IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 112/14

In the matter between

PHUMZILE MAGAGULA	**1ST APPLICANT**
ALDONA LAPIDOS	**2ND APPLICANT**
MANDLA NXUMALO	**3RD APPLICANT**

And

ACTING JUDGE PRESIDENT OF THE INDUSTRIAL COURT	**1ST RESPONDENT**
STANDARD BANK SWAZILAND LIMITED	**2ND RESPONDENT**

Neutral citation	**Phumzile Magagula and Two Other vs Acting Judge of the Industrial Court and Another *(112/14) [2014]* SZHC 78 (7th April 2014)**
Coram:	**Ota J.**
Heard:	**2 April 2014**
Delivered:	**7 April 2014**

Summary: **Civil procedure: interim interdicts principles thereof; balance of convenience heavily weighed against grant of interdict: application refused.**

JUDGMENT

OTA J.

[1] The three Applicants are permanent employees of the 2nd Respondent, Standard Bank Swaziland (the bank).They held the positions of Accounts Executives in the Corporate and Investment Banking Division (CIB).

[2] On 5 March 2014 the bank served the Applicants with a letter notifying them of its Client Coverage /TPS Restructuring Plans. The letter informed the Applicants that the bank has narrowed its client coverage universe and also restructured how it engages with its clients. That the initiatives are to allow the bank to work smarter and remain closer and relevant to a fewer but more profitable clients. As a result, the Corporate Banking and TPS functions with CIB, Swaziland, will be realigned to deliver the Client Engagement Model.

[3] To this end, the Applicants' role had been affected. The letter required the Applicants, as part of the process, to express interest in the available roles

under the new structure and to apply for it on or before midday 7 March 2014.

[4] It is also an established fact that if the Applicants were not successful in applying for positions in the new structure, they had the option of applying for other positions which were available within the bank. The bank froze all the relevant positions to accommodate the Applicants.

[5] The Applicants contend that the latter positions are support roles and they do not have the experience or expertise that would qualify them for these positions. Furthermore, the equivalent positions in the new structure would now report to the Executive Director in charge of CIB and this would similarly be the case in respect of the other positions available within the bank. Therefore, so goes the argument, the introduction of the new structure would result in the Applicants having no suitable comparable position unless they accept a demotion or be rendered redundant.

[6] The Applicants refused to apply for positions in the new structure. They also refused to identify other positions in the bank. The bank engaged the Applicants who urged the bank to either keep the structure as it is or give

them immediate payout. The bank refused and proceeded with the restructuring. The Applicants therefore contend that this being so, the bank has unilaterally changed their terms and conditions of employment in violation of sections 26 and 40 of the Employment Act (the Act).

[7] The Applicants invoked the provisions of section 26 of the Act by requesting the bank to submit to the Commissioner of Labour the changes notified by the bank. The bank refused and advised that it would go ahead and implement the changes.

[8] Against the backdrop of the foregoing facts, the Applicants approached the Industrial Court under a certificate of urgency praying for the following reliefs:-

> **"3 Pending finalization of this application and or determination of the matter by the Commissioner of Labour in accordance with the provisions of section 26 of the Employment Act:-**
>
> **3.1 the Respondent be and is hereby interdicted and restrained from implementing the restructuring exercise and / or the new structure in its Corporate and Investment Division;**
> **3.2 setting aside any steps taken in relation to the alteration of the Applicants' terms and conditions of employment in pursuance of the aforesaid restructuring and restoring the status *quo ante*;**
>
> **4 That a *rule nisi* do hereby issue calling upon the Respondent to show cause on a date and time determined by this Honorable Court, why the following Orders should not be made:**

4.1 Declaring the implementation of the proposed restructuring presented on 5 March 2014 to be unlawful and or in violation of section 26 of the Employment Act No. 5 of 1980 and of the terms and conditions of the contract of employment between the Applicants and the Respondent;

4.2 An Order interdicting and restraining the implementation of the aforesaid restructuring;
Alternatively: An Order interdicting and restraining the aforesaid restructuring pending compliance with the provision of section 26 of the Employment Act;

4.3 An Order declaring the implementation of the aforesaid restructuring in its current form to be unlawful and an unfair labour practice;

5 Costs of Suit on the scale between attorney and client".

[9] The Industrial Court per **D Mazibuko J. (Acting President)** handed down an *ex tempore* judgment on 31 March 2014, as follows:-

"1. The application for an interdict is hereby dismissed.
2. The matter is referred to the Commissioner of Labour for finalization.
3. There is no order as to costs".

