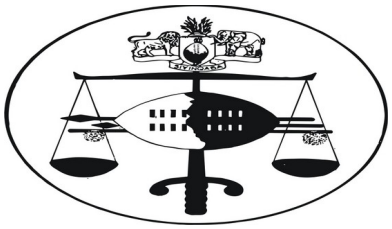

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

CASE NO. 598/2015(B)

In the matter between:-

DUMISANI Z. MNGOMEZULU **APPLICANT**

AND

SWAZILAND WATER &AGRICULTURAL DEVELOPMENT ENTERPRISE [SWADE] **1ST RESPONDENT**

THE MINISTER OF AGRICULTURE **2ND RESPONDENT**

THE CHAIRMAN OF THE STANDING COMMITTEE ON PUBLIC ENTERPRISES **3RD RESPONDENT**

THE ATTORNEY GENERAL N.O. **4TH RESPONDENT**

Neutral citation : *Dumisani Z. Mngomezulu v SWADE & 3 Others (2014) 2016 SZIC 1 2 (16 March 2016)*

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

Heard : **10 MARCH 2016**

Delivered : **16 MARCH 2016**

Summary: ***Labour law – Industrial Relations –*** *Applicant seeks to compel the 1st Respondent to refer dispute on termination of Applicant's services to conciliation in terms of contract of employment of the parties.* ***Held –*** *Applicant has not shown good cause for urgent intervention by the Court. Applicant has not advanced reasons why he cannot be afforded substantial relief at a hearing in due course, especially taking into account remedial powers of the Court in terms of section 16 of the Industrial*

Relations Act. ***Held –*** *Contract of employment between the parties has been terminated therefore Applicant cannot seek to rely on same.*

1. On 18 December 2015, Applicant, Dumisani Mngomezulu filed before this Court on a certificate of urgency, an application in which he principally sought prayers as follows; a) an order that the dispute between him and the 1st Respondent (SWADE) relating to his employment status be referred to arbitration, b) that the 1st Respondent do all in its powers to facilitate and expedite the arbitration referred to in prayer 3.1 and c) that pending the completion of these proceedings and the arbitration referred to in prayer 3.1 the Applicant's continued employment is maintained and the termination of the Applicant's services by the 1st Respondent is set aside and the purported lapse of the Applicant's employment by the 1st Respondent and desecondment by the 4th Respondent are hereby stayed.

2. After hearing the parties in argument, the Court per Nkonyane J, on 13 January 2016, dismissed the application with costs. In dismissing the application the Court stated as follows at paragraph 22 of its judgement;

"The Court is of the view that it does not matter that the setting aside of the employer's decision to terminate is sought on a temporary or permanent basis. The fact remains that the employee's services would have already been terminated by the employer. If the employee is of the view that the termination was unlawful either for substantive or procedural reasons, that is a question that the Court should determine after a dispute has been reported with CMAC and not resolved."

3. After the dismissal of his application by this Court on 13 January 2016, the Applicant then sought to invoke clause 13 of his contract of employment. He instructed his attorneys to write to the 1st Respondent seeking that the dispute of the parties regarding the unfair termination of his services be referred to conciliation in terms of the said clause 13.1. The response he received from the 1st Respondent's Attorneys brought him no joy it would seem. In effect this response was to the effect that the Applicant should report a dispute to the Conciliation Mediation and Arbitration Commission. The Applicant though feels that the 1st Respondent is contractually bound and obliged by clause 13 of the contract of employment signed by the parties to submit to arbitration. The 1st Respondent on the other hand insists that the Applicant follow the CMAC route, hence now this stalemate ensuing.

4. The matter has now found its way to this Court, again on a certificate of urgency. The Applicant in this second urgent application principally seeks orders as follows;

"3. Granting a rule nisi, to be made returnable on a date to be determined by the above honourable Court, calling upon the Respondent to show cause why an order on the following terms should not be made final:

3.1 That the dispute between Applicant and 1st Respondent relating to 1st Respondent's termination of the Applicant's services be referred to arbitration in terms of Clause 13.2 of Applicant's Contract of Employment.

