



**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE No617/2012**

In the matter between:

**SABELO MASUKU**

APPLICANT

**AND**

**USUTHU STRIKE FORCE (PTY) LTD** 1<sup>st</sup> RESPONDENT

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

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

**Neutral citation;** Sabelo Masuku and Usuthu Strike Force & 2 Others  
(617/2012) [2012] SZHC 42 (30<sup>th</sup> March 2012)

**Heard: 29 March 2012**

**Delivered: 30 March 2012**

**CORAM: SEY J.**

**For the Applicant  
For the Respondents**

**Mr. M. SIMELANE  
Mr. NGCAMPHALALA**

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**JUDGMENT**

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**SEY J.**

[1] By notice of motion filed on the 28<sup>th</sup> day of March 2012, the

Applicant launched an urgent application in this Court for an order in the following terms:

“1. Dispensing with the normal provisions of this Honourable Court as relates to form, service and time limits and hearing this matter as one of urgency.

2. Interdicting and restraining the 1<sup>st</sup> Respondent from proceeding with the Annual General meeting on **31<sup>st</sup> March 2012**.

3. Setting aside the 1<sup>st</sup> Respondent’s letter of **21<sup>st</sup> February 2012**.

4. Cost of suit.

5. Such further and/or alternative relief.”

[2] This application is founded on a 26 paragraph Founding Affidavit sworn to by **Sabelo Masuku**. Attached thereto are annexures “SM1” to “SM6” respectively.

[3] The premise upon which the Applicant has brought this application on a Certificate of Urgency is predicated on the averments contained in paragraphs 23 to 26 of the Founding Affidavit. For ease of reference, the said paragraphs are reproduced hereunder as follows:

“23. *The matter is urgent on account of the fact that the AGM is scheduled to proceed on 31<sup>st</sup> March 2012. Decisions detrimental to the 1<sup>st</sup> Respondent may be*

*taken. The meeting itself is not in accordance with the 1<sup>st</sup> Respondent's constitution.*

24 *The breakdown in negotiations was communicated to the Applicant's Attorneys on 27<sup>th</sup> March 2012 as set out in annexure "SM6" . Prior to that I could not have instituted the present application.*

25 *In light of the a foregoing, I had to suffer prejudice and irreparable harm if this matter were to be heard in due course as by that time, the meeting sought to be interdicted would have proceeded, and worse still, sentimental decisions taken against myself and the 1<sup>st</sup> Respondent (in which I am a director and shareholder).*

26 *The 1<sup>st</sup> Respondent's directors have in essence gang up against me in violation of the company constitution. It is inter alia this flagrant disregard of the articles and the companies Act that requires immediate action to be taken before things spiral out of control."*

[4] The 1<sup>st</sup> Respondent is opposed to this application and it is on record that it also filed papers styled as "Preliminary Answering Affidavit" of 23 paragraphs, sworn to by one **Obed Dlamini**, described in that process as the Acting Managing Director of the 1<sup>st</sup> Respondent. Attached to the said affidavit is annexure "A".

- [5] The 1<sup>st</sup> Respondent has raised points *in limine* on three issues namely, urgency, failure to satisfy requirements of an interdict and jurisdiction of the High Court in respect of suspension.
- [6] On the issue of urgency, the 1<sup>st</sup> Respondent contends in his Preliminary Answering Affidavit that the urgent application in this matter was served on the 1<sup>st</sup> Respondent's attorneys at approximately 1500hrs on Wednesday the 28<sup>th</sup> of March 2012 and it provided that the application would be heard on Thursday the 29<sup>th</sup> day of March 2012 at 0930hours. Furthermore, that the Applicant effectively gave the 1<sup>st</sup> Respondent a period of four (4) hours to consider all the averments in the affidavit and thereafter consult with its attorneys on the matter then prepare comprehensive opposing papers.
- [7] In his oral submissions to the Court, Mr. Ngcamphalala, learned counsel for the 1<sup>st</sup> Respondent submitted that the abridgment of the time limits by the Applicant was most unreasonable when one has regard to the fact that the 1<sup>st</sup> Respondent is a corporation which acts through officers and that the nature of the issues to be canvassed are complex. Counsel also submitted that the abridgement of the time limits as provided for by the Rules of

