nd May 2010 when the Respondent was served with a letter from the Applicants' representatives (annexure PNS). The Respondent avers that there is a material dispute of fact in this matter regarding the questions whether or not the Respondent denied the Applicants entry at Ngwane park premises in May 2010. Further there is dispute of fact on whether or not the Applicants absented themselves from work as from the 3rd May

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2010 at Malindza. According to the Respondent these issues require oral evidence in order for the court to get to the truth of the matter.

16. It was upon delivery of the annexure PNS on the Respondent that the Respondent was able to serve the Applicants' representatives letters calling upon the Applicants to attend disciplinary hearing for absenteeism. Each of the (three) 3 Applicants was served with a letter inviting him to a disciplinary hearing. These letters are referred to in paragraph 10 above. The above is the Respondent's argument.

17. The first technical point raised by the Respondent is that of urgency. It is alleged that the Applicants have failed to follow the peremptory requirements of rule 15(2) (a), (b) and (c).

17.1 In a matter at the workplace (between employer and employee) where there is a dispute of fact, the Applicant is required to report that matter to CMAC for conciliation. Upon receipt of the dispute CMAC is enjoined to attempt to resolve the dispute using various machinery at its disposal (section 81 of the Act). Should Conciliation fail CMAC is enjoined to issue a certificate of unresolved dispute.

Upon receipt of the certificate of unresolved dispute the Applicant may file his application in court and attach the certificate to his papers as required by the rule 7 (4) (d). By CMAC is meant the Conciliation Mediation and Arbitration Commission established in terms of Section 62 (1) of the Industrial Relations Act No.1 2000 (herein before and after referred to as the Act). The procedure mentioned above is provided for in Part VI11 of the Act.

17.2 The Industrial Court rules have provided an exception to the general rule. In terms of rule 15(1) and (3) an applicant who has not complied with Part VIII of the Act may be granted urgent relief provided he complies with rule 15 (2) a) b) and c). The sub-rule reads as follows;

'The affidavit in support of the application shall set forth explicitly-

- a) *the circumstances and reasons which render the matter urgent;*
- b) *the reasons why the provisions of Part VIII of the Act should be waived;*
and
- c) *the reasons why the applicant cannot be afforded substantial relief at a hearing in due course'.*

17.3 The Applicants have stated in their affidavits that they served the Respondent at the Ngwane Park workplace. They were subsequently transferred to Malindza area by Respondent without consultation. The transfer resulted in extreme hardship for the Applicants as a result of which they failed to carry out their duties to which they were assigned. The problems the Applicants have encountered as alleged in the affidavit included the following;

- d) The Applicants were made to clear a bush and erect a barbed wire fence. They were not given protective clothing or equipment and tools. The nature of work they were required to carry out required that they

use protective clothing or equipment and tools. Working at Malindza without protective clothing and tools exposed the Applicants to danger of injury which would necessarily and adversely affect the Applicants' lives and health.

- e) At the time when they were transferred to Malindza the Respondent informed the Applicants that the transfer is permanent (meaning indefinite). The Respondent provided the Applicants a one room dwelling for their accommodation for all 3 (three) Applicants to share and to cook in. The Applicants found that arrangement intolerable. The Applicants refused to share a single room and use the same room for cooking. The Applicants preferred to leave separately as they were living in Manzini before the transfer. Worse still the Respondent did not provide food. That means the Applicants had nothing to cook and eat. The Respondent did not pay them sleep-out allowance yet the Applicants considered themselves entitled as they slept away from the residences of their choice in Manzini. Faced with this difficulty the Applicants decided to go and sleep in Manzini where they had their rented accommodation. That however created another difficulty.
- f) In order to get back to Malindza from Manzini the Applicants had to travel by bus. The Applicants had no bus fare and could not get to Malindza for work.
- g) Applicants reported at Ngwane park workplace for work. The Ngwane Park workplace was nearer their places of residence. The Applicants allege that they were denied access to the workplace at Ngwane Park by the Respondent's director. The Respondent's director has denied this allegation.
- h) About 20th May 2010 the Applicants were charged with absenteeism and were called to a disciplinary hearing which was scheduled for the 3rd June 2010 but was postponed. The disciplinary hearing is pending.

i) The Applicants wish to challenge the transfer and the manner of treatment at Malindza. If they report or pursue this matter at CMAC it will take sometime before it is resolved or declared unresolved by CMAC. In Paragraph 16 of the replying affidavit the Applicants allege that they did report the dispute to the relevant office in the labour department. It is however not clear what steps were taken to resolve that matter.

