



**IN THE INDUSTRIAL COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO: 410/2013**

In the matter between:

**ELIJAH NHLANHLA ZWANE**

**APPLICANT**

And

**SWAZILAND POST AND  
TELECOMMUNICATIONS**

**1<sup>st</sup> RESPONDENT**

**THE BOARD OF DIRECTORS OF  
SWAZILAND  
POST & TELECOMMUNICATIONS**

**2<sup>nd</sup> RESPONDENT**

**THE CHAIRMAN OF THE BOARD OF  
DIRECTORS OF THE SWAZILAND POST AND  
TELECOMMUNICATIONS N.O**

**3<sup>rd</sup> RESPONDENT**

**THE MINISTRY OF INFORMATION,  
COMMUNICATION AND TECHNOLOGY**

**4<sup>th</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**5<sup>th</sup> RESPONDENT**

Neutral citation : *Elijah Nhlanhla Zwane vs Swaziland Post & Telecommunications Corporation & Others* [410/2013] [2018] SZIC 56 (20 June 2018)

**CORAM:**

**BONGANI S. DLAMINI : ACTING JUDGE**

**DAN MMANGO : MEMBER**

**NKHOSINGIPHILE DLAMINI : MEMBER**

DATE HEARD : 18 JUNE 2018

DATE DELIVERED : 20 JUNE 2018

***Summary: Labour Law- Application for a declaratory order- Applicant seeking an order declaring the termination of his contract of employment to be unlawful - Applicant also seeking to have the appointment of current Managing Director set aside for being unlawful and invalid.***

***Held; The orders sought by the Applicant not competent and proper given the circumstances of the matter – Application accordingly dismissed.***

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## RULING

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### **Introduction**

1.0 On the 4<sup>th</sup> September 2013, the Applicant instituted an application under a certificate of urgency and sought the following orders;

**“1. Dispensing with the normal forms of service and time limits provided by the Rules of this Honourable Court and hearing this matter urgently.**

**2. That the findings of the forensic audit investigation for which the Applicant was suspended by 2<sup>nd</sup> Respondent, from work on the 28<sup>th</sup> March 2012, be made known to the Applicant and;**

**Alternatively;**

**3. That the suspension of the Applicant by the 2<sup>nd</sup> Respondent be uplifted and;**

**4. That the Applicant should, with immediate effect, be re-instated into his position as the Managing Director of the 2<sup>nd</sup> Respondent and;**

**5. That pending the outcome of this application;**

**5.1 The 2<sup>nd</sup> Respondent be and is hereby interdicted from engaging in any recruitment exercise to appoint a Managing Director to replace the Applicant and;**

**5.2 The 2<sup>nd</sup> Respondent is interdicted from taking any steps to terminate the Applicant's contract with the 3<sup>rd</sup> Respondent.**

**6. That prayers 5.1 and 5.2 hereinabove operate with immediate and interim effect pending the outcome of this application.**

**7. Costs of suit against the Respondents on a punitive scale.**

**8. Further and/or alternative relief.**

**9. That a *Rule Nisi* do hereby issue returnable on a date to be determined by this Honourable Court for the Respondents to show cause why an Order in terms of paragraphs 2,3,4, and 7 should not be made final.”**

2.0 On the 5<sup>th</sup> September 2013, the Court granted an interim order in terms of prayer [5.1] of the notice of application and the matter was to be followed by several postponements with the last of such postponements being the 4<sup>th</sup> December 2013.

- 3.0 In the meantime, the parties exchanged their pleadings and a book of pleadings was filed in Court on the 11<sup>th</sup> October 2013.
- 4.0 In the answering affidavit deposed to by one Author Ngcobo who was the Chairman of the Board of Directors, the corporation (First Respondent) had, with the consent of the line Minister and the Standing Committee on Public Enterprises taken a decision to pay the Applicant all his remuneration and benefits contained in his contract of employment with the First Respondent as if the contract had run its full course.
- 5.0 The Board of Directors of the First Respondent also took a decision to appoint one Mr. Petros Dlamini as the Managing Director of the First Respondent with immediate effect.
- 6.0 The Applicant filed a replying affidavit and insisted therein that he was entitled to know the reasons of his suspension and subsequent termination by the Board of Directors. According to the Applicant's assertion in the replying affidavit, it is immaterial that all his dues in terms of the contract were fully settled by the Respondents when a

decision was taken to replace him at the Swaziland Post and Telecommunication Corporation.

7.0 On the 14<sup>th</sup> October 2013, the Applicant filed a notice to amend the relief sought in the main application. The notice to amend sought to add or include two other prayers couched as follows;

**“1. Declaring the termination of the Applicant’s employment as the Managing Director of the First Respondent to be unlawful and invalid and setting it aside.**

**2. Declaring the appointment of Mr. Petros Dlamini as the Managing Director of the First Respondent to be unlawful and invalid and setting it aside.”**

**Brief Historical background**

8.0 The matter has been pending in Court since the year 2013 and from our assessment of the Court file, the Applicant has done little to have it finalized.

