IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 88/2004

In the matter between:

PHYLLIS PHUMZILE NTSHALINTSHALI **Applicant**

and

SMALL ENTERPRISE DEVELOPMENT COMPANY **Respondent**

CORAM:

P. R. DUNSEITH: **PRESIDENT**

JOSIAH YENDE: **MEMBER**

NICHOLAS MANANA: **MEMBER**

FOR APPLICANT: **Z. JELE**

***FOR* RESPONDENT:** **Z SHABANGU**

J U D G E M E N T -27/09/2007

1. On 16th August 2007 at the conclusion of a trial action, the Industrial Court delivered a written judgement and granted the following order:

> (a) The Respondent is ordered to reinstate the Applicant to her position as Personnel Officer with effect from 1st December 2003, with full restoration of seniority, length of service and benefits.
>
> (b) The Respondent is ordered to pay to the Applicant the sum of E69,347.25 in respect of the balance of arrear remuneration after refund of terminal benefits.
>
> (c) The Respondent is ordered to pay to its Pension

Fund for the credit of the Applicant the employer contributions for the period from 1st December 2003 to the date of reinstatement, and to procure that the Applicant is credited with all employer contributions paid to the Fund on her behalf prior to 1st December 2003 together with accrued
interest to date.

(d) The Respondent is ordered to pay the costs of the suit.

2. The Respondent in the trial action, namely the Small Enterprises Development Company ("SEDCO"), noted an appeal against this judgement to the Industrial Court of Appeal. It has now applied to the Industrial Court for the execution of the judgment to be, stayed pending the outcome of the appeal.

3. For ease of reference, we will continue to refer to SEDCO as the Respondent, and to Phyllis Ntshalintshali - who was the Applicant in the trial action - as the Applicant.

4. In terms of section 19 (1) of the Industrial Relations Act 2000 (as amended) a party may appeal against the decision of the Industrial Court to the Industrial Court of Appeal on a question of law only.

5. In terms of section 19 (4) of the Act, the noting of an appeal against the decision of the Industrial Court shall not stay the execution of the court's order unless the court on application directs otherwise.

6. This section varies the common law position so that the mere noting of an appeal does not ipso facto operate to stay execution of the order appealed against. The Industrial Court is however given a discretion to stay the execution of its order on application. Such discretion is to be exercised fairly and equitably on the merits of each case.

- See the unreported judgements of this Court in **Atlas Motors v John Kunene (IC Case No. 178/97)**

Paul Siba Simelane v Tibiyo Takangwane (IC case No. 171/98).

7. *"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 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; 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 maybe."*

- per **Corbett JA in South Cape Corporation v Engineering Management Services 1977 (3) SA 534 at 545,** cited with approval in **Atlas Motors (supra)** and **Paul Siba Simelane (Supra).**

8. The Respondent, as the Applicant for a stay of execution, bears the onus of establishing on a balance of probabilities that it is just and equitable that execution be stayed pending the outcome of the appeal. In **Atlas Motors (supra)** and **Paul Siba Simelane (supra)** this court adopted the following principle from the South Cape Corporation case (supra at 548 C-E):

> *"The onus proper (or overall onus) rests, as I have already indicated, upon the applicant. This is so in my view irrespective of whether the judgement in question*

is one sounding in money only or is one granting other forms of relief. Where the judgement is one for money only, then in an appropriate case, the inference may be drawn, prima facie, that the furnishing of security de restituendo would protect the Appellant against irreparable harm or prejudice."

9. The decision of this court which has been appealed against includes an order *ad factum praestandam* - namely reinstatement - and orders for the payment of money.

10. With respect to the order for reinstatement, the Respondent submits that implementation of this order will involve creation of a new personnel department to be headed by the Applicant. New equipment would have to be acquired to set up the new department. Apart from financial and budget implications, there would be an impact on the present personnel structures and the jobs of employees to whom Applicant's duties were allocated when her position was abolished.

11. The Respondent accordingly submits that it will be irreparably prejudiced if it is obliged to reinstate the Applicant and the reinstatement order is ultimately reversed on appeal, since it will have incurred irrecoverable -financial - expense and endured needless disruption of its structures and operations.

12. Regarding the orders sounding in money, the Respondent states in its founding affidavit that it is not aware of assets owned by the Applicant from which it may recover monies paid in execution of the judgement debt should the judgement be reversed on appeal.

13. The Applicant responded in her answering -affidavit that she is a woman married in community of property to a manager at SIDC and she and her husband have more than enough assets to enable the Respondent to recover monies paid in terms of the judgement, should this become necessary.

