IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 722/2017

In the matter between

SWAZILAND ELECTRICITY COMPANY	**Applicant**
and	
MBONGISENI DLAMINI	**1st Respondent**
GCINA MASEKO	**2nd Respondent**
THABISO SIMELANE	**3rd Respondent**
SIMON M. DLAMINI	**4th Respondent**
SWAZILAND ELECTRICITY SUPPLY MAINTENANCE AND ALLIED WORKERS UNION	**5th Respondent**
JUSTICE NKOSINATHI NKONYANE	**6th Respondent**
GILBERT NDZINISA N.O.	**7th Respondent**
SIMON MVUBU N.O.	**8th Respondent**

Neutral citation:	*Swaziland Electricity Company v Mbongiseni Dlamini & 7 Others* (722/2017) [2017] SZHC 131 (02 June 2017)
Coram:	**MAMBA J**
Heard:	**02 June, 2017**
Delivered:	**02 June, 2017**

[1] *Civil law – urgent application for review of judgment by Industrial Court per section 19 (5) of Industrial Relations Act 1 of 2000. Application to comply with rule 6 (25) (a) and (b) of rules of this court.*

[2] *Civil law – urgent application – grounds of urgency. That matter involves reinstatement of employees sacked by applicant not ipso facto a ground of urgency as ordinary review and appeal still open or*

available to applicant. There being no evidence that reinstatement of employees has disruptive effect at applicant's workplace. Urgency not shown and application refused with costs.

[1] This is a review application brought in terms of section 19 (5) of the Industrial Relations Act 1 of 2000, following Judgment by the Industrial Court wherein the said court ordered that the dismissals of the First to Fifth Respondents herein by the Applicant was unlawful. This order was made by the sixth respondent sitting with the Seventh and Eighth Respondents. Judgment was delivered on 17 May 2017.

[2] In this application the Applicant, who is the employer of the first five respondents, seeks an order, *inter alia*,

> '1. Reviewing and setting aside the judgment and order delivered by the Industrial Court on 17 May 2017 ---
>
> 2. Substituting that order with an order dismissing the application that came before the Industrial Court ---.'

[3] After hearing argument on 02 June 2017, I immediately refused the application with costs in favour of the first to fifth respondent. I indicated then that the Applicant had failed to satisfy this court that the matter was sufficiently urgent or urgent at all to be heard as an urgent one in terms of the rules of this court. I further indicated, in my *ex tempore* judgment that a written judgment containing my reasons for that order would follow in due course. What follows herein are those reasons.

[4] The facts of the matter are largely common cause. They are as follows: and I quote paras 6 – 8 of the judgment of the court *a quo*

‘6. --- The 1st Applicant was charged with a second level misconduct involving violation of Operational Safety Rules by not following the correct procedures for operating the network. The Chairperson was Luke M. Mswane. The initiator was Simanga Dlamini. The 1st Applicant was found guilty and the sanction of final written warning was issued.

7. The 2nd Applicant was also charged with gross negligence, level 2 misconduct, for violating Operational Safety Rules. He pleaded guilty to the charge. The Chairperson was Joseph Ngcwane, the Senior Planning Engineer of the Respondent. The 2nd Applicant was found guilty and sentenced to a final written warning subject to some conditions that were stated. The 3rd Applicant’s hearing was chaired by Respondent’s IT Manager, Melusi Malinga. He was facing two charges of gross negligence it being alleged in the first charge that the violated Operational Safety Rules by not following the correct procedures for operating the network, that is, leaving permit area/working site without communicating with control centre. On the second charge it was alleged that he changed the scope of work to be done on the network and did not communicate this to all stakeholders involved in the work as a result causing the death of a contractor employee and bringing the company’s name and standards into disrepute. He pleaded guilty to the charges. He was accordingly found guilty and on count 1 he was sentenced to a final written warning. On count 2 he was sentenced to three months suspension without pay.

8. The 4th Applicant faced five charges. The first charge was that of dishonesty. He pleaded guilty to the charge. The second charge was that of fraud. He pleaded guilty. The third charge related to the unauthorized use of company vehicle. He pleaded not guilty to the charge. The fourth charge also related to the unauthorized use of company vehicle. He also pleaded not guilty. The fifth charge was that of concealing evidence. He pleaded guilty to the charge. The disciplinary hearing was chaired by Busisiwe Masangane, the

Respondent's Billing and Revenue Protection Manager. The 4th Applicant was found guilty on charges 1, 2. And 5. On counts 1 and 2, he was sentenced to a final written warning.'

[5] The said disciplinary hearings were finalized or concluded in January and February 2017 and the four Respondents began serving their respective e sentences, immediately.

[6] By letter dated 30 March 2017, the Applicant requested the Respondents to show cause why they should not be dismissed instead; in substitution of the sanction that had been meted out during and in the disciplinary hearings. The Respondents filed and served their reasons for objecting to the applicant's internal or proposed dismissals. Their response is dated 05 April 2017. In response, the Applicant summarily dismissed them by letter dated 27 April 2017. The Respondents subsequently filed their objection to such dismissal through an application before the court *a quo*. They were successful and this has culminated in this review application.

[7] The Applicant claims that this application is urgent. The grounds for such assertion are stated as follows:

'45. The matter is urgent, because following the decision of the court on 17th May, the employees have since reported back to work, seeking to resume their duties. The employer is therefore obliged to deal with this matter on an urgent basis in view of the decision of the Industrial Court. The matter was brought on an urgent basis at the Industrial Court, and remains urgent even at this stage.