3.2 That pending the outcome of these proceedings and of the arbitration referred to under Prayer 3.1, the 2nd Respondent be and is hereby interdicted from appointing a substantive Chief Executive Officer for the 1st Respondent.

4. That prayers 3.2 above operates with immediate and interim effect pending finilisation of this application.

5. Costs of this application."

5. Mngomezulu's ground for seeking that the matter be enrolled as one of urgency is his fear that the Respondents are working behind the scenes to swiftly recruit and appoint a substantive Chief Executive

Officer to replace him thus rendering the primary relief he seeks academic.

6. The 1st Respondent opposes this application of Mr. Dumisani Mngomezulu. And in opposition thereto the 1st Respondent has filed an answering affidavit deposed to by the Acting Chief Executive Officer of SWADE, Zinhle Motsa. The Acting Chief Executive Officer brings it to the attention of the Court that the Applicant has previously brought an urgent application against the same parties in December 2015 and that his first application was dismissed by this Court. She points out that the relief sought by the Applicant in the first application was similar to the present one he now seeks in this second application, save for the new prayer in this second application in which he seeks that the 2nd Respondent be interdicted from appointing a substantive CEO of SWADE, whereas in the first one he wanted his employment maintained and the termination of his services set aside.

7. In essence, the 1st Respondent contends, the only difference between the present urgent application and the previous one is that the Applicant is asking that the 1st Respondent be interdicted from

appointing a substantive CEO for SWADE, pending the outcome of the arbitration as opposed to interdicting the 1st Respondent from terminating his services pending the outcome of the arbitration. Hence the 1st Respondent raises the defence of *res judicata.*

8. Perhaps as a starting point, the Court should point out that the employment agreement signed between the parties in September 2013, regulated their employment relationship. So that once either of the parties terminates it, it immediately ceases to exist and therefore no longer regulates their relationship since one of them would have decided that the employment relationship be terminated. Whether such termination lawful or not and whether it is procedurally or substantively fair or not is a question for another day, of course after due process of our law in terms of the Industrial Relations Act, 2000, as amended.

9. Now in this matter before us, the Applicant seeks that the dispute he has with the 1st Respondent relating to the termination of his services be referred to arbitration in terms of clause 13.2 of his contract of employment. He ignores the fact that the Employer, SWADE, decided

to terminate his services with effect from 01 December 2015. The effect of this termination of the Applicant's services means that the employment contract that regulated the employment relationship immediately ceased to exist when the employer terminated it. Legally therefore, the Applicant cannot seek to compel the 1st Respondent to adhere to a contract that has ceased to exist.

10. It would seem that the Applicant still regards himself as an employee of the Respondent whereas that is not the case. His services have been terminated and he no longer has any relationship with SWADE. The agreement of the parties had provided as follows at clause 13.1;

> *"Should any disagreement, dispute or difference arise between the parties to this agreement…" (*Court's underlining*).*

The words above are self-explanatory. They connote that if a disagreement, dispute or difference arises as between the contracting parties, then it has to be dealt with in a particular manner. But this is as long as they are still parties to the agreement. In this case though, the reality is that they are no longer parties to the agreement because the 1st Respondent decided that it would no longer be part of the

agreement when it terminated the services of the Applicant. Neither of the parties is contractually bound by this contract that has been terminated.

11. A critical question in this regard is; whether this Court has the power to compel the 1st Respondent to refer the dispute between the parties, relating to the (1st Respondent's) termination of the Applicant's services, to arbitration in terms of this clause 13, especially in light of the fact that the employment contract between the parties has already been terminated? Clearly not, because the Applicant is no longer an employee of the 1st Respondent. The 1st Respondent in this matter evinced a clear and unambiguous intention not to go on with the contract of employment when it terminated the services of Mr. Mngomezulu. Neither the Applicant nor the 1st Respondent is still a party to the agreement because the 1st Respondent decided to terminate it. Neither of the parties is still bound by the terms of the contract because they no longer regulate them, they were terminated when the services of the Applicant were terminated. The 1st Respondent therefore cannot be compelled to adhere to a contract that it made a clear and unambiguous intention to terminate, at least until

the contract is reinstated by the Courts. One wonders therefore why and how the Applicant seeks to enforce an agreement that was terminated.