The Applicant did not list any executable assets, but in its Replying Affidavit the Respondent accepts her baid assertion that she and her husband have adequate assets and can afford to

refund any amount paid to her when called upon to do so. In fact the Respondent relies upon this assertion to submit that:

"[tjhere would therefore be no prejudice in [Applicant] awaiting the final outcome of the appeal on the judgement and relying on her adequate resources in the meantime for livelihood."

Mr. Jele for the Applicant contends that the Respondent has very slim prospects of success on appeal. He points out that the court found that the abolishment of the Applicant's position and the redistribution of her duties had no commercial rationale and was engineered solely as an exercise to get rid of her. On the basis of these factual findings, which cannot be challenged on appeal, the court decided that the termination of the Applicant's service was substantively unfair. Mr. «Jele argues, with some justification, that there is tittle-likelihood that this » decision will be overturned on appeal.

It is not impossible, however, that the Industrial Court of Appeal may reach a different conclusion on the question of the appropriate remedy:

> 16.1 This court in its judgement found that the retrenchment of the Applicant was an automatically unfair dismissal. This finding brought section (16) 3 2000 (as amended) into play, prompting the court to give priority to the remedy of reinstatement.
>
> 16.2. The Respondent submits in its notice of appeal that the court was not entitled in law to make a finding of automatically unfair dismissal because this is a separate cause of action which should have been conciliated upon before CMAC and specifically pleaded.
>
> 16.3. We make no comment on this ground of appeal save to say that it does raise an arguable issue and it is not entirely inconceivable that a higher court may be persuaded by the Respondent's argument. In that event, the order for reinstatement might also be susceptible to challenge.

17. In our view there is some prospect, albeit remote, of the reinstatement order being reversed on appeal.

18. The Respondent has shown on a balance of probabilities that

it may be irreparably prejudiced if the Applicant returns to work and the reinstatement order is later reversed on appeal.

19. It has not however shown any likelihood of prejudice if it complies with-the court orders sounding in money.

20. The prejudice shown must relate to restoration of the status quo. In its replying affidavit and through its counsel during arguments, the Respondent accepts that the Applicant will be in a position to refund any monies paid in terms of the order, if called upon to do so.

21. The reason for suspension of execution of * a judgement pehdihg" appeal is to avoid irreparable damage to the intending appellant.

Reid & Another v Godart & Another 1938 AD 511 at 513.

Where no irreparable damage is anticipated, there is no reason to keep a successful party out of its judgement. The question of balancing the equities does not arise where the *status quo ante* can be restored in the event of a successful appeal.

22. In the superior courts where execution is stayed automatically upon the noting of an appeal in terms of the common law rule, the courts usually grant leave to execute upon money judgements subjects to *security de restituendo* - See **Herbstein & Van Winsen: The Civil Practice of the Superior Courts in SA (2nd Ed) at 642.**

23. The Respondent's counsel concedes that security de *restituendo* is not required since the Applicant and her husband have ample assets from which any payment may be recovered. Nevertheless *ex abundantia cautela* the court considers that security in the way of a suretyship guarantee by the Applicant's husband would be a salutary measure to safeguard the interests of the Respondent.

24. With regard to paragraph (c) of the order dated 16th August 2007, it has been brought to our attention that the employer contributions to the Pension Fund up to the date of Applicant's dismissal were paid to her, and the Applicant intends to abandon that part of the order requiring the Respondent to credit such

contributions to her account in the Pension Fund. This issue can be dealt with at the Appeal, and in the meantime the execution of paragraph (c) of the order should be stayed.

25 In the final result,,the court makes the following order™

(a) Execution of paragraphs (a), (c) and (d) of the order of the Industrial Court contained in its judgement delivered on the 16th August 2007 is hereby stayed pending the determination of the appeal against such judgement, subject to the condition that against delivery of the suretyship guarantee referred to in (b) below the Respondent shall pay the Applicant her monthly salary as from 1st September 2007 pending the determination of the appeal.

(b) Execution of paragraph (b) of the order dated the 16 August 2007 may proceed, subject to the Applicant delivering to the Respondent's attorneys a suretyship undertaking in terms of which her husband Dan Ntshalintshali guarantees repayment of all monies paid by the Respondent to the Applicant in execution of the judgement dated 16th August 2007 to the extent that such payment may not be due by virtue of the outcome of the pending appeal.

(C) There is no order as to the costs of this application.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT