IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 186/2010

In the matter between:

KENNETH B. NGCAMPHALALA **APPLICANT**

AND

SWAZILAND DEVELOPMENT AND SAVINGS BANK **RESPONDENT**

CORAM:

D. MAZIBUKO **JUDGE**

A. M. NKAMBULE **MEMBER**

M.T.E MTETWA **MEMBER**

S.C. DLAMINI **: FOR APPLICANT**

M. SIBANDZE **: FOR RESPONDENT**

JUDGEMENT- *2nd* FEBRUARY 2011

Claim for payment of salary. Applicant fails to prove existence of employment contract Salary not claimable in the absence of employment contract Defence of res judicata. Once a claim is adjudicated by Court same claim cannot be brought afresh in the same or another court for same or similar relief.

1. The Applicant is Mr. Kenneth Ngcampalala an adult male Swazi of Mvutjini. The Applicant is a former employee of the Respondent. The Respondent is Swaziland Development and Savings Bank, a body corporate established under the Kings-Order-In-Council No. 49/1973. The Respondent operates business as a bank.

2. About January 1997 the Applicant was employed by the Respondent as Personal Assistant to the Managing Director. The Applicant was subsequently dismissed from work by the Respondent. The Applicant has applied for relief as follows;

> *(a) That the Respondent pays him [Applicant] his monthly salary plus full benefits from March 2001 to date of the final payment*
>
> *(b) Interest on the aforesaid amount from the date of application to date of final judgment*
>
> *(c) Further or alternative relief*

3. After close of pleadings the Applicant amended prayer (a) of the notice of Application to read as follows;

(a) "*That the Respondent pays him [Applicant] his monthly salary plus full benefits from March, 2001 to date of final payment which at present amounts to* ***El 3,488, 611.57***"

4. The Applicant avers that at the time of dismissal he was earning (Fourteen Thousand Five Hundred and Eighty Three Emalangeni Thirty Three cents) El4,583.33 monthly plus benefits.

5. The Applicant alleges that about March 1998 the Respondent underwent a restructuring programme which resulted in a change of management. The Applicant had to serve the Respondent under the new management with which he had endless problems and disagreements. These problems culminated in an altercation between the Applicant and the Managing Director of the Respondent.

6. The parties eventually agreed that the Applicant should remain at home with full pay and benefits pending finalization of an exit package for the Applicant. That agreement was confirmed by letter dated 22nd January 2001 written by the Respondent to the Applicant. A copy of that letter is attached to the replying Affidavit marked KN1. Upon receipt of the annexure **KN1** the Applicant remained at home and awaited further advice from the Respondent.

7. The Applicant alleges further that in February 2001 the Respondent unilaterally stopped payment of his salary and benefits. The payment of his salary and benefits was stopped notwithstanding that the dispute in terms of which he remained at home had not been resolved.

8. According to the Applicant the dispute between the parties is subject of litigation before the Courts of Law. Since the matter is pending before Court it cannot be regarded as finalized. As the matter is not finalized he is entitled to payment of his salary and benefits on a continuous and regular basis until the matter is resolved. Since the Respondent has unilaterally stopped payment of his salary as aforementioned, he [Applicant] has moved the present application in order to compel the Respondent to pay.

9. In response, the Respondent avers that the Applicant was dismissed from work with effect from the 9th March 2001 on the ground of redundancy. A copy of the letter of dismissal is attached to the answering affidavit marked **A.** The Applicant thereafter filed a claim before Court on the 5th February 2003 in which he challenged the dismissal on the basis that it was unfair.

10. The matter proceeded in Court. Judgment was granted in the Applicant's favour on the 17th March 2005. The Industrial Court awarded the Applicant twelve (12) months compensation in the sum of E264.516.00 (Two Hundred and Sixty Four Thousand

Five Hundred and Sixteen Emalangeni). The matter is registered as case No. 26/2003. A copy of the judgment has been attached to the answering affidavit marked **B.**

11. The Respondent avers that since the Applicant was dismissed on the 9th March 2001 as per annexure **A,** the Applicant was paid his salary up to the 11th March 2001. The Applicant ceased to be an employee of the Respondent from the date of dismissal namely 9th March 2001. The Applicant is accordingly not entitled to payment from the Respondent of a salary or benefits after the date of dismissal. Furthermore, the employment contract between the parties came to an end upon dismissal and so did the employment rights and benefits.

12.The Respondent avers further that the Applicant's claim before Court is *res judicata.* The claim before Court was adjudicated by a competent Court and an award was made in favour of the Applicant under the case 26/2003 as aforementioned. Annexure **B** (a copy of the judgment) is tendered by the Respondent as proof that the Industrial Court dealt with and finalized the Applicant's claim for unfair dismissal. The award of compensation took into consideration that the Applicant had suffered loss of salary since the 9th March 2001, this being the date of dismissal.

