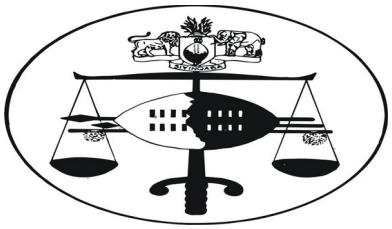

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 418/2015

In the matter between:-

DR BHADALA T. MAMBA **APPLICANT**

AND

CENTRAL BANK OF SWAZILAND **1ST RESPONDENT**
SIKHUMBUZO SIMELANE **2ND RESPONDENT**

Neutral citation : *Dr Bhadala T. Mamba v Central Bank of Swaziland and Another SZIC 61 (12 November 2014)*

CORAM : **DLAMINI J,**
*(Sitting with **D. Nhlengethwa & P. Mamba***
Nominated Members of the Court)

Heard : **10 NOVEMBER 2015**

Delivered : **12 NOVEMBER 2015**

Summary: ***Labour law – Industrial Relations –*** *Applicant seeks to interdict appeal hearing. His contract of employment subsequently elapsed and there was therefore no longer in existence an employer/employee relationship. Applicant also seeking to set aside his dismissal.* ***Held –*** *Applicant's application does not meet peremptory requirement of Rule 15(2) – Applicant has not shown good cause for the matter to be heard as one of urgency.*

1. This matter initially served before this Court on 28 September 2015, on a certificate of urgency and the Applicant, Dr. Bhadala Mamba sought prayers as follows;

1. Dispensing with the normal forms and time limits relating to service and hearing this matter urgently;

2. Condoning the non-service of this application;

3. *A rule nisi do issue calling upon the 1st and 2nd respondents to show cause on a date to be determined by the above Honourable Court why:*

3.1 They should not be interdicted from proceeding to hear the Applicant's appeal pending the Applicant being furnished with a full and proper record of the disciplinary proceedings;

3.2 The 2nd Respondent should not be removed from acting as chairman of the appeal tribunal;

3.3 Costs of the application should not be awarded against the 1st and 2nd Respondents.

4. That orders 3.1 and 3.2 operate with immediate and interim effect pending the finalization of these proceedings.

2. In his founding affidavit, Dr. Mamba states that he is an adult male of Engculwini in the Manzini District. He further states that he is a senior executive of the 1st Respondent Bank holding the position of General Manager in the Economics and Policy Research Department. He states as well that the purpose of his application is to restrain and interdict the 2nd Respondent from conducting the hearing of his appeal pending the furnishing of an audio recording of mitigating and aggravating circumstances of a disciplinary hearing that culminated in the termination of his services.

3. Mamba states that he was hauled before a disciplinary hearing on 24 July, 2015 whereat he was facing the following charges; a) that on or about 10 April and 25 June 2015, he abused his position as GM EPRS by conducting himself improperly through using abusive, insulting and demeaning language toward a subordinate; b) he conducted himself improperly through shouting, threatening and verbally intimidating a subordinate; and c) that by the conduct mentioned above he created an unconducive working environment and atmosphere within the Research Department, thus instilling a sense of fear and/or intimidation among his subordinates. It would appear that

the Applicant raised preliminary objections at the start of the hearing contending that the words complained of were not reasonably capable of constituting an insult, fear, threat or creating an unconducive working environment. Hence, through his representative at the hearing, he applied that the charges preferred against him be quashed. However this application was not successful as the Chairperson of the disciplinary hearing dismissed the application ordering that the matter proceeds to its merits, which it did.

4. At the conclusion of the hearing the Chairperson of the hearing returned a verdict of guilt against Dr. Mamba and he was called upon to mitigate. He points out that in terms of the Disciplinary code and Procedures of the Central Bank of Swaziland (specifically clause 5.2.1.9), for the offence of using abusive or obscene language the sanction that ought to be meted out for a first offender is a written warning. Mamba continues to depose that this fact was even supported by the Human Resources Manager of the Bank who gave evidence at the hearing to the effect that the said code also applied to senior executives like Mamba as well. However after hearing the mitigation and aggravating submissions the Chairperson made a

recommendation to the effect that Dr. Mamba be summarily dismissed. And indeed on the 01st September 2015, the Applicant received a letter from the Human Resource Manager advising that the Bank had considered the recommendation of the Chairperson and resolved to accept it. This meant that the services of the Applicant were therefore terminated as at 01 September 2015.

