IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE	CASE NO. 171/98

In the matter between:

PAUL SIBA SIMELANE	APPLICANT/ RESPONDENT

and

TIBIYO TAKANGWANE	RESPONDENT/APPLICANT

CORAM:

NDERI NDUMA:	PRESIDENT
DAN MANGO:	MEMBER
NICHOLAS MANANA:	MEMBER
FOR THE APPL/RESP:	MR. ALEX SHABANGU
FOR THE RESP/APPL:	MR. PATRICK FLYNN

RULING

28. 03. 2000

The Respondent/Applicant seeks an order for a stay of execution of the order of the court pending the determination of the appeal against the judgement of the court handed down on the 9th September 1999.

The Application is founded on the Affidavit of Musa Ndela, a senior Personnel Officer of the Respondent/Applicant.

The Notice of Appeal is annexed to the Application and marked 'MN2'. It sets out the grounds of Appeal as follows:

"1. The court aquo erred in law in finding that the Respondent's employment had not been terminated by the Appellant in that:

1.1 The court aquo based its finding on the letter of the 27th May 1997 and misdirected itself in law by finding that the further evidence of dismissal relied upon by the Appellant in its Answering Affidavit could be disregarded on the basis that the Appellant was required to show that such termination was fair.

1.1.1 In so doing the court aquo misconstrued the issues and erroneously applied the law with regard to unfair dismissal to the issue before it. The question for determination by the court aquo was whether there had been a termination of employment and not whether there had been a fair termination. The court Aquo erred in law by invoking Section 42 of the Employment Act 1980 which was irrelevant to the issue for determination.

1.2 The letter of the 27th May 1997 in itself constituted a clear termination of the Respondent's employment".

The Respondent/Applicant filed his Answering Affidavit on the 2nd February 2000 and on the 24th

January 2000 he lodged a parallel Notice of Motion on a Certificate of Urgency seeking for the following orders interalia:

"2. That the Notice of Appeal filed by the Respondent before this Honourable Court be and is hereby set aside.

3. That the Respondent be and is hereby ordered to pay all amounts due to the Applicant within ten days of the granting of the order.

4. That the respondent be and is hereby ordered to pay the costs of this application".

The Applicant/Respondent raised points in limine objecting to the urgent application in the following terms :

"1. The Industrial Court has no jurisdiction to set aside a Notice of Appeal filed in the Industrial Court of Appeal.

LL The Appeal is pending in the Industrial Court of Appeal and the Applicant's/Respondent's objection to the Respondent's/Appellant's right of appeal may only be raised before the Industrial Court of Appeal.

1.2 The order of this Honourable Court for the payment of money is enforceable by execution and there is accordingly no legal basis for the order sought in terms of prayer 3 of the Notice of Motion ".

On the 16th February 2000 the court made a ruling upholding points 1 and 1.1. as contained in the aforesaid notice to raise points in limine.

The points were upheld on the basis that in terms of Rule 6 of the Industrial Court of Appeal a Notice of Appeal from a judgement of the Industrial Court is noted in the Industrial Court of Appeal. In terms of Rule 6 (2) the notice is to be served on the

Registrar of the Industrial Court of Appeal. We were referred to various South African authorities to the effect that a Notice of Appeal is noted in the court Aquo and not in the Appeal Court. The South African authorities cited are distinguishable since the notice of Appeal thereof is filed in court Aquo, hence the setting aside of the notice under Rule 30.

See Supreme Court Practice of South Africa by Van Winsen. Cillier & Loots 1997 4TH ED at pg 669 and Neil V. Enyat Colliery Ltd (1976) 2 SA 466 H to the effect that any attacks on the right to Appeal is to be made in the court Aquo. That it is the court that is seized with a matter that has control over it.

I agree with the aforesaid proposition of the law but in terms of the relevant Rules of the Industrial Court of Appeal aforesaid the position has been varied in no uncertain terms. The court that is seized with and has control of the Appeal that has been noted is the Industrial Court of Appeal and not this court. It was for this reason that the objections by Mr. Patrick Flynn were upheld.

The Application for the stay of execution was then argued on the merits by the parties.

As we stated in the matter between Atlas Motors (Pty) Limited and John Kunene (I.C) Case No 178/97 unlike the common law position, according to Section 11 (4) of the Industrial Relations Act No. 1 of 1996, the mere noting of an Appeal does not automatically stay the execution of an order of this court.

The Section reads:

"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 Act empowers the court to grant a stay of execution of its orders on application. This is a discretion to be exercised by the court on the merits of each case.