g) The disciplinary hearing interferes with the Applicants' right to pursue the dispute at CMAC. The Applicants run the risk of being dismissed at the hearing for absenteeism. The charge of absenteeism is related to the dispute which the Applicants wish to report or pursue at CMAC. If the Applicants succeed at CMAC the charge of absenteeism will fall away automatically. If the disciplinary hearing proceeds before the CMAC hearing is finalised whatever victory they gain at CMAC will be academic as they would most probably be dismissed by then. The issues that form the subject matter at the CMAC hearing are initially the same issues that will be discussed and argued at the disciplinary hearing. These issues will include the transfer, the treatment of the Applicants at Malindza, the reason behind the Applicants' failure to work at Malindza and the subsequent absence of the Applicants from work.

h) The charge that the 3 (three) Applicants are facing is absenteeism. The Charge reads as follows:

'Absenteeism'

In that on or about the 6 May 2010 you absented yourself for more than three day working days [sic] without a report or permission of your employer.

The charge is inter-related with the dispute which is proposed at CMAC.

18. The Court has a discretion to determine whether a matter before Court

should be enrolled as urgent or not. That discretion must be exercised judiciously. Taking into consideration the allegations made in paragraph 18.3 to 18.3 (h) the Court is convinced that good cause exists in hearing this matter as urgent. Justice requires that the issue of transfer be heard and finalised by a competent forum namely CMAC. The outcome of the dispute to be resolved at CMAC will determine whether or not the Applicants have a case of absenteeism to answer. It is the finding of the court that the Applicants have satisfied the requirements of rule 15 (2) a),b), and c).

19. The Court has already made a finding that the dispute which the Applicants are to report or pursue at CMAC is based on the same set of facts and circumstances as the charge of absenteeism which the Applicants may face at the disciplinary hearing. The Court is satisfied that CMAC is a proper forum with competent jurisdiction to hear the prayers that the Applicant has brought to Court and grant appropriate order. It is therefore necessary and proper that the dispute be determined and finalised at CMAC as soon as practical. The outcome of the CMAC hearing will determine whether or not the Applicants have a case to answer at the disciplinary hearing. If the disciplinary hearing proceeds before the dispute at CMAC is resolved, the Applicants are likely to suffer irreparable harm. The Applicants have a clear right to challenge their transfer and the circumstances relating thereto if they feel that it was done in an irregular manner. The Applicants have demonstrated a potential irreparable injury if their dispute at CMAC is not finalised prior to the disciplinary hearing being held. The balance of convenience favours that the Applicants' dispute should be heard and finalised before the Applicants are called for a disciplinary hearing. If the Respondent feels it has a strong case of absenteeism against the Applicant it can still call the Applicants to a hearing after the CMAC dispute is finalised. In that case the Respondent suffers no prejudice. The Court is satisfied that the Applicants have complied with the requirements of an interdict. The learned authors have listed the requirements of a final interdict as follows;

'In order to succeed in obtaining a final interdict, whether it be prohibitory or mandatory, an applicant must establish;

a) A clear right;

b) an injury actually committed or reasonably apprehended; and

c) The absence of similar or adequate protection by any other ordinary remedy'

Herbstein and Van Winsen: The Civil practice of the High Courts of South Africa, Vol 2, 5th edition (2009), Juta at 1456 -1457.

20. The Applicants' prayers have been couched in very wide terms. The Court will grant such order as is necessary for the purposes of the urgency in this matter and to prevent potentially chaotic situation at the workplace.

21. (1) The Court will not declare null and void the letters calling upon the Applicant to appear before the disciplinary hearing. If the Applicants wish to challenge these letters, the Applicants may make their application before the chairperson of the disciplinary hearing. The Court will not usurp the function of the chairperson of the disciplinary hearing.

21. (2) The Court will not declare null and void the alleged transfer of the Applicants from Ngwane Park to Malindza. The Applicants may challenge that transfer at CMAC or at any other forum if the matter is not resolved at CMAC

21. (3) The Applicants may approach CMAC for an order restraining the Respondent from denying the Applicants access to Ngwane Park workplace. This is an issue which CMAC has jurisdiction to hear. The Industrial Court will not hear a matter which can conveniently and competently be heard and finalised by CMAC.

22. The Court grants the following alternative order;

- a). The Applicants are directed to report a dispute at CMAC or pursue their dispute if already reported within 5 (five) court days from today 's order regarding the issues raised in this application.
- b). Upon receipt of the dispute CMAC shall give the matter priority and finalise it as soon as practical. Should CMAC fail to finalise the matter before it by the 30th September 2010, either party may apply to court for relief.
- c) While the matter is pending at CMAC the Respondent is restrained from holding a disciplinary hearing concerning the Applicants.
- d) Each party will pay its costs. The members agree.

DUMSANI MAZIBUKO
JUDGE OF THE INDUSTRIAL COURT