[10] Aggrieved by the foregoing order, the Applicants launched a review application to the High Court under a certificate of urgency, in terms of which they claim, *inter alia*, the following reliefs:-

"1. Dispensing with the usual forms and procedures relating to institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. Condoning any non- compliance of this application with the rules of this Honourable Court in terms of Rule 6, on grounds of urgency, set out in the founding affidavit filed herewith.

3. Pending finalization of this application:

3.1 The 2nd Respondent be and is hereby interdicted and restrained from implementing the restructing exercise and / or the new structure in its Corporate and Investment Division;

3.2 setting aside any steps taken in relation to the alteration of the Applicants' terms and conditions of employment in pursuance of the aforesaid restructuring and restoring the status *quo ante;*

4. Reviewing and setting aside the decision of the industrial Court of 31 March 2014 in terms of which it refused to grant an interim interdict for the maintenance of the status *quo ante* pending the determination by the Commissioner of Labour of the Applicants' complaint in terms of section 26 of the Employment Act No. 5 of 1980.

5. Substituting the decision of the *court a quo* refusing to grant the interim interdict with the following Order:

Pending the determination of the Applicants' complaint by the Commissioner of Labour in accordance with the provisions of section 26 of the Employment Act:

The 2nd Respondent be and is hereby interdicted and restrained from implementing the restructuring exercise and / or the new structure in its Corporate and Investment Division;

Setting aside any steps taken in relation to the alteration of the Applicants' terms and conditions of employment in pursuance of the aforesaid restructuring and restoring the status *quo ante;*

6. Reviewing and setting aside the finding of the Industrial Court that the Applicants were consulted.

7. Reviewing and setting aside the finding of the Industrial Court that the introduction of the new structure did not demote the Applicants.

8. Costs of Suit on the scale between attorney and client.

9. Such further and / or alternative relief as the Honourable Court deems fit".

[11] The present proceedings before me is grounded on an interim interdict pending the finalization of the review application, as well as, an order setting aside the steps taken by bank in pursuance of the restructuring agenda and restoring the Applicants to status *quo ante* as per prayers 3.1 and 3.2 of the review application, setforth in para [10] above.

[12] The application is vigorously opposed by the bank which through its attorney, Advocate Flynn, filed a notice to raise points of law which is to the effect that the Applicants have failed to establish the requirements for an interim interdict.

[13] Mr Magagula who appeared for the Applicants on the other hand passionately urged the court to adopt a restricted approach to the application and to grant the interim interdict principally on grounds that the Applicants have allegedly made out a clear right based on the fact that they have a right to preserve their employment, pending the outcome of the review application.

[14] It is pertinent that I observe here, that an interdict, whether final or interim, cannot be had just for the asking. It is a discretionary measure which the court is enjoined by law not to award arbitrarily or capriciously but judicially and judiciously upon facts and circumstances which show that it is just and equitable to do so. It is thus now judicially settled that an Applicant is required to prove four well known requisites in order to obtain an interim interdict. These are:-

1. *Prima facie* right (though open to some doubts).
2. A well grounded apprehension of irreparable injury.
3. The absence of ordinary or alternative remedy.
4. A balance of convenience in favour of granting of the interim relief.

[15] Speaking about the interdependency of these factors in **Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) S.A 382,** the court observed as follows:-

> **"It thus appears that where the applicant's right is clear, and the other requisites are present no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak. The expression "prima facie established though open to some doubt" seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts.**

> **Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted".**

See **Setlogelo v Setlogelo 1914 AD 221, Nedbank Swaziland Limited v Ndaba Goodwill Dlamini, Editor Times Sunday v Susan Myzo Magagula Appeal Case No. 31/05.**

[16] There is no doubt, as correctly submitted by Mr Magagula, that the Applicants have a right to approach the High Court to review and set aside a decision of the Industrial Court in terms of section 19 (5) of the Industrial Relations Act, 2000, as well as, section 152 of the Constitution Act, 2005.