In the case of South Corp v Engineering Management Services (1977) (3) SA 534 at 545 Corbet J.A. stated as follows:

"In exercising this discretion the court should in my view determine what is just and equitable in all the circumstances and in so doing would normally give regard, inter alia, to the following factors;

1. The potentiality of irreparable harm or prejudice being sustained by the Appellant on Appeal (Respondent in the application) 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 the question as to whether the appeal is frivolous or vexatious or has been noted with the bona fide intention of seeking to reverse the judgement but for some indirect purpose eg to gain time or harass the other party; and

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

As we stated in the Atlas Motors case (supra) the onus proper rests upon the Applicant. This is so irrespective of whether the judgement in question is one sounding in money only or is one granting other forms of relief.

We note that the judgement in this case is partly specific performance by way of physical restoration of the Respondent to his job and partly sounding in money in that the Applicant is to pay in arrears all the salary the Respondent was entitled to from January 1997 todate with interest at 9% as from when it became due and payable.

The Applicant submitted that it has an arguable Appeal pending. That as a matter of probability the Applicant had an argument of law that the court ought not to have applied Section 42 of the Employment Act in the circumstances of the case because it had found that there was no termination in the first place. That by introducing the issue of fairness, the court had misdirected itself.

The other argument by the Applicant was that the court had disregarded certain contents of the Answering Affidavit and paragraphs 4.5.1 of the supporting Affidavit of Mr. Mkhweli. That if the court had taken the same into consideration it would have reached a different conclusion. This evidence was said to have been relevant to the issue as to whether the Applicant had adequately communicated its intention to terminate the services of the Respondent to him.

On the above basis, the Appeal was said to have a high probability of success since another court may come to a different decision with regard to the Application of Section 42, as well as to whether there was unequivocal communication of the intended termination.

Further, Mr. Flynn submitted that the Applicant would be greatly prejudiced were it to succeed in the Appeal having satisfied the judgement since the sum involved is large and the Respondent would have been back in his employment.

That the Respondent may not be in a position to repay should the Appeal succeed. After all the Applicant was a reputable organisation and would in any event be able to satisfy the judgement should the Appeal fail.

On the contrary, Mr, Shabangu submitted that the wording of Section 11 (4) is of relevance in the exercise of the court's discretion to stay or not to stay the execution. He observed that of relevance is the use of the word "shall " not stay execution unless the court directs on application.

That the provision constitutes a deliberate departure by the legislature from the common law position. This being the case there must be special consideration for the court to be moved to stay execution.

Mr. Shabangu added that the Legislature contemplated that the parties before this court would be employees and employers and gave special consideration to the financial inequality between the parties in enacting this provision.

Further the legislature contemplated the nature of claims and remedy available to the parties to include compensation, reinstatement and re-engagement but nevertheless decided that the mere noting of an Appeal should not stay the execution.

The mere fact that an employee is one of little means should not be taken as a special consideration therefore in matters of this nature. This should not therefore be a sufficient reason upon which execution of an order in favour of an employee should be stayed.

The amount in question had accumulated over a number of years and the Applicant had suffered untold hardship as a consequence thereof including loss of his house that was on bond.

Mr. Shabangu further argued that the Applicant had very slim prospects of success and therefore the potential for prejudice was minimal. He submitted further that the court did not disregard any evidence and if it did, this was an issue for review but not Appeal.

The issue of law decided upon was that a notice to terminate must be done in clear and unambiguous terms. This issue is not challenged in the Notice of Appeal he added.

The court decided an issue of fact also to the effect that the communication by the Applicant was vague and ambiguous as per the letter dated 27th May 1997. Therefore this is not an issue of law and should not have been taken up on appeal in the first place. This aforesaid letter of 27th May 1997 constituted final communication to the Respondent and whatever had happened prior at the alleged disciplinary hearing is immaterial, Mr. Shabangu submitted.

We have duly considered submissions by both Counsel on the facts and law applicable in the circumstances. We are persuaded that there is potentiality of irreparable harm or prejudice to both the Applicant and the Respondent. The Application in our view therefore turns on the balance of hardship or convenience likely to be suffered by the Applicant should an order for stay be refused visavis that is likely to be suffered by the Respondent should an order for stay be made.

We do not consider the pending Appeal to be frivolous or vexatious but the prospects of success of the Appeal can be downplayed considering the hardship and inconvenience the Applicant has undergone since 1997 when his salary was stopped.

He is under considerable difficulty to pay school fees for his three children for the last three years and states in his Answering Affidavit that the children would inevitably drop out of school this year should he not receive payment from the Applicant. His family house was sold in execution due to his inability to discharge the instalments in terms of a mortgage bond. Should the Applicant fail in its Appeal, it may well be too late for the three (3) children who would have dropped out of school. This prejudice is real as

viewed against that which may be suffered by the financially able Applicant.
In the circumstances the Application for stay of execution is dismissed with no order as to costs.

The Members agree.

NDERI NDUMA

RESIDENT - INDUSTRIAL COURT