

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 182/2007

In the matter between:

NHLANHLA MHLANGA

Applicant

and

E-TOP UP (PTY) LTD

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : Z. DLAMINI

FOR RESPONDENT : MKHATSHWA

EX TEMPORE JUDGEMENT – 01/06/2007

1. The Respondent has raised a preliminary defence of *lis alibi pendens*, alleging that the present application should be stayed pending the determination of a criminal prosecution instituted against the Applicant.
2. To succeed in its plea of *lis alibi pendens*, the Respondent must

show that another action is already pending between the same parties on the same cause of action and in respect of the same subject matter.

Marks & Kantor v Van Diggelen 1935 TPD 29.

3. The plea in this case is entirely misconceived, since the Respondent is not a party to the criminal proceedings, which are instituted by the Crown. Moreover, the subject of the criminal proceedings is entirely different to the Applicant's present claim arising from his alleged unfair dismissal.
4. The Court has a discretion to stay proceedings in a civil suit if, in the interests of justice, it is necessary that a criminal charge be first disposed of – **Whalley v Buchner 1910 CPD at 229**. Such a stay will only be granted if it can be shown that the accused person may be prejudiced in his defence of the criminal prosecution, or where the administration of justice is likely to be prejudiced.

No such prejudice has been suggested, let alone shown.

5. Regardless of the outcome of his criminal trial, the Applicant is entitled to dispute the procedural and substantive fairness of his dismissal – see **Mphikeleli Sifani Shongwe v PS Ministry of Education & Others (I.C. Case No. 207/2006 at page 9)**.
6. No reason has been shown for a stay of proceedings. The preliminary plea of *lis alibi pendens* is dismissed. The matter is referred to the Registrar for allocation of trial dates.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT