IN THE INDUSTRIAL COURT OF SWAZILAND

REASONS FOR RULING

CASE NO. 391/2016

In the matter between:-

BONGANI BHEMBE **APPLICANT**

AND

BROOKLN INVESTMENT **RESPONDENT**

Neutral citation **:** *Bongani Bhembe v Brookln Investment* ***(****391/2016****)*** ***[2017]*** *SZIC 03 (06 February 2017)*

CORAM **:** **DLAMINI J,**

Heard **:** **22 December 2016**
Delivered **:** **22 December 2016 (*Ex tempore*)**

Summary: ***Labour law – Industrial Relations – Urgent application*** *– In urgent applications, the rule is that on good cause shown, the court may direct that the matter be heard as one of urgency.* ***Held :*** *In casu good cause has not been shown for matter to be heard as one of urgency. Application accordingly dismissed for want of urgency.*

1. Following an urgent application by the Applicant in this matter, this Court on 22 December 2016, delivered an *ex tempore* ruling in terms of which it dismissed the application for want of urgency. These now are the reasons of the Court for its ruling dismissing the case of the Applicant.

2. The nub of the Applicant's case before this Court is that there exists an employer/employee relationship between him and the Respondent. He states in his founding affidavit that he is a Director and shareholder in the Respondent company with a 10% shareholding. His co-shareholder is Sibonisile Nkambule who controls the remaining 90% shares. Other than being a director and shareholder in the company, the Applicant further deposed that since incorporation of the company he was engaged as an employee of same. In this regard he states that he occupies the position of Sales Executive and that his monthly remuneration is the amount of E8,539.95. This employment relationship still subsists.

3. The Applicant further states that notwithstanding the fact that there still exists this employer/employee relationship between the parties,

the Respondent has since September 2016 unlawfully and unreasonably stopped and neglected paying him his monthly salary. He has now approached this Court on a certificate of urgency for orders as follows;

> *"1. Dispensing with the normal forms and time limits relating to the institution and service of court processes as prescribed in the Rules of this Honourable Court and to hear this matter as one of urgency.*
>
> *2. Condoning the Applicants non compliance with the rules of this honourable court.*
>
> *3. Directing and ordering the Respondent to forthwith pay the Applicant's arrear salaries for the months of September, October and November 2016 in the total sum of E25,619.85.*
>
> *4. Directing and ordering the Respondent to reinstate the Applicant into the payroll system of the Respondent's business and thus to pay Applicant's current and future monthly salaries as and when they fall due.*
>
> *5. Directing the Respondent to pay costs of suit hereof at attorney and own client scale.*
>
> *Granting further and /or alternative relief.*

4. In support of his assertion that the matter is urgent, the Applicant asserts that he has been advised and verily believes that the matter is urgent by virtue of the fact that the non-payment of his monthly salaries encroaches upon his right of livelihood in that he is now unable to pay for his basic human needs and those of his dependents.

5. The Respondent vigorously opposes the application of Mr. Bhembe. In this regard it filed an affidavit of Francinah Sibonisile Nkambule who is also the Director and majority shareholder of the Respondent. As a prelude, and in giving a brief background of the company, Nkambule states that she and the applicant established the respondent company pursuant an oral agreement. She confirms that she owns 90% of the shares and that the remaining 10% shares are held by the Applicant. That according to her is the end of their relationship with the Respondent. She therefore vehemently disputes that the Applicant is an employee of the company. Instead she states that there is a verbal agreement between themselves as co-directors that they would share profits as and when they are available. Hence the payments which the company has been paying to the Applicant, which she states have not

been consistent and therefore were not salaries but his share of the profits as agreed.

6. Nkambule further deposes that as founders of the company, she and the Applicant agreed that for purposes of fast tracking the progress and success of the company, they would both contribute to the business operations and also source for business opportunities and behalf of the business and be responsible for the day to day operations and supervision of the Respondent.

7. The majority shareholder then also raised the following *points in limine*; urgency, jurisdiction, incompetent order and unclean hands. On the urgency it was submitted and argued that no sufficient legal grounds for urgency had been advanced and that financial hardship and/or loss of income does not qualify as a sufficient ground for urgency. On the jurisdiction the submission was that this court lacks the necessary jurisdiction to hear and determine this matter by virtue of the fact that there is no employer/employee relationship between the Applicant and the Respondent company, instead the dispute instigated by the Applicant is one of shareholders. Intertwined with

this point is the one on incompetent order, in which the Respondent states that since this is a shareholder's dispute then the order he seeks cannot be granted by this Court as no employment relation exists between the Applicant and Respondent.

