IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 119/14 (C)**

In the matter between:

SIFISO SIMELANE & 50 OTHERS APPLICANT

and

TQM TEXTILE SWAZILAND (PTY) LTD RESPONDENT

Neutral citation : Sifiso Simelane & Others vs TQM Textile Swaziland [PTY] Ltd [119/2014 (C)] [2018] SZIC 134 [2018]

Coram **:** **B.W. MAGAGULA - ACTING JUDGE**
(*Sitting with N. Dlamini and D. Mmango Nominated Members of the Court)*

Heard : 16/11/2018

Delivered : 26/11/2018

SUMMARY - - Labour Law - - Applicant brought an urgent application seeking that the court authorizes the sheriff or her lawful deputy, in any district where assets of the respondent may be found, to attach, make an inventory and place under his custody such property, to be kept a security for an unquantified claim of the applicants. Pursuant to a judgment issued by this court under case no 119/14.The matter was opposed by Respondent, which raised points in limine of urgency. Further points, to the effect that the order sought is one of anti-dissipation and is incompetent in the circumstances. Held--The point of law of urgency upheld. It is not necessary to decide the other points of law raised. No order as to costs.

RULING

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1. The Applicant is **SIFISO SIMELANE & 50 OTHERS**, whose full particulars appear in annexure "TD1" of the application. The founding affidavit has been deposed to by one Thembi Dlamini who is one of the employees listed in the aforesaid annexure.

2. The Respondent is **TQM TEXTILE SWAZILAND (PTY) LTD**, a company duly registered and incorporated with limited liability according to the company Laws of the Kingdom of Eswatini. Carrying on business at Matsapha industrial site, in the district of Manzini.

3. The parties before court have a long history of litigation inter se. The current application appears to be a sequel from a judgment issued by His Lordship Nkonyane J on the 23 July 2014. The summation of the order is as follows;

a. *The Respondent is ordered to pay its employees in terms of the Regulation of Wages applicable to it, in terms of the report of the Commissioner of Labour dated the 9th December 2010.*

b. *The Respondent is ordered to pay the underpayments going back to 9th December 2010 with immediate effect.*

c. *The payment of the underpayments from 9th December 2010 going back to the period when the respondent started to operate is to be negotiated and agreed upon by the parties with the assistance of the office of the Commissioner of Labour.*

d. *The Respondent is to pay the costs of suit based on the ordinary scale.*

4. The urgent application before court seeks to preserve the assets of the respondent to give effect to part 19 (c), of the judgment by Nkonyane J.

5. It is not in dispute that the Respondent has complied with part 19 (b) of judgment of his Lordship of Nkonyane J. Hence, the current application seeks to preserve the assets of the Respondent to ensure that part 19 (c) is given effect to.

6. The Applicants have instituted the current application, under Rule 15 of the industrial court Rules of 2007, as it has been instituted under certificate of urgency. It is worthy of mention, that all the Applicants are former employees of the Respondent.

7. The Application was served on the Respondent Attorneys on the 15th November 2018. Although the time on which it was received by the Respondent's Attorneys, is not reflected on the papers. The Respondent's Attorney Mr. Mamba, told the court that they received the application before 5pm. An issue that was not denied by the Applicant's counsel. The matter was set down to be heard, on the 16th November 2018 at 9.30am. When the matter was called in court, Mr. Mamba for the Respondent, begged leave of court to file from the bar, the Respondent's notice of intention to oppose. He also simultaneously filed a notice to raise points of law. The court granted him leave to do so. The court enquired from both counsel, if they were ready to argue the points raised in limine. Both counsels responded to the affirmative.

8. It is now apposite for this court, to examine the points in limine filed by the Respondent's attorneys in their notice dated 16th November 2018. They are captured as follows:-

8.1 ***The matter is not urgent.***

8.2 The application is vague and embarrassing on the ground that it is not clear whether the applicants; cause of action is based on an ant-dissipation interdict or is an application for leave to attach pursuant to a judgment of the court;

8.2.1 If the application is an anti-dissipating interdict then such an order is not competent under the circumstances issue such an order.

8.2.2 If on the other hand the applicant seeks to give effect to an order of the above honorable court, then a writ is not competent to enforce the said order.