12. That being the case therefore, the Applicant then has to show good cause why the Court should set everything aside, hear his matter on an urgent basis and compel the 1st Respondent to refer the dispute relating to the termination of his services to arbitration on the basis of the terminated employment contract. He has to convince the Court that his matter is peculiar or exceptional.

13. The reason that the Applicant relies for seeking that this matter be enrolled as one of urgency is that the Respondents are working behind the scenes to swiftly appoint a substantive CEO, which he says will render the primary relief he seeks academic. He fears that the Respondents may recruit and employ a replacement employee making it impossible for him to re-take him position. He also fears that he would suffer irreparable harm if he were to approach CMAC because by the time his dispute is declared unresolved and eventually heard in this Court it would already be academic.

14. Our law is that an Applicant approaching this Court for urgent relief must explicitly advance reasons why he claims he cannot be afforded substantial redress at a hearing in due course. The Applicant in this matter has failed to do so. His matter is neither peculiar nor exceptional. It is not different from the hundreds, if not thousands, of matters that are currently pending before this Court concerning the breach of the terms and conditions of employment by the employer. The refusal by the 1st Respondent *in casu* to refer the dispute of the parties to arbitration can also be categorized as a breach of the terms of their contract, which the Applicant regards as unfair. However, that unfairness has occurred is not the issue at this stage. 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 report the dispute with CMAC and thereafter bring it to this Court for determination, using the provisions of Part VIII of the Industrial Relations Act.

15. Another reason the Court considers that the reasons relied on by the Applicant for enrolment of this matter on an urgent basis are not sufficient is that in terms of the remedial powers of this Court in Section 16 of the Industrial Relations Act, 2000 (as amended), the Court can order reinstatement of the affected employee from any date not earlier than the date dismissal. So that even if where there is already a replacement employee in the Applicant's position, as he fears, that will not prevent the Court from ordering that he be reinstated where it finds in his favour.

16. This Court has previously stated that it is there to serve the public, and this service is likely to be disrupted if considerations such as those advanced by the Applicant were allowed to dictate the priority matters should receive on the roll. 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.

17. The Court has in recent times also warned that it remains concerned with the number of cases that come before it brought by the top executives and senior employees to either challenge their suspensions, dismissals or seeking such other relief as the present one, on an urgent basis thus unnecessarily clogging the Court's roll. This is a worrying trend which has been steadily on the increase in the past years. 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 grant them relief on an urgent basis, even where no such 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.

18. For the afore-mentioned reasons, it is the considered view of this Court that the present application of the Applicant has not shown exceptional circumstances for urgent intervention by the Court, especially since the contract he seeks to rely on has been terminated. It cannot be said that the Applicant cannot be afforded substantial redress at a hearing in due course. The finding of the Court is that there is nothing peculiar or exceptional with this matter of Dumisani Mngomezulu. It cannot be said that this is a matter where justice might not be attained if the Applicant were to report the dispute with CMAC and thereafter bring it to this Court for determination, using the provisions of Part VIII of the Industrial Relations Act. It is therefore unnecessary that this Court traverses the defence of *res judicata* as raised by the 1st Respondent. The application was bound to fail even before it got out of the starting blocks. The application is accordingly dismissed with costs, which are to include certified costs of Counsel. The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 16th DAY OF MARCH 2016.

For the Applicant: Attorney Mr. M. Sibandze (Musa M. Sibandze Attorneys)
For the Respondent: Advocate Mr. D. Smith (On instructions of S.V. Mdladla Attorneys)