INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO.164/2016

In the matter between:

KENNETH MASHABA Applicant

And

CENTRAL BANK OF SWAZILAND Respondent

Neutral citation: Kenneth Mashaba vs Central Bank of Swaziland (164/2016) [2017] SZIC 01 (2017)

Coram: MAZIBUKO J,
(Sitting with A.Nkambule & M.Mtetwa
Nominated Members of the Court)

Last Heard: 29th November 2016

Delivered 29th November 2016

Summary: *Urgent application- requirement for: Rule 15 provisions are peremptory. Failure to follow Rule 15 provisions is fatal to an application that is brought on urgency.*

Court's power to order reinstatement or re-engagement of a dismissed employee: where the Court finds that an employee has been dismissed unfairly, it has power (in an appropriate case) to order reinstatement or re-engagement of the dismissed employee.

Application for urgent interdict: Applicant must prove that he has no adequate alternative relief and that if the interdict is not granted on urgent basis the applicant would suffer irreparable harm as a result of the Respondent's conduct.

REASONS FOR EX TEMPORE RULING

18TH JANUARY 2017

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1. The Respondent is the Central Bank of Swaziland a financial institution established in terms of the Central Bank of Swaziland Order 1974, with power to sue and be sued.

2. The Applicant is Kenneth Mashaba who has challenged the termination of his contract of employment with the Respondent.

3. On the 1st January 1999 the Applicant was employed by the Respondent as a Systems Support Officer. A copy of the letter of employment is attached to the founding affidavit marked KM3. The Applicant was appointed to a post that was unionisable. There is a Disciplinary Code and Procedures Agreement which the Respondent concluded with a trade union named Swaziland Union of Financial Institution and Allied Workers - also known as SUFIAWU. According to the Applicant the Disciplinary Code applies in his case.

4. On the 26th May 2003 the Applicant was promoted to the position of: Manager Information Technology. The letter of appointment is marked KM4. According to annexure KM4, some of the conditions in terms of which the applicant was employed initially – remained unchanged. The Applicant argued that the Disciplinary Code still applied to him in the new position to which he had been promoted.

5. On the 2nd April 2014, the Applicant was suspended from work by letter – namely annexure KM1. The Applicant was subsequently charged with a disciplinary offence whereupon he was facing several counts of alleged misconduct. The Applicant has challenged the disciplinary charges on the basis that, inter alia, he was charged contrary to the provision of the Disciplinary Code.

6. A disciplinary hearing proceeded and the Applicant was found guilty of misconduct. The Applicant was eventually dismissed from work by letter dated 2nd February 2016 – annexure KM8. The Applicant appealed the decision to dismiss him. The appeal was unsuccessful. A letter dismissing the appeal is marked KM9.

7. The Applicant has challenged his dismissal on the basis that it contravenes the provision of the Central Bank Order 1974. The Applicant pointed out that the letter of dismissal as well as the letter dismissing the appeal does not state that the decision contained therein was taken by the Respondent's board. The Court was referred to Section 17 of the Central Bank Order which reads thus:

"All appointments of officers and employees of the Bank shall be only to positions created by or pursuant to decisions of the board and at such remuneration and on such other terms and conditions as shall be prescribed by the board."

(Record page 12)

The Applicant's argument is that the letter of dismissal was not sanctioned by the board and it should therefore be set aside as a nullity.

8. The Applicant further complained that the disciplinary charges were instituted out of time and in contravention of the disciplinary code, and consequently they should be set aside.

9. On the 2nd June 2016 the Applicant brought an urgent application to Court for relief as follows:

"1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of

the above Honourable Court and directing that the matter be heard as one of urgency.

2. *Pending finalization of the matter, a rule nisi do hereby issue returnable 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 *Setting aside the Respondent's letter dated 17th May 2016.*

    2.2 *The Respondent be ordered to release to Applicant the investigation report concerning the E7.5 Million theft.*

    2.3 *Declaring the entire disciplinary hearing instituted against the Applicant as null and void after it was held out of time.*

    2.4 *Ordering the Respondent to stop any recruitment of Applicant's position.*

Alternatively; reversing any appointment made in favour of anyone pursuant to the letter dated 17th May 2016.

2.5 Interdicting Respondent from claiming or deducting the Applicant's salary from February 2016 to May 2016 pursuant to the decision encapsulated in the letter dated 17th May 2016.

