

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO.2/2011

In the matter between:

JOHN ZIBUSE DLAMINI

APPLICANT

AND

**DISTELL SWAZILAND
LIQUOR DISTRIBUTORS**

RESPONDENT

CORAM:

D. MAZIBUKO

JUDGE

A. M. NKAMBULE

MEMBER

M. T.E. MTETWA

MEMBER

MR. D. JELE

FOR APPLICANT

MR. A. LUKHELE

FOR RESPONDENT

JUDGEMENT-17th MARCH 2011

Urgent application, Applicant fails to establish Court's jurisdiction, application fails. Presence of material dispute of fact in an application may result in failure of the application. Urgent application, Respondent denies he is employer of Applicant, oral evidence required to prove employment contract, urgency fails.

1. The Applicant is Mr. John Zibuse Dlamini an adult male Swazi of Manzini District.

2. The Respondent is Distell Swaziland Liquor Distributors, a limited liability Company duly incorporated in accordance with the Company laws of Swaziland.

3. The Applicant has filed an urgent application against the Respondent in which the Applicant has asked for relief as follows:

"1. Dispensing and condoning the applicant for non compliance with the usual normal requirements relating to the method of service, time limits, forms and enrolling this matter to be heard as one of urgency.

2. That a nisi do hereby issue calling upon the respondent to show cause, on a date to be determined by the above Honourable Court, why an order in the following terms should not be made final;

2.1. The lay off of the applicant by the respondent through the letter dated 4th January 2011 [be] hereby set aside and declared unlawful;

2.2. The Respondent is ordered to reinstate the applicant back to his position;

2.3. The respondent is ordered to confirm the applicant as its permanent employee;

2.4. Pending the finalisation of the matter, the respondent is ordered to pay the applicant his monthly salary;

3. That prayer 2.4 above operate with interim and immediate effect pending the finalisation of the matter;

4. The respondent is ordered to pay costs of the application;

5. Granting the applicant further and/or alternative relief"

4. The application is opposed by the Respondent. The Respondent has raised points *in limine* and has further pleaded over on the merits.

5. The Applicant alleges that he was employed by the Respondent since the 27th July 2009. He was positioned in the warehouse. He was paid a salary of E3 122.14 (Three Thousand One Hundred and Twenty Two Emalangen Fourteen cents) by the Respondent.

6. About the 4th January 2011 the Applicant was laid off at work for an indefinite period of time. He was however, promised that he will be recalled should work become available. This message was delivered

orally by Mr. Mavimbela. Mr. Mavimbela was the Applicant's senior at work.

7. The Applicant avers that the lay off caught him by surprise. He thereafter sought legal advice. His lawyer advised him to get written confirmation concerning the lay off. A letter was thereafter written by the Respondent which is attached to the founding Affidavit marked **JD1**. The letter is on the Respondent's letterhead.

8. The letter annexure **JD1** reads as follows;

04.01.2011

To Whom It May Concern

Kindly be advised, John Dlamini was temporally [temporarily] employed by Swaziland Liquor Distributors (Distell Swaziland), He has been laid off until further work prevails, He [he] will then be recalled.

Your patience will be greatly appreciated. Regards

Amelia Eamshaw
Admin Controller"

9. The Applicant is challenging the lay off by way of an urgent application. The Applicant argues that the Respondent has no legal basis to lay him off. The Respondent is in the wholesale and distributive trade industry. Employers who are in that industry are not legally entitled to lay off their employees. The Respondent's conduct in laying the Applicant off is therefore irregular. That irregularity should be set aside as a matter of urgency. The Applicant wants an immediate re-instatement to his employment.

10. The first point *in limine* raised by the Respondent addresses the issue of jurisdiction. The Respondent argues that the Industrial Court has no jurisdiction to hear the matter. The Respondent denies that she is the Applicant's employer. The Respondent avers that the Applicant's employer is Alternative Field Personnel (Property) Limited (hereinafter referred to as Alternative).

11. The Respondent avers that Alternative is a labour broker. There is a contract in place between the Respondent and Alternative. In terms of that contract, Alternative supplies the Respondent with labour (workers) in return for a fee. The Applicant is a worker that has been hired (employed) by Alternative (labour broker) and supplied to a client (Respondent) in return for a fee. While the Applicant is doing work at the Respondent's premises he is actually working for his employer namely Alternative.

12. The Respondent argues that there is no employer -employee relationship between the Applicant and the Respondent. The Court therefore has no jurisdiction in the matter. In terms of section 8 (1) of the Industrial Relations Act No. 1/2000 as amended (Act), the employer-employee relationship is necessary in order for the Court to exercise jurisdiction in the present matter.

13. On the contrary, the Applicant has denied that he is employed by Alternative. The Applicant points to the Respondent as his sole employer.

14. The Applicant acknowledges the principle laid down in section 8(1) of the Act. The Applicant confirms that the employer-employee relationship is necessary to establish the jurisdiction of the Court in the present matter. In paragraph 11.3 of the replying affidavit the Applicant states as follows;

"I admit that the Court does not have jurisdiction on issues that falls [fall] outside the provision of section 8 (1) of the Industrial Relations Act, but I have been advised that my matter is one that falls under the section as it involves an employer and the employee in the course of employment."

15. The Applicant argues further that the Court has jurisdiction in the matter on the basis of the evidence submitted on the affidavit by the Applicant. The Applicant avers *inter alia*, that he has never dealt with

Alternative ever. Further that he has never received a salary from Alternative. Instead he is paid a monthly salary by the Respondent through the Respondent's head office.

16. The second point raised *in limine* is that of the alleged presence of material disputes of fact which require oral evidence to resolve. The Respondent argues that there is a dispute regarding the identity of the Applicant's employer. The Applicant alleges that he was employed by the Respondent. That allegation is denied by the Respondent. Instead the Respondent avers that the Applicant was employed by a labour broker namely Alternative.

17. There is a further dispute regarding payment of the Applicant's salary. The Applicant avers that his salary was paid by the Respondent from its head office which is allegedly based in the Republic of South Africa. The Respondent denies that allegation. According to the Respondent it pays the labour broker an agreed fee in terms of their contract. It is the labour broker who pays the Applicant a salary as its employee.

18. A third point raised *in limine* concerns non-joinder of a third party namely Alternative. The Respondent avers that Alternative should be joined as a necessary party in the lawsuit. It was argued that Alternative has a direct and substantial interests in the matter before Court. Any decision that the Court will make in the matter will affect the rights and interests of Alternative especially the labour contract it

has with the Respondent. This matter has not been brought to the attention of Alternative. It follows therefore that Alternative has been denied an opportunity to be heard in the matter.

19. The three (3) points *in limine* raised above revolve around the same facts. There is a dispute regarding the identity of the Applicant's employer. That dispute is one of fact and it is material. With the information provided on the affidavits the Court is not certain who the Applicant's employer is. That fact may be determined on the pleadings and the evidence that should be adduced at the trial. Once the employer-employee tangle is cleared, the Court will be in a position to determine the issue of jurisdiction and the merits of the application.

20. The allegation on which the point of non-joinder is based is the same allegation on which the two(2) points *in limine* raised above will be argued. The central issue in all the three (3) points raised so far revolves around the identity of the Applicant's employer. The Court is not in a position at this stage to determine whether or not Alternative is a necessary party to these proceedings. A determination of the employer-employee dispute will yield sufficient material to resolve the non-joinder argument.

21. The Court appreciates the point that a third party is entitled to be joined in legal proceedings if the order sought may affect his rights and interests. Further, that failure by the Applicant to join an interested party may result in a delay or dismissal of the matter before Court.

22. A recent local case on joinder of a necessary party is that of MFOMFO NKAMBULE vs. THE GOVERNMENT OF SWAZILAND and 2 others, High court case No. 1965/2006. The Court dismissed an application on the basis that the Applicant had failed to join a necessary party. The Court found that a certain third party had a direct and substantial interest in the relief sought in the application and was therefore a necessary party.

