IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 238/16**

In the matter between:

MINISTER OF PUBLIC SERVICE **1st** Applicant

ACCOUNTANT GENERAL 2nd Applicant
[E.N. MATSEBULA]

MINISTRY OF FINANCE 3rd Applicant

ATTORNEY GENERAL 4th Applicant

and

SWAZILAND NATIONAL ASSOCIATION OF

GOVERNMENT ACCOUNTANCY PERSONNEL

Neutral citation: *Swaziland National Association of Government Accounting Personnel v Minister of Public Service & Others (238/16) [2017] SZIC (September , 2017)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

Heard submissions :

Delivered judgement:

JUDGEMENT
26.09.2017

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1. The Applicants have filed an application under a certificate of urgency for a stay of execution of this Court's judgement dated 28th March 2017 under case number 238/16.

2. The Respondents' is application is opposed by the Respondent.

3. The Respondent raised two points of law namely that; there was no urgency and that there were no prospects of success on appeal.

4. The urgent application first appeared before the Court on 15th June 2017. There were numerous postponements and the matter was finally argued in Court on 13th September 2017. The view of the Court is that the point of law relating to urgency has now been overtaken by events and will not therefore be considered. The Court will now consider the application as a whole and issue a final judgement.

5. On behalf of the Respondent it was argued that:-

5.1 The Applicants have no prospects of success on appeal and that the appeal was frivolous and vexation.

5.2 The members of the Respondent would be prejudiced if the order for stay of execution was granted by the Court.

5.3 An application for stay of execution is not there must be proper grounds that are advanced to influence the Court to grant the order.

6. On behalf of the Applicants it was argued that;

6.1 The employer will suffer prejudice if the order to stay of execution was not granted as the employer will not be in a position to recover the monies to be paid to the Respondents' members should the appeal be successful.

6.2 There was nothing vexations or frivolous about the appeal as the employer is exercising its right to appeal.

6.3 The real test is prejudice to the other party. The Respondent's members can always recover any monies due to them as it was not likely that the employer would disappear or cease its operations.

7. The general principle is that at common law the execution of all judgements is suspended upon the noting of an appeal. (See:- South Cape Corporation (Pty) Ltd V. Engineering Management Services (Pty) Ltd 1977 (3) S.A. 534 (a)). Our local legislation has provided for an exception to this principle. Section 19 (4) of the Industrial Relations Act number 1 of 2000 as amended clearly states that:

"The noting of an appeal under subsection (1) shall not stay the execution of the Court's order unless the Court on application, directs otherwise"

The Applicants have accordingly filed the present application as required by the Act.

8. Dealing with a similar application Corbett JA in the South Cape Corporation case (supra), espoused the following principles at page 545:

"The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to exercise shall be exercised…..This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgements…..In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances and, in doing so would normally have regard, inter alia, to the following factors:

1. The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal.. if leave to execute were to be granted.

2. The potentiality of irreparable harm or prejudice being sustained by the Respondent on appeal (Applicant in the application) if leave to execute were to be refused.

3. The prospects of success on appeal including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgement, but for some indirect purpose e.g. to gain time or harass the other party.

4. Where is the potentiality of irreparable harm or prejudice to both appellant and Respondent, the balance of hardship or convenience as the case may be."

9. In the present application it cannot be successfully argued that the Respondent's members will suffer irreparable harm if the stay of execution were to be granted taking into account that the employer is the Government of the Kingdom of Swaziland, an institution that is highly unlikely to cease operations.

10. Further, the Applicants' appeal has since been allocated a date of hearing being 04th October 2017 under appeal case number 05/2017. It is the view of the Court that the Respondent will not suffer any irreparable harm or prejudice is the stay is granted taking into account that the appeal will be heard just on the following week.

11. On 31st May 2017 the Applicant got a telephone call from the Respondent telling him to come to the Respondent's premises. The Applicant attended and on arrival he was served with the letter of termination dated 30th May 2017. In that letter the Applicant was advised of his right to appeal within five days of receipt of the letter. The Applicant could not appeal as he was never furnished with the minutes of the hearing.

12. Applicant Argument:-

The main argument by the Applicant was that the termination was irregular and should be set aside because the decision was taken before the completion of the disciplinary hearing process. It was argued that this was one of the rare exceptions where the Court should interfere as the Respondent was failing to observe its own internal procedures.

