



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 205/17

In the matter between:

PHUMELELE DLAMINI

Applicant

and

**NATIONAL EMERGENCY RESPONSE
COUNCIL ON HIV AND AIDS**

Respondent

Neutral citation: Phumelele Dlamini Vs National Emergency Response Council
on HIV and AIDS [205/17] [2018] SZIC 45

Coram: **L. Msimango – Acting Judge**
(Sitting with P. Mamba and E.L.B Dlamini – Nominated
Members of the Court)

Heard: 28th March 2018

Delivered: 15th June 2018

Summary: There is an order issued by the High Court, staying execution of a Judgment granted by the Industrial Court in favour of the applicant, that she must be paid her salary arrears. The Respondent sought Review at the high Court and it was held that execution of the Industrial Court Judgement should be stayed. Applicant argues that the rule nisi lapsed and was never revived, there is now no order preventing the Respondent from paying the salary arrears. The Respondent argues that the Review Application has not been finalized yet and that the Applicant should make an application to the High Court for the dismissal of the rule.

JUDGEMENT

1. The Applicant was employed by the Respondent as its Manager Program for HIV and TB on a fixed term contract. On or about the 16th June 2017, the Applicant was charged with seven counts of misconduct which includes gross misconduct, gross in Subordination, gross insolence and incompatibility.
2. A disciplinary enquiry was conducted and the Chairman recommended that a final written warning be issued against the Applicant. However, the Respondent opted against such recommendation and dismissed the Applicant from its work place instead.
3. The Applicant subsequently moved an urgent application to this Honourable Court, in which she sought an order declaring her termination null and void,

and that a directive be issued that the disciplinary hearing be reconvened denovo and that she be permitted legal representation at the disciplinary enquiry.

4. After deliberation, the Court held that the termination of the Applicant's employment be declared null and void, in that the respondent had no power to alter a sanction recommended by the disciplinary Chairperson.
5. Consequent to that Judgement, the Applicant believed that she would be reinstated to her former position of program Manager HIV and TB. However that has not been the case nor has the Respondent paid the Applicant her salary arrears.
6. Instead the Respondent brought a review application to the High Court on the 19th December 2017, in which the Court issued an Order staying the execution of the Industrial Court's decision.
7. The Applicant mentions that for all intents and purposes the order granted by the High Court on the 19th December 2017 was an interim order, returnable on the 28th December 2017 to either confirm or discharge the order.
8. On the return date the 28th December 2017, His Lordship who was presiding over the matter sent an apology that he was out of the country and the matter did not proceed. As a result the rule elapsed since the Respondent did not apply to revive the order or have it extended.

9. As a direct result of the matter not being heard the rule nisi, therefore, fell away and was discharged automatically and, the Applicant has moved this application to compel the Respondent to comply with this Honourable Court's decision of the 18th December 2017.

10. The Respondent avers that there was no rule nisi, which elapsed, as the order of the 19th December 2017 stated as follows:

“pending finalization of the matter in due course, the execution of the Judgement of the 1st Respondent sitting with nominated members delivered on the 18th December 2017 under Industrial Court Case No: 205/2017 (b) is hereby stayed”.

11. The Primary issue to be now determined in these proceedings is whether the Order granted by the High Court is a rule nisi or an Interlocutory Order.

12. According to Herbstein and Van Winsen, the Civil Practice of the Superior Courts in South Africa, 4th Edition at page 709, describes an interlocutory as an order granted by a Court at an intermediate state in the course of litigation, setting or giving directions with regard to some preliminary or procedural question that has arisen in the dispute between the parties. Such an order may be either purely interlocutory or an interlocutory order having final or definitive effect. A stay of execution of a judgement falls under interlocutory orders having final or definitive effect.

13. A stay of execution of a Court Order/Judgement is to temporarily suspend the execution of that Court Judgement. It can be granted automatically by operation of the law or conventionally, when the parties agree that no execution shall occur for a certain period. If a party appeals or reviews a decision, or any Judgement issued by the original Court, it may be stayed until the appeal or review is resolved. Further, a stay can be defined as a time period in which the execution of a Judgement is prohibited from being carried out. It postpones the enforcement of a Judgement against a litigant who has lost a case, called the Judgement debtor. In other words, a Court may grant a stay of execution in any case in which the Court feels the stay is necessary to secure or protect the rights of a Judgement debtor¹.

14. Whilst on the other hand Barron's Law Dictionary defines a rule nisi as a procedure by which one party through an ex parte application or order should show cause why the rule should not be made final by the Court. If no course is shown the Court will enter an order rendering the relief sought final. The Court may also grant interim relief by ordering that the rule nisi or parties of it operate as a temporary interdict².

15. The Applicant argues that the Honourable Court's power is not taken away by review application's to stay the execution of judgements. The Court must find whether or not there is still an Order staying the execution of the Judgement. To support this argument the Applicant quoted S19 (4) of the Industrial Relations Act, 2000 which reads as follows:

“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”¹

16. The above quoted section by Applicant has no bearing on this application, for the reason that Section 152 of the Constitution of Swaziland sets out clearly the powers of the High Court, on review application. The Section reads as follows:

“the High Court shall have and exercise review and supervisory Jurisdiction over all subordinate Courts and tribunals or any lower adjudicating authority, and may in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers”.

17. In simple terms the section means that the High Court plays a supervisory role on subordinate Courts. The Industrial Court itself included in the mentioning of subordinate Courts. Hence it cannot go against an order granted by the High Court.

18. The order of the High Court dated 19th December 2017 unambiguously directs that the execution of the Judgement of this Honourable Court is suspended until the review application is finalised. This means that the Applicant is automatically precluded from giving effect to the judgement for that certain time period, also taking into account that a stay of execution of a judgement is an interlocutory order having a final or definite effect.

¹ Hazard, Geoffrey C. Jr, Colin C and William A. Fletcher, 1994, Cases and Materials on pleadings and Procedure: State and Federal, 7th Edition Westbury N.Y. Foundation Press

19. In light of the foregoing, the following order is made:

(a) The Applicant's application is dismissed.

(b) No order as to costs.

The Members agree.



L. MSIMANGO
ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT:

Mr. M. Simelane
(M.P. Simelane Attorneys)

FOR RESPONDENT:

Mr. D. Jele
(Robinson Bertram Attorneys)