[17] However, under the requisite test as propounded by **Passenger Service (Pty) Ltd (Supra),** the *prime facie* right an Applicant must establish is not merely the right to approach a court in order to review a decision. This is because the right simpliciter to review the impugned decision did not require any preservation *pendente lite.*

[18] Quite apart from the right to review and to set aside the assailed decision, the Applicants must show a *prima facie* right that is threatened by an impending or imminent irreparable harm. A right which if not protected by

an interdict, irreparable harm would ensue. This enquiry would include the prospects of success of the review application as well as the balance of convenience of the grant of the interdict.

[19] In view of the outcome I reach on other grounds, I am reluctant to comment on the prospects of success of the review application in order not to prejudge both the review application and the enquiry that is pending before the Commissioner of Labour. The issues that inform the prospects of success are live before these fora. Suffice it to say that the Applicants have to my mind failed to satisfy all the relevant factors.

[20] I say this because, in my view, the presence of the alternative remedy offered by the section 26 proceedings pending before the Commissioner of Labour, emasculates the interim interdict sought. This is crucially so as this factor fortifies the balance of convenience which is heavily weighed against the grant of such an order.

[21] A court must be satisfied that the balance of convenience favours the grant of an interim interdict. It must juxtapose the harm to be endured by an Applicant, if interim relief is not granted, with the harm a Respondent will

bear, if the interdict is granted. Thus, a court must asses all relevant factors carefully in order to decide where the balance of convenience rests.

[22] In their founding affidavit the Applicants allege that if the interim interdict is not granted they would suffer prejudice if they lose their existing rights through a restructuring that has an effect on their rights in terms of sections 26 and 40 of the Employment Act. If the Applicants lose their existing employment rights and the bank implements fully the new structure, the section 26 application would be rendered academic because the bank will have implemented a new structure which does not have the exiting positions of the Applicants.

[23] The Applicants further contend that if the structure is implemented they will have no positions in the employers structure and will be rendered redundant. The bank has stated that if the Applicants become redundant they will only be paid severance allowance. All this will be achieved by the bank through a restructuring that is implemented in a manner that violates the Applicants rights of employment. The Applicants have rights to negotiate exit packages if they preserve their employment status and the employer follows due

process. The bank should not be allowed to put itself at an advantage by flounting employment laws.

[24] Furthermore, the Applicants advised the bank on 1 April 2014 not to proceed with the restructuring pending the review application. The bank responded that they are implementing the restructuring. The Applicants have not been informed of any changes and are still going about their normal duties. The implementation process of the new structure is not complete. In these circumstances, pending the review application, an interim interdict should be granted maintaining the status *quo* to prevent irreparable harm, so argued the Applicants.

[25] It is questionable to me why the harm the Applicants are likely to face is alleged to be irreparable. This is because they are afforded an alternative remedy via the section 26 procedure which they initiated themselves. The Labour Commissioner is now seised with the substantive matter in terms of section 26 of the Act. In the event that the Labour Commissioner finds that the alleged changes are in fact disadvantageous changes in the terms and conditions of employment of the Applicants, he is empowered to declare

such changes null and void as if they had never happened. This is the purport of section 26 (2) and (3) of the Act, which provide as follows:-

> **"(2) Where, in the employee's opinion, the changes notified to him under subsection (1) would result in the less favourable terms and conditions of employment than those previously enjoyed by him, the employee may, within fourteen days of such notification, request his employer, in writing, (sending a copy of the request to the Labour commissioner), to submit to the Labour Commissioner a copy of the form given to him, under sect 22, together with the notification provided under subsection (1) and the employer shall comply with the request within three days of it being received by him.**
>
> **(3) On receipt of the copy of the documents sent to him under subsection (2), the Labour Commissioner shall examine the changes in the terms of employment contained in the notification. Where, in his opinion, the changes would result in less favourable terms and conditions of employment than those enjoyed by the employee in question prior to the changes set out in the notification, the Labour Commissioner shall, within fourteen days of the receipt of the notification, inform the employer in writing of this opinion and the notification given to the employee under subsection (1) shall be void and of no effect".**

[26] It is also the established position of the law that a party who is dissatisfied with the decision of the Labour Commissioner may apply to him for a review. Where the Labour Commissioner is unable to carryout the review within fourteen days of the receipt of same, he shall refer the matter to the Industrial Court which may make an order. This is in terms of section 26 (4) of the Act which states as follows:-

> **"(4) Any person dissatisfied with any decision made by the Labour Commissioner under subsection (3) may apply in writing for a review**

to the Labour Commissioner, who using the powers accorded to him under Part 11, shall endeavour to settle the matter. Where he is unable to do so within fourteen days of the receipt of the application being made to him he shall refer the matter to the Industrial Court which may make an order".