23. The Court agrees with the principle as stated in the MFOMFO NKAMBULE case. However that principle does not apply yet in the matter before Court. The Court has not determined that Alternative is the Applicant's employer. That legal principle will only apply once that determination is made. At this stage it is not clear whether Alternative is a necessary party in this lawsuit or it is a total stranger. Furthermore it is not clear whether the present Respondent is the employer of the Applicant or she has been incorrectly cited as such.

24. The fourth point raised *in limine* is that the Applicant has failed to justify the element of urgency in his urgent application. The Court was requested to dismiss the application for failing to comply with rule 15 (2) (a), (b) and (c).

25. This point can properly be determined by the Court once the issue of jurisdiction has been finalised. The identity of the employer of the Applicant is yet to be determined. Once the identity of the employer

has been established, that employer will decide which points of law will he raise and argue.

26. The Respondent has further distanced itself from the contents of annexure **JD1**. According to the Respondent the contents of this letter were obtained from the Respondent by the Applicant under false pretences. The contents thereof do not reflect the correct state of affairs. In short the Respondent argues that though the letter was written by an employee of the Respondent, its contents were manipulated by the Applicant for his personal gain. The Applicant has refuted that allegation.

27. There is indeed a dispute between the parties regarding the circumstances under which the letter (annexure **JD1**) was written. The dispute is such that some explanation is required from the parties in order for the Court to arrive at the truth. It is proper that the required explanation be given in a trial rather than a further affidavit. A trial will give the parties a chance to extract the truth from the witnesses by way of cross examination.

28. The Court is satisfied that there are material disputes of fact in this matter which should be resolved in a trial. These disputes include the contract in terms of which the Applicant was employed and the terms and conditions thereof. Also included in the dispute is the manner annexure **JD1** was written and the effect it has on the contents. The

remaining points *in limine* raised by the Respondent can be determined once the said disputes of fact are resolved. The matter therefore cannot proceed by way of urgent application owing to the presence of material disputes of fact. Prayer 1 of the Notice of motion is accordingly refused.

29. The issue of jurisdiction of the Court to deal with a matter before it is of paramount importance. The issue of jurisdiction must be established prior to the Court determining the dispute before it. The learned authors state as follows regarding the question of jurisdiction in an application before it;

*"If the Court is not satisfied on the facts stated in the application that it has jurisdiction, **it will not entertain the proceedings.**"*

HERBSTEIN AND VAN WINSEN: The Civil Practice of the High Courts of South Africa, 5th edition (2009) Vol. 1 (Juta) at Page 438.

(Emphasis added)

30. Another learned author adds the following on the subject of jurisdiction;

"A plaintiff must allege and prove in all instances the facts necessary to establish that the court has jurisdiction in the matter and over the person of the defendant."

LTC Harms: AMLER'S PRECEDENTS OF PLEADINGS, 5th edition, 1998, Butterworth's at page 244.

(Emphasis added)

31. The Court agrees with the principle regarding jurisdiction as stated in the authorities cited above. In application proceedings, it is the duty of the Applicant to state sufficient facts in the affidavit in order to satisfy the Court that it has jurisdiction over the matter before it. Failure to discharge this duty will lead to the application either being dismissed or delayed.

32. The Court is not satisfied that it has jurisdiction to deal with the present matter. The Court accordingly declines to enrol the matter. Prayer 1 of the Notice of Motion fails also on this ground.

33. The Court is not satisfied that the material disputes of fact aforementioned were foreseeable to the Applicant or a reasonable person in the position of the Applicant. Though the Respondent has successfully argued its point in *limine* this is not a proper case to mulct the Applicant in costs.

34. The Court accordingly makes the following order;

(a) Prayer 1 of the Notice of the Motion is dismissed. The Applicant may institute an action on this matter.

(b) Each party will pay its costs.

The members agree.

D. MAZIBUKO
JUDGE OF THE INDUSTRIAL COURT