Court is so unreasonable as to constitute an abuse of Court process and he further argued that there is no basis set out in the Founding Affidavit to warrant the abridgement of the time limits in the manner in which the Applicant has done. Learned counsel further referred the Court to the case of ***Plastic International Limited t/a Swazi Plastic Industries v Markus Zbinden and Four Others Civ. Appl. No. 4364/10***, where the Court had remarked that “the extent of the abridgment of the time limits was extreme indeed” and that “this is to be deprecated.”

[8] I find it apposite at this juncture to consider the provisions of Rule 6 (25) of the High Court Rules dealing with urgent applications. It provides as follows:

*“ 6 (25) (a) In urgent applications, the Court or a Judge may dispense with the forms and service provided for in these Rules and may dispense of such matter at such time and place in such a manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to the Court or Judge as the case may be, seems fit.*

*(b) In every affidavit or petition filed in support of an application under paragraph (a) of this sub-*

*rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims he could not be afforded substantial redress at a hearing in due course.”*

[9] The foregoing legislation which is couched in peremptory language has been interpreted and settled by local case law in cases such as **H. P. Enterprises (Pty) v Nedbank Swaziland Ltd, Case No. 788/99**. See also the case of **Phila Dlamini And Sakhile Ndzimandze And another, In re: African Properties Ltd And Siboniso Clement Dlamini, Civ. Applic. No. 4158/08**, where the matter was not enrolled as one of urgency for failure of the Applicant to comply with the provisions of Rule 6 (25) of the High Court Rules.

[10] In dealing with an urgent application in **Megalith Holdings And RMS Tibiyo (Pty) Ltd And Another, Case No. 199/2000**, **Masuku J** (as he then was) had this to say:

*“The provisions of Rule 6 (25) (b) above exact two obligations on any Applicant in an urgent matter. Firstly, the Applicant shall in the affidavit or petition set forth explicitly the circumstances which he avers render the matter urgent. Secondly, the Applicant is enjoined, in the some affidavit or petition to state the reasons why he*

*claims he would not be afforded substantial redress at a hearing in due course. These must appear ex-facie the papers and may not be gleamed from surrounding circumstances, brought to the court's attention from the bar in an embellishing address by the Applicant's counsel."*

[11] Again, in the recent judgment of ***Plastic International Limited t/a Swazi Plastic Industries (supra)*** at pages 9 - 11 [paragraphs 13 and 14] of the cyclostyled judgment, **Masuku J** (as he then was), made the following remarks after considering case law:

*"I should state in particular that in relation to (b) of the sub-Rule, the word 'explicitly' bears particular resonance as it sets out the tone for the extent of the disclosure required of an applicant seeking to have the urgency procedures invoked. According to Collin's Concise Dictionary, 4<sup>th</sup> ed, 2000, the word indicates 'precisely and clearly expressed, leaving nothing to implication; fully stated; leaving little to imagination; graphically detailed; openly expressed without reservation; unreserved' . . . The founding affidavit or petition must therefore disclose fully and without reservation; leaving nothing to implication regarding the reasons why he claims he cannot be afforded substantial redress at a hearing in due course. An applicant can choose to be chary in this regard to his detriment."*

[12] In the instant case, Mr. Ngcamphalala has submitted that in so

far as urgency is concerned, the Applicant has failed dismally to fully comply with the requirements particularly of Rule 6 (25) (b) in that the extent of the urgency has not been explicitly mentioned by the Applicant in his Founding Affidavit and that it was incumbent upon the Applicant to allege how the decisions to be taken in the meeting scheduled for the 31<sup>st</sup> of March 2012 would affect him. Furthermore, learned counsel submitted that there is nothing in the Founding Affidavit which suggests what prejudicial decisions may be taken during the meeting.