46. The order of the Industrial Court has drastic consequences for the applicant and the conduct of its business that, the applicant cannot have

this matter dealt with in the normal course because there is a need to have the declaration of the employment status of the respondents made at the earliest.

47. In the event that the matter were to be dealt with in the normal course, the applicant would be obliged to reinstate the employees, in the circumstances wherein their continued presence in the workplace, may cause industrial disharmony. The loss of the three lives occasioned by the first to the third respondents' negligence has already caused serious disquiet not only within the workforce but with other stakeholders as well. The presence of the fourth respondent when he has been found guilty of dishonesty, is also untenable. It is submitted therefore that the matter is urgent and that a hearing in due course may not accord the applicant adequate remedy.

48. It is further submitted that it is in the interest of both the applicant and the respondents that the matter be determined expeditiously. In respect of the respondents, there is a need for certainty, particularly because the issues affect their livelihood. It is submitted therefore that there is good cause for the matter to be enrolled as one of the urgency and for the relief sought in the notice of motion to be granted on an urgent basis.'

[8] Again Counsel in his certificate of urgency avers that because the matter was filed in the court *a quo* on a certificate of urgency and dealt with on that basis and pertains or affects the livelihood of individuals, it is also urgent in this court. Counsel also states that **'because the [Respondents] have already been reinstated, there is now an obligation to pay remuneration. This will cause the Applicant irreparable harm because if the dismissal is upheld, it has no way of recovering this amount.'**

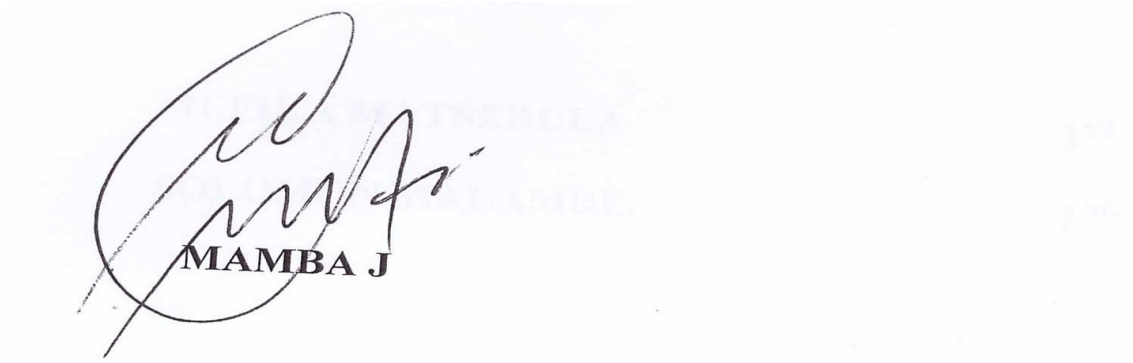
[9] That the court *a quo* viewed the respondent's application or even their dismissals as warranting its urgent attention, cannot, in my judgment, be *ipso facto* used as a matter of law, as the necessary or required urgency in this application. Besides, these are two distinct matters serving before two different fora. These applications are pleaded differently and each is based on its own merits or demerits. In any event, this court is not bound by the ruling of the court *a quo* where it held that the application before it was urgent. It is the applicant who must satisfy this court that its application is urgent and has to be heard as a matter of urgency.

[10] The fact that the Respondents have been reinstated by the order of the court below cannot, in the circumstances of this case, constitute the necessary or required ground of urgency. Indeed, after the conclusion of the disciplinary hearings, the 3 respondents who were given written warnings, continued working without any demur by the applicant. This went on for about 2 months until the applicant decided to intervene and interfere with the sanctions imposed during the disciplinary hearings. It is this peaceful wait or lull that has solicited the defence of peremption or acquiescence by the respondents. (See: *VENMOP 275 (PTY) LTD & ANOTHER v CLEAVERLAND PROPERTIES (PTY) LTD & ANOTHER (2014/14286).* Further, there is no evidence or averment by the Applicant that during this period there was any disharmony or industrial unrest amongst its other employees following the outcome of the disciplinary hearings in question. I refer to the issue of unrest merely because it was relied upon by Counsel for the applicant during submissions. It is not part of the applicant's pleaded case though. It has no merit, in my view. It constitutes sheer embellishment by Counsel. The loss of the three lives at the applicant's workplace is understandably a matter for concern but that does not translate into the

sort of urgency that is required by this court in terms of rule 6 (25) (a) and (b) of the rules. For instance, an appeal or ordinary application for review of the impugned decision may be one of the appropriate measures or relief necessary to address or meet such concerns. An appeal, in the ordinary manner, would I suppose, have the effect of suspending or staying the operation or execution of the order of reinstatement of the respondents. That being the case, the Applicant would not be without an adequate remedy. But even if this was not possible or tenable in an industrial dispute setting, an application for a stay of execution would certainly be possible.

[11] But even more importantly, there is no iota or evidence to show that the reinstatement of the respondents has a very disruptive effect or such potential at the applicant's workplace. The Applicant mentions, without any further elaboration, **'serious disquiet not only within the workforce but with other stakeholders as well.'** Whilst these concerns may indeed ultimately be legitimate, they do not constitute the sort of urgency that is required in such application. They may constitute legitimate grounds of interfering with the decisions of the disciplinary hearings or even grounds of appeal or review. That, however, is a matter entirely separate and different from urgency.

[12] These then, are my reasons for refusing the application.



FOR THE APPLICANT : **MR. Z.D. JELE**

FOR THE RESPONDENTS : **MR. M. HLOPHE**