5. The Applicant thereafter exercised his right of appeal. Through his present Attorneys he also made a request that the original audio recording of the minutes be availed to him for his own transcription purposes and amendment of the grounds of appeal accordingly. The Applicant states that this request was ignored, prompting his Attorneys to write a follow up letter to which the Bank responded undertaking to avail same on the next day, but this was not to be. A preliminary appeal hearing was held on 18 September 2015, where again the Applicant, through its Attorneys, pursued the request for the audio recording of the hearing. Again the 1st Respondent undertook to deliver same on the very same day and in fact the Chairperson of the Appeal hearing even directed that same be delivered to the Applicant's Attorneys by 4:30pm on that same day.

6. The audio recording was eventually furnished to the Applicant's Attorneys on 21 September 2015, and it was only then that an independent transcriber was instructed to transcribe same. It would seem that upon listening to the audio record, the Applicant's Attorneys deduced that the audio recording did not cover the mitigation and aggravation of the sentence proceedings. This was considered the most crucial parts of the Applicant's case since it contained the evidence of the Human Resource Manager confirming that the disciplinary code applied to senior executives as well.

7. On the date set as a call date of the appeal hearing (24 September, 2015), the Applicant's Attorneys pointed out that it would not be possible to proceed with the appeal hearing because the audio recording was too long and that the mitigation and aggravation proceedings had been omitted. The Chairperson of the appeal hearing insisted on proceeding with the hearing on 28 September reminding the Applicant that his contract of employment had only been extended by one month to the end of September, 2015. It is on that basis that this matter then found its way to this Court in the manner it did.

Principally this was the case of the Applicant that was initially filed before this Court.

8. On Monday 28 September 2015, this Court heard the matter without any appearance by the Respondents. It turned out that the Respondents had only been served with the application on that very morning. After hearing Attorney Mr. LR. Mamba the Court raised concern with the fact that the Respondents were not before Court. Nonetheless, and in the interests of equity and justice this Court granted an interim order in respect of prayer 3.1 only, interdicting the appeal hearing pending the Applicant being furnished with a full and proper record of the disciplinary proceedings.

9. Then on Wednesday 30 September 2015, the 1st Respondent's representatives anticipated the return day by setting the matter down and also filed its answering papers in which it vigorously opposed the application of Dr. Mamba. At the hearing of the matter on 30 September though, Attorney Mr. Simelane undertook to engage the Chairperson of the disciplinary hearing in securing the missing portions of the record.

10. Then on 12 October 2015, the matter took new twist altogether. The Applicant now filed a notice of his intention to amend his notice of motion to now include additional prayers as follows;

> *"5. In the alternative and in the event the 1st Respondent failing to comply with prayer 3.1, setting aside the disciplinary proceedings as instituted by the 1st respondent against the Applicant on 15th July,2015.*
>
> *6. The termination of employment by the 1st respondent pursuant to the recommendation of the Chairman is and be hereby set aside."*

11. The 1st Respondent again vigorously opposed the proposed amendment. In the main, it stated that there are no allegations in the Applicant's founding affidavit to support setting aside the disciplinary proceedings. It also stated that the Court may not pronounce on the adequacy or otherwise of the record at this stage as this would amount to usurping the powers and functions of the appeal Chairperson. It also stated that in respect of prayer 6 the amendment should not be

entertained because the contract of employment of the Applicant had expired through the effluxion of time.

12. It is perhaps important for this Court to start off by pointing out and clarifying that the as at 01 September 2015, after the Bank wrote to Dr. Mamba notifying him that it had considered the recommendation of the Chairperson of the disciplinary hearing that his services be terminated and that it had resolved to accept such recommendation, he ceased to be an employee of the Bank. His fate from then lay in the decision of the appeal hearing Chairperson that was to hear and determine his grounds of appeal. Since his disciplinary hearing was recorded both manually and electronically then he is entitled to be given access to same. If there is a problem with the electronic record then the Chairperson, together with Dr. Mamba's representative and the initiator of the disciplinary hearing, have to ensure that they endeavor to reconstruct same from their available notes.