[13] For his part, Mr. Simelane contended that the Applicant's averments regarding the requirements of Rule 6 (25) are as they appear in paragraphs 23 - 26 of the Founding Affidavit and that the Applicant has satisfied the requirement of urgency. Learned counsel for the Applicant referred to annexures "SM5" and "SM6" and he submitted that the allegations therein do meet the requirements of Rule 6 (25). He further argued that the breakdown in negotiations was communicated to the Applicant's attorneys on 27<sup>th</sup> March 2012 and that the matter is urgent on account of the fact that the AGM is scheduled to proceed on 31<sup>st</sup> March 2012.

[14] On the second point raised in *limine* as to the Applicant's failure



to satisfy requirements of an interdict, it is not in dispute that the AGM is scheduled to proceed on 31<sup>st</sup> March, 2012, pursuant to the proposal by the shareholders as outlined in annexure "SM2." What the Applicant is seeking in prayer 2 of his Notice of Motion is for an order interdicting and restraining the 1<sup>st</sup> Respondent from proceeding with the Annual General meeting on 31<sup>st</sup> March 2012. There is nothing in the Founding Affidavit which suggest what prejudicial decisions may be taken during the meeting and I find that it was incumbent upon the Applicant to allege in his Founding Affidavit how the decisions to be taken in the meeting scheduled for the 31<sup>st</sup> of March 2012 would affect him.

[15] It is clear from the way prayer 2 is couched that the interdict being sought by the Applicant is final. In any event, even though the Applicant has pre-empted that he will be removed, no decision has been taken yet and should the Applicant be aggrieved by any decision taken at the meeting scheduled for 31<sup>st</sup> March 2012, he can approach the Court to request for any resolutions passed at that meeting to be set aside.

[16] Under the heading **basis of the present application**, as it appears in paragraph 8 of his Founding Affidavit, the Applicant

states as follows:

*“8. The resolution passed by the Board of directors of the 1<sup>st</sup> Respondent to suspend me is ultra vires the powers of the Board. In terms of article 71, of the Articles of 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent’s Board lacks such power. For the sake of completeness I annex herewith the entire Memorandum and Articles of the 1<sup>st</sup> Respondent marked **“SM3”**.*

[18] Suffice it to say that Section 200 (7) of the Companies Act of 2009 provides that a person who feels aggrieved by his removal from the office of a Director can claim compensation or damages.

[17] In the final analysis, it cannot be said that the Applicant has fully met the mandatory requirements of Rule 6 sub-Rule (25) on urgency. I find that the Applicant has failed to explicitly state reasons why the matter is urgent and also why he cannot be afforded substantial redress at a hearing in due course. Furthermore, it is clear that the Applicant can have other suitable remedies open to him, such as an action for damages against the Respondents. A final interdict is a drastic remedy and in the Court’s discretion. The Court will not, in general, grant an

interdict when the applicant can obtain adequate redress in some other form of ordinary relief. See **The Law & Practice of Interdicts** by **CB Prest** (at page 45).

[18] Another vexed point raised in *limine* in this application relates to the question of the jurisdiction of the High Court in respect of suspension. It is common cause that the Applicant, in his position as the Managing Director, is an employee of the 1<sup>st</sup> Respondent. This fact is evident from the averments in paragraph 21 of the Answering Affidavit of **Obed Dlamini** where he deposed to the fact that the Applicant was providing services and also drawing a salary from the 1<sup>st</sup> Respondent.

