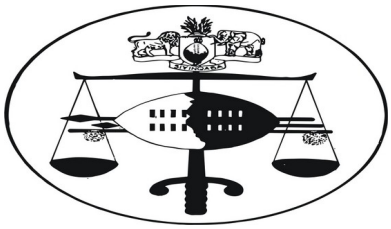

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

CASE NO. 137/2012

In the matter between:-

NJALOFUTSI DLAMINI **APPLICANT**

AND

GETMED SWAZILAND **RESPONDENT**

Neutral citation: *Njalofutsi Dlamini v Get Med Swaziland (137/2012) [2012] SZIC 24 (18 April 2012)*

CORAM : DLAMINI AJ,

(Sitting with D. Nhlengetfwa & P. Mamba Nominated

Members of the Court)

Heard : 23 APRIL 2012

Delivered : 30 APRIL 2012

Summary: ***Labour law - Industrial relations – Applicant seeks to set aside notice of termination of services – Dispute not dealt with under procedure laid down***

under Part VIII of the Industrial Relations Act – Irreparable harm not proved – Alternative remedy - Remedial powers of the court.

1. The Applicant in this matter approached this Court on an urgent basis seeking an order in the following terms:

1. ***Condoning the applicant for non compliance with the rules and that the matter is enrolled as one of urgency.***
2. ***Setting aside the notice of termination of service contract dated 04th April, 2012.***
3. ***A Rule nisi be issued in terms of prayer 2 above as an interim measure pending finalization of the matter.***
4. ***Costs of suit.***
5. ***Further and/or alternative ancillary relief.***

2. The Respondent opposes the application. As a preliminary step, the Respondent's attorneys filed a notice to raise points *in limine.* The points raised are as follows;

- That the Applicant has failed to establish the requirements for granting of the relief that he seeks.
- That the Applicant seeks a mandatory interdict to compel the Respondent to accept him into service by setting aside the notice of termination of service dated 4th April 2012.
- That the Applicant has failed to establish that he has a well grounded apprehension of irreparable harm if the relief is not granted.
- That the Applicant has failed to allege and establish that the balance of convenience favours the granting of the relief sought.

- That the Applicant has failed to establish that he has no other satisfactory remedy.

3. The Respondent's attorney had initially sought to raise his points of law from the bar when the matter was first called on the 17th April, 2012. However, following submissions by Mr. Mamba for the Applicant to the effect that he would need time to go through the points *in limine*, the court adjourned to the 23rd April 2012, for arguments. In the meantime the Respondent's counsel was directed to prepare and serve the preliminary points of law and serve same upon the Applicant's attorney.

4. Mr. Sibandze for the Respondent was of the view that the points *in limine* he had raised have the potential of disposing of the matter without even venturing into its merits. It is on that basis therefore that he submitted that the court hears and determines the points *in limine*.

5. Attorney Sibandze started of his arguments by submitting that the Applicant seeks before court a mandatory interdict in which he wants to compel his employer to continue employing him until finalization of the present application. However, the Applicant has failed to;

    a) State that he would suffer irreparable harm should the employer not be interdicted before the 30th April 2012.
    b) Allege that the balance of convenience favours the granting of the interdict.
    c) That he has no satisfactory alternative remedy.

6. Further argument by the Respondent's counsel was to the effect

that since it is within this Court's remedial powers to order reinstatement or even re-engagement, the Applicant has failed to, at the least, demonstrate that he suffer irreparable harm or grave injustice should it (Court) not intervene. He also argued that the Applicant in his founding affidavit has even failed to demonstrate that the balance of convenience favours the granting of the interim relief pending the final determination of the matter. He accordingly prayed for the dismissal of the Applicant's case.

7. Attorney Mamba in his *contra* arguments submitted that what the Respondent's attorney had failed to note and appreciate that the Applicant was not court seeking an interdict but rather seeks to set aside the decision to give notice to terminate his services.

8. Mamba went on to point out that all the Applicant seeks is his constitutional right to be heard, which is also enshrined in terms of the *audi alteram partem* principle of natural justice, before his services are arbitrarily terminated. Interestingly, Attorney Mamba stated that the Applicant is not before court to challenge his dismissal but rather the manner the decision to terminate his services was arrived at. In support of the aforementioned submissions and arguments the court was referred to the authority of the ***Ndoda Mathebula V Lavumisa Town Board & Others High Court Case no. 2308/10 (unreported).***

9. Perhaps as a starting point we should point out that for this court to intervene it must be satisfied that this is one of those rare or exceptional cases where a grave injustice might result if the notice terminating his services is not set aside. To put issues in a much clearer perspective we find the dictum in the case of

Walhaus V Additional Magistrate, Johannesburg 1959 (3) SA 113 at 119H 120E apposite in this regard. In that matter the court held as follows;

> "***By virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief by way of review, interdict or mandamus – against the decision of a Magistrates court given before conviction. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances…and <u>will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained</u>…"*** (Court's emphasis)

10. The above principle has been extended to apply even in this, our field of labour law. In the case of ***Booysen V The Minister of Safety and Security and Others [2011] 1 BLLR 83 (LAC)*** the Labour Appeal Court upheld the jurisdiction of the Labour Court to interdict any unfair conduct. However the Court per Tlaletsi JA went on to caution thus:

> "…***However, such intervention should be exercised in exceptional circumstances…Among the factors to be considered would be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means."***

11. Whether a court intervenes depends on the facts and circumstances of each case. So that if a court is satisfied that a particular case is one of those rare or exceptional ones it will intervene immediately. Amongst the factors to be considered would be whether its failure to intervene would lead to grave injustice or whether justice might be attained by other means.