2.6 Costs of suit.

2.7 Such further and or alternative relief."

(Record pages 3-4)

10. According to the Applicant, exceptional circumstances exist in his case which would justify the Court hearing this matter on an urgent basis. Those exceptional circumstances entitle the Applicant to bypass the provisions of part viii of the Industrial Relations Act No 1/2000 (as amended). The Applicant presented the alleged exceptional circumstances as follows:

"24. This Honourable Court has the necessary power to restrain illegalities in employment settings. In my case, a valid dismissal which complies with the law must be by resolution of the Respondent's Board, inter alia and secondly be in compliance with the terms and conditions of my service.

25. In casu, I have demonstrated that there is no such reference to a resolution having been taken as envisaged by Section 18 of The Central Bank of Swaziland Order, 1974.

26. This is a requirement by law and the Court should come to the aid of an employee who seek[seeks] to enforce contractual rights. I have done so promptly and instanter, to seek to set aside the letter of 17th May 2016 [sic].

27. I am not seeking to have the issue of my purported dismissal heard in priority of other cases, all I am seeking is to set aside a blatantly and unlawful act to terminate my services. I am not [as can be seen from

the aforegoing paragraphs] seeking to have the above Honourable Court pronounce upon whether it was fair or not for the Respondent to terminate my services. All, I seek is that the termination if it should take place, it must adhere to the legal requirements i.e. in terms of the Central Bank Order and my terms and conditions of Employment. My salary should not be deducted purportedly under that appeal decision as it was agreed that my employment status quo remains the same during the appeal.

28. *Had my purported dismissal complied with the legal requirements stated above, I would then have to report a dispute to look at the fairness or otherwise of the dismissal. In which event, the enquiry at that stage would be limited to determining whether my dismissal was procedurally and substantively fair.*

29. *The distinction herein is that, I am not challenging either and that set[sets] apart my case from any ordinary dismissal situation. The gist of my*

challenge is that, it is illegal or unlawful for the Respondent to purport to terminate my services in the absence of a Board resolution or in violation of my terms of service. Hence the letter of 17th May 2016 ought to be set aside."

(Record pages 13-14)

11. According to the Applicant his case should be exempted from the requirements of part VIII of the Industrial Relations Act for two reasons. Firstly, the Applicant's dismissal is invalid in that the Respondent has failed to comply with the Central Bank Order 1974 in the manner it dismissed him. Secondly, the dismissal is illegal because it does not comply with the terms and conditions of the contract of employment. According to the Applicant, his case is different from other cases that come before Court on an unfair dismissal claim – in that he is not challenging the procedure at the disciplinary hearing or the merits of the disciplinary hearing that the Respondent brought against him. Instead he is challenging the

authority of the Respondent in instituting disciplinary charges against him as well as terminating his employment.

11.1 The Applicant added that if his dismissal is not enrolled as a matter of urgency,

> *"... then justice may not by other means be attained. These processes set out in the Order of 1974[and] the terms and conditions of my service are to be jealously guided as employment in the contrary [country] is legally protected. An unfair dismissal determination at a later stage will not afford me the protection I seek as enshrined in the Order and Terms of service."*

(Record page 15)

11.2 In supporting urgency, the Applicant also stated that,

> *"34. This matter is urgent on account of the fact that, there is an unlawful invasion of my rights and violation of the law."*

(Record page 15)

12. The Respondent filed an answering affidavit which was deposed to by a certain Ms Gcebile Dlamini who is or was its Human Resources Manager. The Respondent raised points *in limine* and further pleaded over on the merits. Among the points raised were the following:

12.1 The Industrial Court has no jurisdiction and/or power to review an employer's decision to dismiss an employee.

12.2 The Applicant has failed to make a case for an interdict.

12.3 The Applicant has failed to establish urgency and the matter therefore cannot be heard as such but should proceed in the ordinary manner.

13. Part VIII of the Industrial Relations Act (hereinafter referred to as the Act) provides a mechanism by which a dispute existing between employer and employee – may be resolved. The aggrieved party (in this case the Applicant) is expected to report the dispute with the Conciliation, Mediation and Arbitration Commission. (hereinafter referred to the Commission). The Commission is mandated to

attempt to resolve the dispute within a stipulated time frame, failing which to issue a certificate confirming that the dispute remains unresolved. When the aggrieved party is armed with a 'Certificate of Unresolved Dispute', he would then be entitled to file the dispute with the Industrial Court – for adjudication. Once the dispute has been filed with the Court, the aggrieved party will have to wait his turn for his matter to be placed on the Court roll for hearing. There is a growing tendency among some litigants to try and bypass the waiting period by bringing their matters to Court under a certificate of urgency when infact they do not qualify as such.