[19] Furthermore, it is common cause that the Board of Directors have by annexure "**SM1**" suspended the Applicant. In prayer 3 of the Notice of Motion dated 28<sup>th</sup> March, 2012, the Applicant has prayed for an order setting aside the 1<sup>st</sup> Respondent's letter of 21<sup>st</sup> February 2012. To this end, the Applicant has alleged in paragraph 14 of his Founding Affidavit that the suspension further violates section 39 of the Employment Act No. 5 of 1980, in that the letter of suspension dated 21<sup>st</sup> February 2012 does not allege any of the grounds mentioned in the section, particularly 39 (1) (b).

Furthermore, in paragraph 16 of the said Founding Affidavit, the Applicant has alleged, *inter alia*, as follows:

*“16. In light of the foregoing it is certain that my suspension from office is illegal and so is the annual general meeting scheduled for **31<sup>st</sup> March 2012** .....*”

[20] It appears to me that the effect of the suspension is, that while on suspension, the Applicant is prohibited temporarily from rendering his services to the 1<sup>st</sup> Respondent pending an investigation. It follows, therefore, that the Applicant’s suspension thus affects the employer and employee relationship. See the South African case of **Ian Wicks And SA Independent Line Services (Pty) Ltd And Another, Case No. 10155/2008**, where His Lordship **Zondi J.** in his judgment, delivered on 30 April 2010, opined as follows:

*“[47]the question is whether the Labour Relations Act provides for a remedy to an employee such as the applicant who by reason of an unlawful suspension is temporarily prohibited from rendering his services to his employer.*

[48] *In my view suspension of an employee based upon an unlawful conduct which is violative of either the company law or common law constitutes an unfair suspension for which the Labour Relations Act fully provides for remedies under section 193. It is therefore incorrect to contend that an employee whose suspension is unlawful has no remedies under the Labour Relations Act.*"

See also **Annadale v. Pasdech Resources (SA) Ltd (2007) 28 ILJ 849 (LC); Swaziland Brewers Limited and Siboniso Dlamini v. Constantine Ginindza Civil Appeal No 33/2006 at 12.**

[21] In this jurisdiction of Swaziland, Section 8 (1) of the Industrial Relations Act, 2000 (as amended) confers exclusive jurisdiction on the Industrial Court in respect of any matter between an employer and employee in the course of employment. It provides as follows:

*" 8 (1) The Court shall, subject to Sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this (Act), the Employment Act, the Workers Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at*

*Common Law between an employer and employee in the course of employment or between an employer or employers, association and a trade union, or staff association or between an employees association, a trade union, a staff association, a federation and a member thereof”*

[22] I am in agreement with Mr. Ngcaamphalala that the Courts of Swaziland have made various rulings and pronouncements to the effect that where there is a matter between an employer and an employee it should be heard by the Industrial Court. See the case of **Delisile Simelane v The Teaching Service Commission and Anor Civil Appeal No. 22/2006**, where the Court pronounced as follows:

*“In my opinion, the wording of section 8 (1) of the 2000 Act can be interpreted in one way only and that is that the Industrial Court now has exclusive jurisdiction in matters arising at common law between employers and employees in the course of employment”.*

[23] In **Swaziland Breweries Ltd and another v Constantine Ginindza Civil Appeal No 33/2006 at 12, His Lordship Ramodibedi JA** (as he then was) remarked as follows:

*“The effect of this change, read with the use of the word “exclusive” in the section makes it plain in my view that the*

*intention of the legislature in enacting Section 8 (1) of the Act was to exclude the High Court's jurisdiction in matters provided for under the Act and thus to confer exclusive jurisdiction in such matters on the Industrial court''.*

[24] In the light of all the foregoing, it is my considered view that the jurisdiction of the High Court is clearly ousted in this matter. I accordingly refuse to enrol this matter on an urgent basis and I also refuse the grant of the interdict as the Applicant can obtain redress by an award of damages. In the circumstances the points raised in *limine* are hereby upheld and the application is dismissed with costs to follow the event.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
THE.....DAY OF MARCH 2012.**

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***M. M. SEY (MRS)***

**JUDGE OF THE HIGH COURT**