It is therefore prayed that the application be dismissed with costs.

9. In motivating his arguments in support of the first point, Mr. Mamba for the Respondent argued that the matter is not urgent, as it is clear from the Applicant's founding affidavit, that the applicants met and agreed to institute the current legal proceedings as way back as 10th November 2018. There is no explanation on the founding affidavit, as to why the Applicants waited until the 16th November 2018, to approach the court. So the argument goes.

10. In response, Mr. Fakudze who appeared for the Applicant argued *contra*, that between the 10th November and the 16th November 2018 which is the date on which the matter was heard, there was no delay. He continued to argue that, in the circumstances, the Applicants were still within a reasonable time to approach the court on a certificate of urgency.

11. He argued further that, when the Applicants met on the 10th November 2018 he was before this court, dealing with another urgent application. Subsequent thereto, he had other matters that he was dealing with in his office. As such, in the circumstances of the case, to draft and prepare the application and serve it on the Respondent, within the time in which he did, was still reasonable. So his argument went.

12. Rule 15 of the Industrial Court Rules of 2007, is instructive on how urgent applications, should be dealt with. It states as follows;

15.(1) ***A party that applies for urgent relief shall file an application that so far possible complies with the requirement of the 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 provision of Part V111 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.***

(4) ***The party who brings the application shall satisfy the court, when the application is heard that a copy of the application has been served on all affected parties or that sufficient and adequate notice of the content of the application has been brought to the attention of the affected party by other acceptable means, unless giving notice of the application will defeat the relief sought in application.***

(5) ***A party who intends to oppose the application or make representation concerning the application shall notify the Registrar and the party who brings the application as soon as possible after the application has come to the notice of the party.***

(6) ***The court may deal with an urgent application in any manner it considers fit, and may dispense with the usual time limits, forms and service prescribed by the rules of court.***

(7) ***Unless otherwise ordered a party may anticipate the return date of an interim order granted in the absence of such party on not less than twenty four (24) hours' notice to the applicant and the Registrar***.

13. The reading and interpretation of Rule 15 (6) makes it clear that when dealing with urgent applications, especially with regard to dispensing with the time limits, forms and service prescribed by the rules of court. The court has discretion. This court is not bound by strict rules of evidence and

procedure. It may depart from such, as long as it does not result in the miscarriage of Justice.

14. In as much as Mr. Mamba argued forcefully, that the 5 day period that the Applicant delayed in bringing the application, removes the urgency of the matter. In our considered view, subject to our findings hereunder, this period is not unreasonable. The problem is on the alleged circumstances that underpin the urgency.

15. Having said so, we would have dismissed this point in its entirety, if the circumstances justifying the urgency, were substantiated by facts. The Industrial Court Rules of 2007, is worded almost similarly with Rule 6 (25) of the High Court Rules. Save for part (b).

In ***Humphrey H Henwood vs Maloma Colliery and another Civil case no. 1623/94, Dunn J,*** held that the provisions of the above cited rules are mandatory.

15.1 The provisions of the High Court Rule 6 (25) Part (b) imposes, two obligations on any applicant in an urgent matter. ***Firstly, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent; secondly, the Applicant is enjoined in the same affidavit to state reasons why he claims that he cannot be afforded substantial redress at a hearing in due course.***

15.2 [Rule 15 (2) (c) of the Industrial court Rules, state that this must appear ex-facie the founding affidavit. One need not decipher the reasons from

surrounding circumstances, brought to the court or from arguments of counsel from the bar. In order for this court to ascertain, whether the current Applicants have satisfied the standards of urgency comprehensively, other than the stringent time limits, as raised by Mr. Mamba. We have to look at the Applicants founding affidavit.

16. In paragraph 32 of the founding affidavit, that is where the applicants deal with urgency. This is what the deponent says;.