9.0 The First Respondent's Counsel took it upon himself to place the matter on the Court's roll and, in that regard, two notices of set down were prepared and served upon the Applicant's attorneys of record with a view to have them attend Court in order for the matter to be heard and finalized.

10.0 Despite being served with notices of set down on two different occasions, the Applicant's attorneys failed to attend Court and this necessitated that the Court hears the application in the absence of the Applicant and/or his attorneys of record.

**Analysis of the pleadings and brief submissions from the First Respondent's Counsel**

11.0 The Court notes that when the employer opted to pay the Applicant's remuneration package in terms of the contract, it discharged all its obligations arising from the contract. The Applicant was accordingly released from the contract and the employer was then at liberty to engage another person to take charge of the institution.

12.0 On another note, it is now settled law in our jurisdiction that once a termination is effected by an employer against an employee, the only available remedy to that employee is to report a dispute of unfair dismissal to the Conciliation Mediation and Arbitration Commission (“CMAC”). In the High Court Case of **Alfred Maia v The Chairman of the Civil Service Commission & 2 Others (1070/15) 2016 SZHC 25 (17 February 2016)**, the Court stated the principle as follows;

**“As already indicated above, a review [in a case of dismissal or termination of a contract] is not one of the appropriate reliefs to be granted by the Industrial Court, because as a creature of statute, that power is not extended to it anywhere. It also could not have been part of those powers given the Industrial Court under the broad reliefs it is entitled to grant, which are those that arise between employer and employee, as it does not so arise.”**

13.0 If the Applicant’s complaint is that the termination of his contract was unlawful and invalid, his remedy does not lie in a review or declaratory order but lies under the mechanism provided under Part VIII of the Industrial Relations Act 2000 (as amended).



14.0 The other relief sought by the Applicant which is to have Mr. Petros Dlamini's appointment set aside for being unlawful and invalid also forms part of the main relief sought by the Applicant which is to have the termination of his contract declared unlawful and invalid and must therefore follow the same legal route. We also note that inasmuch as there is an order sought against Mr. Petros Dlamini, there is no indication from the pleadings filed in Court that he was personally cited or served with the court papers. The Court cannot grant relief which fundamentally affects the rights of another person without being satisfied that the person in question was served with the Court papers. On this ground alone, the Applicant's application cannot succeed.

15.0 We also agree with the submissions made on behalf of the First Respondent which is that the matter has been overtaken by events and as such, the relief sought by the Applicant would be incompetent to grant. Indeed, the contract upon which the Applicant relies for the relief he is seeking has run its full course with the result that all the rights and obligations of the parties arising thereunder have become non-existent.

16.0 In law, the ‘doctrine of effectiveness’ applies to all disputes that come before the Courts for resolution. What this means in a layman’s language is that whatever order the Court issues must be possible to give effect to. The Court cannot give effect to rights and obligations which were fulfilled even before the contract expired. We say that the rights and obligations in Applicant’s case were fulfilled because substantially, the Applicant was expected to render services to the First Respondent and, for those services, the First Respondent was expected to remunerate the Applicant in accordance with the terms agreed upon by the parties in the written contract. The Applicant can therefore not seek an order to render services on a contract that has expired and on which he was fully paid all benefits for the duration of that contract.

17.0 In **Hebstein & Van Winsen *et al*, The Civil Practice of the Supreme Court of South Africa (4<sup>th</sup> Ed) at p.52**, it is stated by the authors as follows;

**“While it is not capable of application in every case, South African courts have in many instances accepted the principle that jurisdiction depends upon the power of the court to give an effective judgement. Thus in *Steytler NO v Fitzgerald* [1911 AD**


**295 at 346] it was said that ‘a Court can only be said to have jurisdiction in a matter if it has the power not only of taking cognizance of the suit, but also of giving effect to its judgement’.**”

18.0 As already indicated above, the Applicant cannot be reinstated on a contract that has expired (assuming that the Court has jurisdiction to entertain the review application by the Applicant) and as such the relief he is seeking stands to be dismissed.

**The court accordingly makes the following orders;**

- a) Both Applications, that is, the main application together with the amended application filed by the Applicant are dismissed.**
- b) There is no order as to costs.**

**The members agree.**

  
BONGANI S. DLAMINI  
ACTING JUDGE OF THE INDUSTRIAL COURT

*For the Applicant* : *No appearance*

*For the first Respondent* : *Mr. M. Sibandze (Musa M Sibandze Attorneys)*