13. It is common cause that the appeal which the Respondent noted against the Industrial Court judgment (annexure **B)** was

dismissed in November 2007. It is further common cause that the review proceedings which the Respondent launched against the aforementioned Industrial Court judgment were also dismissed on the 30th September 2009. That means that the judgment of the Industrial Court (annexure **B)** was confirmed on appeal by the Industrial Court of Appeal in November 2007 and on review by the High Court in September 2009. There is no allegation that the Respondent took the matter further from the High Court to the Supreme Court.

That means therefore that litigation between the Applicant and the Respondent came to an end on the issues contained under case No. 26/2003 (Annexure **B)** on the 30th September 2009 when the High Court dismissed the review proceedings. There is neither allegation nor evidence that the parties engaged in further litigation on the same dispute after the 30th September 2009.

14. The Applicant's further complaint appears to be that he was not paid the full amount of the Industrial Court award of the 17th March 2005. In terms of the Industrial Court judgment (annexure **B),** the Applicant was awarded compensation for unfair dismissal in the sum of E264.516.00 (Two Hundred and Sixty Four Thousand Five Hundred and sixteen Emalangeni). In paragraph 7 of the replying affidavit the Applicant seems to suggest that he was paid a portion of the award and there is a balance outstanding of E l

13,795.12 (One Hundred and Thirteen Thousand Seven Hundred and Ninety Five Emalangeni Twelve cents.)

15. In paragraph 7 of the replying affidavit the Applicant states as follows;

> "*Respondent only partially complied with the Industrial Court Order of the 17th March 2005 on the 28th October, 2009. Even then it withheld the amount of El 13,795.12 which is still the subject of ongoing litigation.*"

The Court will deal with the allegation regarding an outstanding balance due to the Applicant later in this judgment.

16. The Applicant does not state before which Court is the alleged, 'ongoing litigation' pending and for what relief. The allegation that the dispute between the parties is subject to an 'ongoing litigation' has been made by the Applicant. The Applicant therefore bears the onus to prove the allegation he has made. The Applicant has failed to discharge that onus. There is no evidence that there is ongoing litigation between the parties which is pending before Court. The Court accordingly dismisses the Applicant's claim that the award made by the Industrial Court in its judgment dated 17th March 2005 is subject to ongoing litigation. According to the papers before Court that matter was finalized on the 30th September 2009 when the Respondent's review proceedings were dismissed. After the 30th September

2009 there is no indication that either of the parties took the matter further.

17. The Respondent has further raised the defense that the matter before court is *res judicata.* This allegation has been denied by the Applicant. The Applicant states as follows in paragraph 8 of its replying affidavit;

> "*The defense of res judicata can only succeed if I have brought the same subject matter and founded on the same cause of action. In other words I must be demanding the same thing on the same ground. In the present proceedings I am claiming specific performance of an agreement between the parties.*"

18. In order for a defense of *res judicata* to succeed the Respondent must show that the Applicant is claiming the same thing on the same facts, ground or circumstances or that the Applicant's claim comes to the same thing as previously claimed in another legal suit.

> The learned authors **HERBSTEIN AND VAN WINSEN: The Civil Practice of the High Court of South Africa, 5th edition (2009) vol. 1 at Page 610** state as follows on the subject of *res judicata:*

"*...has the same issue now before court been finally disposed of in the first action ?.*"

If an answer to this question is in the affirmative, the defence of *res judicata* can be successfully raised.

19. It is common cause that on the 22nd January 2001 the parties agreed that the Applicant will not report for work as the practice was but would instead remain at home forthwith on full pay plus benefits. In the meantime the parties would find ways to amicably terminate their employment contract. That agreement is recorded in annexure **KN1.**

20. It is further common cause that in terms of the agreement aforementioned the Applicant remained at home while negotiations between the parties proceeded. At that time the Applicant was still an employee of the Respondent.

21. The employment contract between the parties was terminated by the Respondent on the 9th March 2001 by letter dated the same day. The reason given by the Respondent for terminating the employment contract was that the Applicant was redundant. A copy of the letter of dismissal was introduced as annexure **A.**

22. The Applicant was dissatisfied with the reason given by the Respondent for terminating the employment contract. The

Applicant felt that the employment contract had been unfairly terminated. As a result the Applicant instituted legal action against the Respondent for unfair dismissal. The matter was dealt with by the Industrial Court under case No. 26/2003. The pleadings under case No.26/2003 were filed in Court as part of the Respondent's annexures.

23. In his pleadings under case No.26/2003 the Applicant prayed before Court for re-instatement alternatively maximum compensation and ancillary relief. This is confirmed by the judgment of this Court, annexure **B.** The Court refused to order re-instatement. However the Court awarded the Applicant compensation for unfair dismissal which was equal to twelve (12) months salary amounting to E264,516.00 (Two Hundred and Sixty Four Thousand, Five Hundred and Sixteen Emalangeni).