14. In terms of rule 15 (3) of The Industrial Court Rules of 2007, the Court has a discretion to waive part viii of the Act in an urgent matter. However, a litigant who seeks to approach the Court in terms of the rule 15 has to meticulously follow the mandatory requirements of the rule. The rule provides as follows;

"15(1) A party that applies for urgent relief shall file an application that so far as possible complies with requirement of rule (14).

(2) The affidavit in support of the application shall set forth explicitly-

(a) the circumstances and reasons which render the matter urgent;

(b) the reasons why the provisions of Part viii of the Act should be waived; and

(c) the reasons why the applicant cannot be afforded substantial relief at a hearing in due course.

(3)On good cause shown, the court may direct that a matter be heard as one of urgency".

15. The onus is on the Applicant to demonstrate with evidence that his matter is urgent within the meaning of rule 15 (2) a), b) and c). The grounds for urgency must clearly appear *ex facie* the affidavit. An incomplete or deficient affidavit cannot be supplemented by able argument delivered by counsel from the bar. Failure to satisfy the

requirements of rule 15 (2) a), b) and c) would mean that the matter is not urgent. The Applicant would then have to report his dispute to the Commission in accordance with part viii of the Act and follow the procedure as stated therein until a 'Certificate of Unresolved Dispute' is issued. This Court is in agreement with the dictum expressed by his Lordship Dlamini J in the matter of HLOB'SILE NDZIMANDZE VS THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION N.O. and 2 others SZIC case no. 252/2016 (unreported), that:

> *"17. The rules of this Court make it peremptory that litigants wanting to be heard on an urgent basis shall expressly state a) the circumstances and reasons which render the matter urgent, b) the reasons why the provisions of Part VIII of the Industrial Relations Act, 2000[as Amended] should be waived and c) the reasons why that litigant cannot be afforded substantial relief at a hearing in due course. All this has to be stated in detail. Nothing should be left implied. And once the Court is satisfied that good*

cause has been shown for the matter to be heard on an urgent basis, it may direct that it be heard as such."

(Underlining added)

(At page 12)

16. Every employee who is challenging his dismissal is capable of accusing the employer of some illegality, irregularity or invalidity in the manner the dismissal was carried out. Whether the attack on the dismissal is based on an allegation that the employer grounded his decision on –

16.1 a wrong principle of law, or

16.2 a wrong conclusion on the facts, or

16.3 a breach of procedure, or

16.4 a breach of policy, or

16.5 a breach of a disciplinary code, or

16.6 a breach of the contract of employment –

it is still a claim for unfair dismissal. The phrase: unfair dismissal - is a collective term that incorporates an illegal,

irregular and invalid dismissal. A claim for an unfair dismissal does not become urgent simply because it is premised on a technical point – which would overturn the dismissal, if it is successfully argued.

17. The Applicant's argument is that his dismissal should be set aside on an urgent basis (in terms of rule 15(2)) because:

    17.1 He was dismissed contrary to the terms and conditions of his employment contract. In other words the Applicant claims that the dismissal was in breach of a contract.

    17.2 He was dismissed contrary to the Central Bank Order of the 1974. The Applicant therefore accuses the Respondent of breach of a legal principle or procedure.

18. The Applicant revealed further - his additional reason for bringing his claim to Court as an urgent application. The Applicant feared that if he were to comply with the provisions of part viii of the Act, the matter would take a considerable amount of time to be finalised in Court. The Respondent would in the meantime, replace him in

his position. In the event that the Court declares the dismissal to be unfair, the Applicant would apply for reinstatement. A potential order for reinstatement would be met with difficulties if his position has been filled. Those difficulties might deny him a reinstatement order which he otherwise would be entitled to.

19. The fear of being replaced by another employee at work is one that is common to all employees – who have applied to Court to have their dismissals set aside. If that fear is a ground for urgency, that would mean – all similar cases wherein an order setting aside a dismissal is sought, would qualify to be treated as urgent. That is not a situation that is envisaged by rule 15 (2) a), b) and c).

20. Rule 15 (2) (c) compels an Applicant who has filed an urgent application before Court to explain why he claims he cannot be afforded substantial relief at a hearing in due course. Put differently, the Applicant must show that he has no adequate alternative relief. In other words if the order he is seeking is not granted urgently – he would suffer irreparable harm.

20.1 The Applicant's contention that the dismissal is in breach of the Central Bank Order 1974 or that it has not been sanctioned by the Respondent's board of directors, is one in which the Court can grant substantial relief at a hearing in due course.

20.2 Furthermore, the contention that the dismissal is in breach of the terms in the contract of employment, is also one in which the Court can grant substantial relief – at a hearing in due course.