13. One fact that this Court though cannot overlook is that the relationship between Dr. Mamba and the Central Bank of Swaziland was regulated by a fixed term contract of employment. It was governed by a contract

of employment that had a life span of 3 years. And this 3 years was to lapse at the end of August 2015. However, the Governor of the Central Bank on 25 August 2015, wrote to the Applicant advising of his decision, within his discretionary latitude authorized by the Board, to extend his contract by *'not more than 1 calendar month'*. In effect therefore, the contract of the Applicant was to now come to an end on 30 September 2015, and the Applicant accepted such extension.

14. As clarified at paragraph 12 above, on 01 September 2015, the services of the Applicant were terminated, and he forthwith ceased to be an employee of the Central Bank of Swaziland. He then rightfully exercised his right of appeal. But the Court points out that him exercising his right of appeal did not change the fact that he was no longer an employee of the Bank. But he had hope that the appeal hearing would set aside the dismissal. However, the Court points out that after 30 September 2015, no appeal could lawfully be convened without another extension of the contract of employment, which unfortunately did not happen in this matter. Instead what happened in this matter is that the Central Bank Governor wrote to the Applicant notifying him that his contract terminated automatically on this 30

September 2015. This means that the Bank had no intention of any further extensions on the contract, regardless of whether his appeal was eventually heard or not.

15. Having determined therefore, and in fact it being common cause, that the services of the Applicant were terminated on 01 September 2015, the Applicant then has to show good cause why the Court should now set aside the termination of his services in terms of the amendment of his notice of motion. As highlighted at paragraph 10 above, Dr. Mamba now wants this Court to set aside the disciplinary proceedings and ultimately the termination of his employment pursuant the recommendation of the Chairperson. He now wants the Court to determine what he calls the procedurally unfair termination of his services on an urgent basis. In this regard however, there is a hurdle in the Applicant's way. He has to convince the Court why his matter is different from the long queue of matters that are awaiting their turn to be heard and determined by this Court. This is in terms of Rule 15 of the Rules of this Court. Once the Court is satisfied that indeed good cause has been shown it may then direct a matter be heard as one of urgency.

16. In his founding affidavit the Applicant completely ignored to state why the peremptory provisions of Rule 15, especially Rule 15(2) (b) and (c) should be waived. In an attempt to cure this defect he filed a supplementary affidavit in which he states as follows at paragraphs 4, 5 and 6;

4.

"I inadvertently omitted to deal with the reasons why the provisions of Part VIII of the Act should be waived and I beg the Courts condonation.

5.

I have not been able to comply with the provisions of Part VIII of the Industrial Relations Act of 2000 because strictly speaking a dispute had not crystalised in that a decision had not been made on my appeal and therefore internal remedies having not been exhausted.

6.

The matter was urgent since the 2nd respondent had intended to proceed to hear my appeal on the 28th September, 2015. My reporting a dispute to the Conciliation Mediation and Arbitration Commission would have been academic in the circumstances and I would not have been afforded sufficient redress in due course. The Commission has its own time-limits which would have prevented me from obtaining interim relief from the above Honourable Court." (Sic).

17. In terms of the Applicant's supplementary affidavit a dispute had not yet crystalised in that a decision on his appeal had not been made. But that is a wrong summation of the issues. The fact that the Applicant had been dismissed is what is defined as a dispute in terms of the law. In this regard the Court refers to section 2 of the Industrial Relations Act, 2000 (as amended). It defines a dispute to 'include a grievance, a grievance over a practice, trade dispute and means any dispute over the (c) disciplinary action, dismissal, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons.'

18 Another hurdle for the Applicant in this matter is that his supplementary affidavit only seeks to deal with interdicting the hearing and not his subsequent prayers in terms of his amendment. It is common cause that the contract of employment of Dr. Mamba was to expire on 30 September 2015, and that before this date it had already been terminated through his dismissal.