24. The Court has noted that the Applicant does not mention in his founding affidavit that he was dismissed from work on the 9th March 2001.

Further the Applicant did not mention that he filed a claim for unfair dismissal against the Respondent for which he was awarded compensation. These issues are relevant to the Applicant's present claim before Court. There is no explanation from the Applicant or his counsel for failing to disclose in his founding affidavit such vital information. This information was

brought to the attention of the Court by the Respondent. It is not clear whether this was an error on the part of the Applicant or it was a deliberate non-disclosure. Whether the omission of vital information was deliberate or accidental it had the potential of misleading the Court with the consequent result of a miscarriage of justice. It is the duty of all litigants and their counsel to bring to the attention of the Court all relevant material which touches on the matter before Court. The Court hopes that the Applicant's conduct will not be repeated.

25. The Court is satisfied that the agreement between the parties dated 22nd January 2001 was terminated by the Respondent on the 9th March 2001. This is the agreement which authorized the Applicant to remain at home pending finalization of an exit package.

The Applicant is fully aware that, that agreement was terminated by the Respondent by letter dated 9th March 2001 (annexure **A).** The letter, namely annexure **A,** *inter alia* states as follows in its paragraph 2;

> "*I must hereby advise you that your services with the Bank are hereby terminated by reason of redundancy with effect from the 9th March 2001*"

26. Upon reading annexure **A** the Applicant immediately became aware that **as from the 9th March 2001 he is no longer an employee of the Respondent.** The Applicant also became aware that the termination of the employment contract with the Respondent meant that he is no longer entitled to claim salary and any other employment benefits from the Respondent. The refusal by the Industrial Court to order re-instatement meant that the termination of the employment contract subsists. The Court only dealt with the consequences of the termination.

27. When the Applicant prayed to the Industrial Court for re-instatement, he was asking the court to re -instate the employment contract which has since been terminated by the Respondent together with all his rights and benefits.

Those rights included a right to the Applicant **to draw a salary while he remained at home pending negotiation of an exit package.** When an order for reinstatement failed the hope to revive those rights to payment of salary died. The issue of the Applicant's rights to payment of salary while he remained at home was therefore dealt with by the Industrial Court under case No. 26/2003 and a judgment was delivered on the 17th March 2005 (annexure **B).** That judgment survived an appeal and a review. It is therefore final. The Applicant did not file a cross appeal or review proceedings against the Industrial Court's refusal to order re-instatement.

28. The Applicant is not entitled to payment of monthly salary plus benefits from the Respondent from March 2001 to date. With effect from the 9th March 2001, the Applicant ceased to be an employee of the Respondent. The termination of the employment contract brought to an end the Applicant's right to claim salary and any other employment benefits. A salary cannot be paid to someone who is not an employee. The Applicant has failed to prove that since March 2001 to present day he is an employee of the Respondent. The Applicant's claim fails on this principle.

29. The judgment of the Industrial Court dated 17th March 2005 (annexure **B)** dealt with the same issues that the Applicant has claimed before this Court. Since the Industrial Court has adjudicated the matter, the matter is therefore *res judicata.* This court cannot re-open issues that are finalized or closed. The Industrial Court award took into consideration the fact that the Applicant has suffered loss of salary through an unfair termination of employment. The Applicant has no further recourse against the Respondent on the same issues. On the principle of *res judicata* the Applicant's claim again fails.

30. In his replying affidavit the Applicant raised a fresh allegation that the Respondent partially complied with the Industrial Court award in that it made a part payment. There is allegedly a balance outstanding of E113,795.12 (One Hundred and Thirteen

Thousand Seven Hundred and Ninety Five Emalangeni Twelve cents.) The Court does not adjudicate claims in an application which have not been included in the Notice of Application. What makes things worse is that this allegation appears for the first time in the replying affidavit. The Applicant has therefore improperly denied the Respondent an opportunity to answer the allegation made against her. This allegation has been brought before Court in an irregular manner.

The Court will therefore not spend anymore time on this allegation. The Applicant appears to have lost direction in the manner he should present his claim in Court. Issues of payment of a balance outstanding once a matter is adjudicated are dealt with under a different procedure.

31. The Respondent has asked for a dismissal of the application with costs. It is normal procedure that costs follow the event. The difficulties that the Applicant faces in his application are foreseeable. The difficulties could and should have been avoided. It is fair that the Respondent be compensated with costs for successfully defending this application.

32. The court makes an order as follows:

(a) That the application is dismissed.

(b) The Applicant is to pay the Respondent's wasted costs.

Members agree.

D. MAZIBUKO

INUSTRIAL COURT JUDGE