> **" I *humbly submit that this matter is urgent by virtue of the fact that, the Respondent has already sold its business. I can glean from the contents of annexure "M1"* (**we also noted that there is no annexure M1 in the applicant's paper however the documents that speaks to this issue is TD4***") which effective date I am not privy to. The Respondent, if acting in good faith ought to have notified all interested parties of the sale of the business, including myself by virtue of being a preferred judgment creditor against it. If this matter is not heard as one of urgency, the Respondent will inevitable complete the transfer of its business to Texray South Africa and possibly shutdown or even relocate outside the court's jurisdiction, thus rendering paragraph 19 (c) of this honourable court's judgment hollow and ineffectiv****e".***

17. A close scrutiny of annexure "TD4", which forms the basis of the Applicant's contention, that the Respondent has sold its business to Tex Ray South Africa, actually advises that Tex Ray Industrial Taipei and Tex Ray South Africa have entered into a business combination. Whereby, Tex Ray South Africa will acquire all the issued and outstanding securities of TQM Textile. There is nowhere in this letter, where it states that the Respondent has been sold. There is also no mention that all obligations of the

Respondent, to its present and future creditors would be affected. We also note that annexure "TD4", which is dated 16th October 2018, is addressed to the employees of Respondent. It is common cause that, none of the current of Applicants, are current employees of the Respondent. The crux of the communication, as it can be gleaned from the letter, pertains to a notice to the current employees and pertains to terminal benefits, as envisaged in **Section 33 (b) of the Employment Act of 1980 as Amended**.

18. We fail to establish from the founding affidavit and from annexure "TD4" how is the communication equated to a sale of the Respondent, as to justify the Applicant to approach the court in the manner in which it has done, under the Rule 15.

19. It is therefore clear, that the averments stated in the Applicant's founding affidavit, being the alleged sale of the Respondent which has been used as the basis for alleging that the matter is urgent, is flawed. That assertion is not supported by the very document (annexure "TD4), which the Applicants rely on.

20. This therefore, means the alleged circumstances which makes the matter urgent are non-existent. This deficiency makes the entire application to fail the test, as enunciated in the **Humprey Henwood case *supra.***

21. A close reading of Justice Dunn's analyisis, presupposes that, when a deponent makes an averment in the founding affidavit, the deponent must aver the circumstances (our emphasis) which circumstances must be substantiated by facts. *In casu*, when one considers the circumstances that have been alleged by the Applicant, they involve that the business has been sold, and that the Respondent will dissipate its assets. (see paragraph 30).

Further, that the Applicants are preferred creditors and that the Respondent will possibly shutdown. In as much as, the deponent has made an attempt to outline the circumstances which apparently makes the matter urgent. The alleged circumstances are flawed, as we have demonstrated above. They are not supported by their own annexure. There is nowhere in the letter, where it is alleged that, the Respondent will dissipate its assets and will sell its business and that it will shut down and relocate outside the court' jurisdiction.

22. It is our considered view, that the alleged circumstances as pleaded in the founding affidavit are misconceived. They are not substantiated by the very document that Applicants seek to rely on. They are as good as non existent.

23. We now come to examine whether the applicant's case meet the second leg of the test, as enunciated in the Henwood case *supra,* which are the reasons why the Applicants' claim they cannot be afforded a substantial redress, at a hearing in due course. This is also a requirement under The Industrial Court Rules 15 (2) (c).

24. The deponent makes an attempt to deal with this requirement in paragraph 33 of the founding affidavit. Where she states as follows; this paragraph has already been produced in paragraph 16 of our judgment.

25. The accuracy of the averments that the respondent will shut down and relocate outside the court's jurisdiction is wanting. This assertion is not supported by annexure "TD4"which the Applicant seeks the court to rely on, in finding that this matter is urgent. To the contrary, annexure TD4" in paragraph 7 makes it clear that the company will not cease its operations. It therefore follows that the Respondent in its own document has pronounced

itself that it will not cease its operations. Clearly the Applicants can still have redress in due course, once the process as outlined in paragraph 19 of Nkonyane J's judgment, is complete.

26. It is our findings that the Applicants have also failed dismally, to satisfy the second requirement of the Industrial court Rule 15 (2) (c). We deem it unnecessary, to consider the other points of law that have been raised by the Respondent.

27. The court will accordingly make an order as follows;

    a) The Applicants application is dismissed for failure to meet the requirements of Rule 15 (2) (a) and (c) of The Industrial Court Rules of 2007.

    b) There is no order as to costs.

28. The members are in agreement.

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B. W. MAGAGULA
ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. A. Fakudze (Labour Consultant)

For Respondent: Mr. L. R Mamba (L.R. Mamba Attorneys)