13. Respondent's Argument:

On behalf of the Respondent it was argued that the matter was fraught with material disputes of fact which render the matter incapable of determination on the papers. It was further argued that the Applicant having already been dismissed he should report a dispute with the Conciliation Mediation and Arbitration Commission (CMAC) and his matter brought to Court in terms of Part VIII of the Industrial Relations Act No.1 of 2000 as amended.

14. ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-

There is in place a disciplinary code at the Respondent's workplace. This document was annexed to the founding affidavit and marked *Annexure "J" STAGE 4* of this document dealing with "*Notification of Penalty*" provides that "*The employee should be given his/her sanction in writing by the presiding officer. "Further Article 6.2.5 © of the Code provides that "The presiding officer shall decide on the appropriate disciplinary action…*"It was argued on behalf of the Respondent that the presiding officer did issue an ex tempore ruling. This was the basic of the Respondent's argument that there was a material dispute of fact whether or the chairperson did hand down any ruling and that the dispute could not be resolved except by oral evidence.

15. We do not agree with the Respondent's argument. The present application is capable of being determined on the papers before the Court. The code is clear that the employee should be given his/her sanction in writing. It was not in dispute that the Applicant was not given the sanction by the presiding officer. This was also acknowledged by the Respondent itself in the answering affidavit when it stated in paragraph 13 that;

"I note the contents of these paragraphs and admit receiving the correspondence mentioned therein save to state that the delaying in providing Applicant with the findings and recommendations is

because the chairperson has not provided us with the same and we still awaiting him to provide findings and recommendations."

16. The chairperson himself put the matter beyond any doubt by his letter dated 02nd June 2017, Annexure I of the founding affidavit where he stated that;

"1. We refer to your letter dated 1st June 2017.

2. Our Mr. Simelane, the (the DC Chairman) has not made any findings nor recommendation in this matter and if the dismissal letter refers to Mr. Simelane as chairman, we dispute that.

3. In fact, Mr. Simelane has written to both paries and recused himself from the matter. (See attached letter)."

17. The letter of termination gave the Applicant the right to appeal within five working days after receipt of the document. The Applicant was however never furnished with the reasons for the dismissal. He was therefore unable to exercise the right to appeal.

18. The Court therefore has no hesitation in coming to the conclusion that the Respondent failed to adhere to the requirements of its own internal rules. The primary duty of the Industrial Court is to enforce the purposes and objectives of the Industrial Relations Act. Section 4 of the Industrial Relations Act enumerates the purpose and objective of

the Industrial Relations Act. In terms of Section 4 (1) (i) it is provided that;

"The purpose and objective of this Act is to-

(i) Stimulates a self-regulatory system of industrial and labour relations and self-governance".

In casu, the Respondent has indeed put in place its internal regulatory systems. It is the duty of the Court to see to it that these internal regulatory systems are adhered to by the parties.

19. The Court is alive to the decisions of this Court that once an employee is terminated he should report a dispute with CMAC before the matter is heard by the Court. A number of authorities were cited including the cases of Swaziland Poultry Processors V The Presiding Judge of the Industrial Court & Others, Case No.382/2014; Dumsani Mngomezulu V Swaziland Water and Agricultural Development Enterprises, Case No. 598/2015; Gcina Dlamini V NERCHA and Another, Case No. 633/08. The view of the Court is that the present application is distinguishable. In casu, the Applicant is not challenging the prerogative of the employer to make a decision to terminate his services. Reading the application of the Applicant as a whole, all that the Applicant wants is that the employer be held accountable to its own disciplinary code and procedures. We do not think that in the peculiar circumstances of this case, the Court should close its doors to the urgent application and require the Applicant to

bring the matter to Court only after having complied with the provisions of Part VIII of the Industrial Relations Act.

20. As already pointed out, when reading the Applicant's application as a whole, the Applicant is simply entreating the Court to force the employer to adhere to its own internal procedures.

21. The evidence in this application revealed that the chairperson has already recused himself from the matter. The Court has no right force him to return to his position.

22. CONCLUSION:-

Taking into account all the evidence before the Court, the circumstances of this case, the interests of justice and equity the Court will make the following order;

a) The termination of the Applicant is set aside.
b) The Respondent is directed to start the disciplinary hearing de novo before a new chairperson within a period of ten days from the date of delivery of this judgement.

23. The members are in agreement,

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : *Mr. L. Simelane*

(Attorney at L.M. Simelane & Associates)

For Respondent: *Mr. P. K. Msibi*

(Attorney at Dlamini – Kunene Associated)