8. When the matter was argued on 22 December 2016, I requested respective Counsel for the litigants to address me on the point of law on urgency, that is on the circumstances and reasons that render the matter urgent and more importantly on whether good cause had been shown for the Court to direct that the matter be enrolled as one of urgency. After hearing the respective Counsels' submissions and arguments I ruled that good cause had not been shown for the Court to direct that the matter be enrolled and heard as one of urgency, hence the decision that the application was dismissed for want of urgency.

9. Urgent applications in this Court are regulated by Rule 15(2) of the Industrial Court Rules. This rule regulates thus;

> *"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."

10. The above is not the end. Rule 15(3) goes on to state that; *'On good cause shown, the court may direct that the matter be heard as one of urgency.'*

11. 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.

12. The question entailing in this matter therefore is whether good cause has been shown for the Court to direct that this matter be enrolled and

heard as one of urgency. In addressing the issue of urgency the Applicant stated, at paragraph 19 of his affidavit that the non-payment of his salaries encroaches upon his right to livelihood in that he is now unable to pay for his basic human needs and those of his dependents. It cannot be ignored however, that that the Applicant last received payment from the Respondent in August 2016. From the end of September 2016 he did not receive any payment from the company. He only approached this Court for redress in the middle of December 2016. By the time he decided to approach this Court he had worked for three full months without pay. Can it be said therefore that he has shown good cause for the enrolment of the matter on an urgent basis? I think not. Compounding issues for him as well is the fact that this Court has held in a number of decisions that the mere fact that financial loss has been suffered or would be suffered by an Applicant is not, by itself, sufficient reason to ground the requisite urgency necessary to justify a departure from the ordinary rules of Court.

13. For the sake of argument, let me assume in favour of the Applicant that his financial hardship was caused by the withholding of his remuneration, as he claims, and that it was sufficient to establish

urgency and further that such urgency justified the extra ordinary urgent procedure he has chosen in this matter. This is only but the first hurdle he has to jump. There was yet another hurdle he had to overcome.

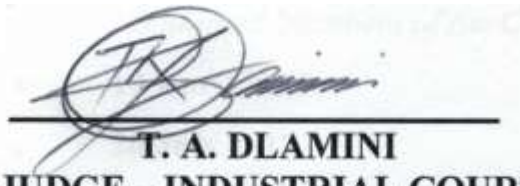
14. By conduct he swiftly had to demonstrate the urgency he is relying upon. In my view, the Applicant's conduct hopelessly failed to demonstrate any sense of urgency. He waited until he was in the fourth month before ultimately deciding to approach this Court, which is unreasonably too long a period to be still able to scream that a matter is still urgent. By failing to take appropriate steps timeously against the Respondent he certainly allowed the passage of time to effectively destroy whatever merits his averment of urgency might have had. He was dilatory in bringing the present application. In this regard I will refer to the words of Tlhotlhalemaje J in ***Mashabane v MEC for Provincial Department of Health: Mpumalanga LC J567/2015*** when he said thus;

> ***"It cannot be re-emphasised enough that if an applicant seeks to have a matter treated as urgent, there is a need to demonstrate that***

the matter was indeed treated with urgency by him from the commencement of the cause of the urgency. It has often been repeated in this Court that urgency is not there for asking, and it is not for applicants to decide when a matter is urgent. Where an application does not satisfy the requirements of urgency, it follows that the urgency should be deemed to be self-created, and that application should not be deserving of the Court's urgent attention"

15. While it is true that the Court encourages parties to engage each other in trying to resolve their disputes before ultimately approaching Courts, such engagements should not be unreasonably long so as to compromise the urgency of their matters. In this present matter for instance, by the time the Applicant rushed to this Court in the manner he did, any measure of urgency that there was originally in his matter had gradually dissipated and had virtually evaporated into thin air. His procrastination had an adverse effect on his matter. By any measure, he waited rather too long before ultimately deciding to approach this Court to assert his rights on an urgent basis. The conclusion therefore is that the urgency in this matter is self-created.

15. For this reason, it was accordingly the finding of the Court that the Applicant had not made out a basis for it to hear his matter on an urgent basis. He failed to show good cause for the Court to direct that his matter be heard on an urgent basis, as required by rule 15(3). As such I deemed it unnecessary to rule on the other points in light of the outcome on the question of urgency. This application was accordingly dismissed for want of urgency, with no order as to costs.



T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DATED AT MBABANE ON THIS 06th DAY OF FEBRUARY 2017.

For the Applicant: *Attorney Mr. L. Manyatsi (Manyatsi & Associates)*
For the Respondent: *Attorney Ms. N. Kunene (Magagula Hlophe Attorneys)*