19. The Court has carefully considered the grounds proffered by the Applicant as a basis for this Court to waive the provisions of Rule 15

in his supplementary affidavit and has come to the following conclusions; firstly and in terms of the prayer for interdicting the appeal hearing, the Court finds that indeed this prayer is now academic since the contract of employment had only been extended for one moth up to the end of September 2015. Secondly, and in terms of the prayers for setting aside the hearing and the subsequent termination of his services, the finding of the Court is that no reasons at all have been advanced by the Applicant for the waiver of Rule 15(2)(b). Not only that, but the Applicant has also not set forth explicitly reasons why he cannot be afforded substantial relief at a hearing in due course, a requirement of Rule 15(2)(c). It was of paramount importance that the Applicant sets forth the reasons why he wanted Part VIII of the Act waived because he was now challenging the decision to dismiss him. He also had to convince the Court on reasons why he cannot be afforded substantial relief at a hearing in due course. This is because he now wanted this Court to set aside his dismissal because of what his representative, Advocate Flynn, said was the procedurally unfair termination of his services.

20. Sufficient and cogent reasons for wanting to jump the long queue of unfair dismissal matters awaiting their day before this Court have to be advanced by litigants wanting to utelise the extreme procedure of urgent applications. This, the Court states in light of the remedial powers it has in terms of section 16 of the Industrial Relations Act, 2000, as amended. Without the sufficient and cogent reasons it cannot be that a matter, such as the present one of Dr. Mamba, where a litigant is challenging his dismissal as unfair, can be heard on an urgent basis.

21. In the case of ***Phylyp Nhlengethwa & Others v Swaziland Electricity Board IC Case No. 272/2002,*** the then Judge President of this Court, Nduma JP, had this to say;

> *"The creation of this institution (CMAC) 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."*

22. This Court reiterates that the policy our Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court, it must be reported to the Conciliation, Mediation and Arbitration Commission which is obliged to conciliate with a view to achieving a settlement between the parties. And where the dispute remains unresolved the Commission is obliged to issue a certificate to that effect and then, and only then, may an application be made to this Court for relief. Whether unfairness has occurred is not the issue. The issue is that an irregularity has occurred which is of a kind and degree to give rise to injustice, and further that such injustice is such that the affected party might not by other means attain justice. This is obviously not such one matter where it can be said that justice might not be attained if the Applicant were to be heard in due course. The guiding principle of this Court is that 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.

23. In the nature of things, it is impossible for all matters to be dealt with as soon as they are ready for trial. Considerations of fairness require

that litigants wait their turn for the hearing of their disputes. To interpose at the top of the queue, in the manner the Applicant seeks, a matter which does not warrant such treatment, automatically results in an additional delay in the hearing of others awaiting their turn. This would be prejudicial and unfair to them.

24. We have previously stated that there is now a steady increase of cases that come to this Court brought by senior employees of companies to either challenge their suspensions or dismissals on an urgent basis thus unnecessarily clogging the Court's roll. This is a worrying trend. In most of these applications, Applicants who are persons of means and occupy top positions in their places of employment, engage lawyers who approach this Court with fanciful arguments about why this Court should, for instance, set aside their dismissals on an urgent basis, even where no such urgent relief is deserved. This in essence amounts to bypassing the prescribed dispute resolution processes and procedures in terms of the Industrial Relations Act 2000 (as amended) for such kinds of disputes. In this Court, and before the law, all litigants are equal. And it is only in exceptional cases and on good cause being shown that this Court will direct that a matter takes

precedence over others and be enrolled as one of urgency. This matter of the present Applicant is not one such matter.

25. For the reasons afore mentioned it is the considered view of this Court that the present application of the Applicant cannot succeed at this stage and as such it is dismissed. This therefore means that the interim order granted on 28 September 2015, be and is hereby discharged since it has now become academic. The Court makes no order as to costs.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 12th DAY OF NOVEMBER 2015.

For the Applicant : Advocate Flynn (Instructed by L.R. Mamba Attorneys)
For the Respondent :Attorney Mr.M. Simelane (M. P. Simelane Attorneys)