21. Section 16(1) of the Industrial Relations Act provides that:

> *"16 (1) If the Court finds that a dismissal is unfair, the Court may –*
>
> *(a) Order the employer to reinstate the employee from any date not earlier than the date of dismissal; or*
>
> *(b) Order the employer to re-engage the employee, either in the work in which the employee was*

employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal;"

22. In terms of Section 16 (1) (a) of the Act, the Court has power to reinstate an employee who is found to have been unfairly dismissed. The Court has exercised its discretion in accordance with Section 16 (1) (a) of the Act and granted reinstatement in several matters that have come before it including the following:

22.1 SWAZILAND ELECTRICITY BOARD VS COLLIE DLAMINI SZICA case no. 2/2007 (unreported).

22.2 MENZI NGCAMPHALALA VS SWAZILAND BUILDING SOCIETY SZIC case no. 50/2005 (unreported).

The Applicant can be granted reinstatement at a hearing in due course provided the Court is so persuaded. The Applicant's fear that his position may be filled by another employee is not a ground for urgency – in this matter. The Applicant has an adequate alternative relief. The Applicant can still be granted substantial relief if he

were to file his claim via part viii of the Act as opposed to rule 15. There is no indication that the Applicant would suffer irreparable harm if he were to file his claim in accordance with part viii of the Act. An employer who is facing an unfair dismissal claim – would be taking risk in filling the post of a dismissed employee without making provision for a possibility that reinstatement or re-engagement may be ordered.

23. The Applicant failed to establish urgency in support of his application. However, even if urgency had been established, the Applicant would have encountered another insurmountable hurdle. The matter before Court is fraught with material disputes of fact which cannot be resolved on affidavit.

23.1 According to the Applicant, his dismissal was not sanctioned by the Respondent's board. For this and other reasons the dismissal is invalid and contrary to the Central Bank Order of 1974. Furthermore, the Respondent did not have a board of directors in office at the time of the dismissal. Both the Respondent's Governor and the Human Resources Manager had a hand in his dismissal -

without authorization from the board. Their conduct was therefore irregular and invalid. The Court should set aside the dismissal since it is devoid of lawfulness and validity.

23.2 The Respondent has denied the allegation that there was no board in office at the Respondent's undertaking at the time of the dismissal. The Respondent argued further that the dismissal of the Applicant was properly conducted by officers who were mandated to do so.

23.3 The Applicant further complained that the disciplinary charges were instituted out of time and that irregularity renders the disciplinary hearing and its outcome invalid.

23.4 The Respondent denied that the charges were instituted irregularly due to time delays. The investigation of the misconduct at the Respondent's workplace was a lengthy process. The disciplinary charges were instituted soon after the completion of the investigation.

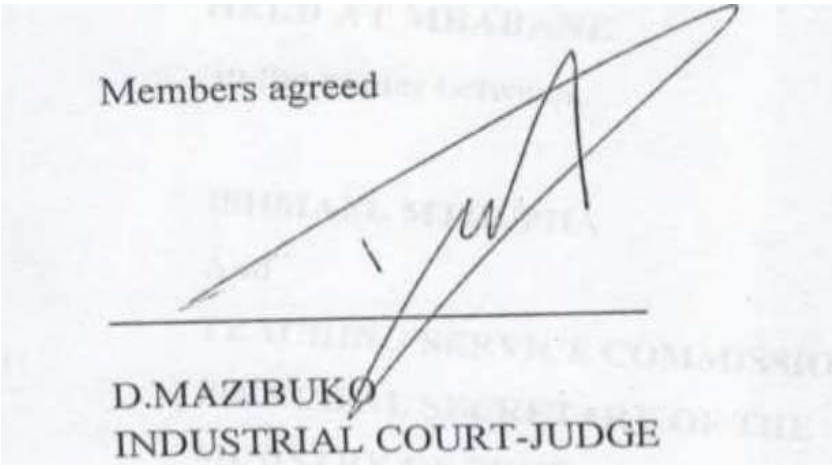
23.5 The disputes of fact which exist in this matter can properly be ventilated in a trial, they are not suitable for motion

proceedings. The Court would have referred the matter to trial – for this reason, if urgency had been established.

24. The application to have the matter enrolled on an urgent basis failed. Consequently the Court did not consider the remainder of the Applicant's claim since it will be dealt with when the matter is properly enrolled before Court for determination. On the 29th November 2016 the Court delivered an *Ex Tempore* ruling based on the above –stated reasons. Particularly the Court ordered as follows:

24.1 Prayer 1 of the Notice of Motion is refused. The matter will not proceed as an urgent application.

24.2 Each party is to pay its costs.



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