[27] The foregoing analogy is foreshadowed by the decision in **Maswati S. Dlamini v Swaziland Development and Savings Bank Civil Case No. 174/2007, paras 18 and 19,** which was urged by Applicants' counsel Mr Magagula. In that case, in dismissing an application for an interim interdict pending a section 26 proceedings, the Industrial Court per **P.R. Dunseith (President)** made the following condign remarks:-

> **"18 ----------To obtain an order staying the transfer pending determination of the section 26 proceedings regarding his appointment as an Operations Officer, the Applicant must show that he will suffer irreparable harm if his transfer to OPC Manzini is not interdicted and he is ultimately successful in the pending section 26 proceedings.**
>
> **19 The court does not find any well grounded apprehension of irreparable harm to have been shown. If the Commissioner of Labour declares the Applicant's appointment as Operations Officer to be an illegal demotion in terms of status and / or remuneration, the horizontal transfer of Applicant to OPC Manzini will be a perpetuation of such demotion and will have to be corrected-----"**

[28] I see no reason why the Applicants cannot be reverted to their previous positions in the bank, if the Labour Commissioner or the court declares the restructuring by the bank null and void.

[29] On the other hand the bank stands to suffer irreparable, astronomical economic and commercial prejudice if the interdict is granted. This fact exudes from the following unchallenged and uncontroverted evidence proferred by the bank:-

> **"9.3 I submit that the balance of convenience does not favour the granting of the interim relief sought in that it is common cause that the new structure, after the interdict was refused in the court a *quo* was made effective on the 01st April 2014.**
>
> **9.4 This has had the effect that the four employees who did apply for positions in the new structure, were appointed to new positions, which they assumed with effect from the 01st of April 2014. Three of these employees within the new structure, one of whom was promoted to a managerial position and the fourth out of the CIB structure to a support operation in the Client Care Centre to service the CIB clients who will move from being serviced by South Africa to Swaziland.**
>
> **9.5 The restructuring is an alignment to group strategy and this process is a group initiative being rolled out in each country in the group in Africa. There would be irreparable damage and confusion and the Respondent's clients would be negatively affected if this process is halted, the normal operations would be disrupted and this cannot be undone if the respondent is ultimately successful in this application, whereas on the other hand there would be minimal if any disruption to the Applicants if the interim relief is not granted but they ultimately succeed and the entire process is reversed by the Labour Commission or by this court".**

[30] Even though the Applicants want the court to believe that the restructuring has not been completed and that they are still at work in the bank occupying their previous positions, they have however acknowledged that the bank wrote them a letter dated 01 April 2014, in the wake of the dismissal of the

interim interdict sought at the Industrial Court. In that letter the bank notified the Applicants that the restructuring was effective 01 April 2014.

[31] In any case, it is incontrovertible that the process of restructuring has begun. This fact can be easily extrapolated from the relief sought in prayer 3.2, wherein the Applicants seek to set aside any steps taken in alteration of their terms and conditions of service in the restructuring process.

[32] The established position of the law is that an interdict is meant to prevent future conduct and not decisions already made or completed as is the position in this case.

[33] In the final analysis, the facts elucidate that more prejudice will be caused to the bank if the interdict is granted than the prejudice that will be occasioned to the Applicants if the interdict is refused. The prejudice that will be suffered by the Applicants is temporary in nature and can be easily remedied within the reasonable time frames set by the section 26 proceedings, if the Commissioner of Labour or ultimately the court finds in their favour.

[34] **CONCLUSION**

In conclusion, this application is unmeritorious. It fails. I order as follows:-

1. The interim interdict sought in terms of prayers 3.1 and 3.2 of the review application be and is hereby dismissed.

2. No order as to costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE …….. DAY OF …….2014

OTA J.
JUDGE OF THE HIGH COURT

For the Applicants:	**M. Magagula**
For the Respondent:	**Advocate P. Flyn (Instructed by attorney M. Sibandze)**