12. We hasten to add here that this court *mero muto* questioned Attorney Mamba on the propriety of bringing the present application without following the procedure under Part VIII of the Industrial Relations Act 2000 (as amended). It is desirable that matters of this nature be conciliated, and always, by way of alternative dispute resolution mechanism which provides a friendlier, informal, expeditious and less expensive environment. This is provided by Part VIII of the Industrial Relations Act, 2000, (as amended). The importance of the Conciliation, Mediation and Arbitration Commission's role is such that these provisions should be strictly observed.

13. In this Court the Applicant bears the onus of showing why he did not follow the laid down dispute procedures as enunciated in Part VIII of the Industrial Relations Act, as amended. Since the landmark decision of Hannah CJ, as he then was, in the case of **Swaziland Fruit Canners (Pty) Ltd v Phillip Vilakati & Another Industrial Court of Appeal Case no 2/87**, this court has always insisted on the use of the procedure laid down in Part VIII of the Industrial Relations Act. The *ratio decidendi* of the decision is as follows;

> ***"Not every party to an industrial dispute is entitled to have the dispute determined by the Industrial***

Court…the policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court, it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties…where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only then, may application be made to the Industrial Court for relief.(Now CMAC)

14. It is most desirable that industrial dispute be settled, if possible, by means of conciliation rather than determined in the more formal surrounds of a court. It is without a shadow of doubt that the existence of a statutory conciliation procedure saves the Industrial Court from hearing many time consuming cases which are capable of resolution with the assistance of a neutral and expert third party. In the case of **Phylyp Nhlengethwa & Others v Swaziland Electricity Board IC case no.272/2002,** Judge President Nduma, as he then was, had this to say of CMAC;

"The creation of this institution has increased the need for the Industrial Court to enforce strict observance of the dispute resolution procedures under Part VIII of the Act because we now have a more suitable structure of expeditiously, conveniently and less expensively resolving industrial disputes which otherwise find their way unnecessarily to this court, and in the process aggravating the backlog the court has suffered for a longtime."

15. The Applicant has set out the following grounds of urgency in his founding affidavit:

15.1 The respondent is unlawfully varying the terms of his employment contract.

15.2 That the Respondent has given notice to terminate his contract without affording him a chance to make representation.

15.3 That the Respondent cannot in law, in particular the Employment Act, issue such a notice.

15.4 That he stands to lose his job which he relies on for his livelihood and that he has bills, loans and debts to settle.

16. Loss of income and the resultant financial hardship have been held to be the inevitable consequence of a dismissal from employment and as such provide no good grounds for jumping the queue of other Applicants who are in the same unfortunate position.

See: Juanita Bernadette Balkisson V Waterford KaMhlaba IC case no 308/2008
Kenneth Manyatsi V Usuthu Pulp Company & Another IC case no 245/2002

17. It is a finding of this court therefore that the Applicant has failed to set forth, and explicitly, circumstances and reasons why he claims he cannot be afforded redress at a hearing in due course and on his failure to follow the procedure under Part VIII of the Act. These are peremptory prerequisites before this court can hear and determine disputes of this nature, without which a matter does not make the grade. We herein also make a finding that the case of ***Ndoda Mathebula*** is distinguishable from the present matter of the Applicant, which is an employer/employee relationship regulated by the Industrial Relations Act (as amended).

18. The court has also noted that the Applicant has elected to institute motion proceedings, which can only be entertained where there are no foreseeable disputes of fact. The enquiry before this court will inevitably boil down to whether his dismissal was fair or not. Clearly if this court were to grant the orders sought by the Applicant, this would inevitably amount to opening the floodgates in terms of which employees would always run to court seeking to interdict employers from terminating their services without following the procedure laid down in section 76 of the Industrial Relations Act 2000 (as amended).

19. This court is not convinced that the Applicant has made out a case on the basis of which it should intervene. We are not persuaded that the Applicant has established prima facie rights which need immediate protection and for which he cannot be afforded redress in terms of the remedial powers of this court as envisaged by section 16 of the Industrial Relations Act. He cannot be said to be without alternative remedy in his pursuit of justice should it be found that he has been unlawfully and unfairly terminated.

20. It is for the aforementioned reasons that we find that the points of law succeed with the result that the application be dismissed. We make no order as to costs.

The members agree.

T. A. DLAMINI
ACTING JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 30TH DAY OF APRIL 2012

For the Applicant: S. Mamba (S.P. Mamba Attorneys).
For the Respondent: M. Sibandze (Currie & Sibandze Associates).