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IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 116/2009**

In the matter between:

SIPHO MANANA MDUDUZI **1st APPLICANT 2nd**
DLAMINI SABELO **APPLICANT 3rd**
NGWENYA **APPLICANT**

and

AFRISAM [SWAZILAND] (PTY) LTD **RESPONDENT**

CORAM:

S. NSIBANDE A.M. **MEMBER**
NKAMBULE M. MTETWA **MEMBER**
ACTING JUDGE

MR. S.C.M. MASUKU MR. **FOR APPLICANT FOR**
M. SIBANDZE **RESPONDENT**

RULING ON POINTS OF
LAW 25th MARCH 2009

[1] The Applicants are employees of the Respondent, a company duly registered in accordance with the laws of Swaziland and having its principal place of business at Matsapha.

[2] The Applicants state that they were arrested on 29 January 2009 and formally charged with the theft of 400 bags of afrisarn cement valued at E26 800.00 (twenty-six thousand eight hundred Emalangeni). They were admitted to bail on 30th January 2009 and subsequently their trial date was set for 16th June 2009.

[3] On their return to work on 3rd February 2009, they were immediately placed on suspension by the respondent pending the outcome of an investigation which, they were advised could result in disciplinary action. They are currently out on bail and suspended from work on full pay.

[4] On 5th March 2009 they were given notices to attend disciplinary hearings from 16th March 2009 at 8:30 am. They face four charges all related to the theft of 400 bags of all purpose cement in this internal disciplinary hearing.

[5] The Applicants have now applied to court for an order in the following terms:

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

6.1 *Condoning any non-compliance with the rules of the Court;*

6.2 *That **ruli nisi** (sic) be issued with immediate and interim effect, calling upon the Respondent to show cause, on a date to be appointed by the above Honourable Court; why prayers 1,2,3,4 and 5 herein below should not be confirmed and made a final order of Court;*

3.1 That the pending disciplinary actions instituted against Applicants is stayed until after the matter is accomplished before the Magistrate Court in Matsapha.

3.2 That pending the finalisation of the matter at the Magistrate Court,
Respondent is restrained and interdicted from proceeding with
internal disciplinary process.

3.3 That the Respondent shows cause why this matter should not be
declared a subjudice *matter.*

3.4 That Respondent is directed to follow the provisions of rules 6 (6.9) of the Recognition Agreement voluntarily entered into by the
parties and is restrained and interdicted to action in a manner contrary to the provisions of 6 (6.9) (sic).

3.5 That the Respondent withdraws forthwith the notices to attend disciplinary hearing issued against the applicants
And or
The notices are declared null and void and of no force and effect.

3.6 That Respondent is restrained from intimidating, unsettling Applicants through the usage of the disciplinary notices before the
matter is concluded at the Magistrate Court.

6.3 *That prayers 3, 3.1, 3.2, 3.3, 3.5 operate as a* ***rule nisi*** *pending the finalization of this Application.*

6.4 *Ordering the Respondent to pay costs of this Application.*

6. Further and/or alternative relief."

[6] The Respondent opposes the application and has filed an answering affidavit in which it has raised two points *in limine* -

6.5 That the applicants have failed to establish a prima facie right to the relief that they seek in that there is no right at law to the staying of a disciplinary hearing pending the outcome of a related criminal trial nor does clause 6.9 of the Recognition Agreement extend such right as alleged by the applicants.

6.6 That the applicants have failed to comply with rule 15(2) (a) of the **Industrial Court Rules** as they have not stated concisely why the matter is urgent. Furthermore the applicants had been alerted of the hearings on 5th March 2009 but only launched the application on 16th March 2009, after the hearings were commenced. Such delay was unacceptable and meant that the matter was not urgent.

[7] The Applicants state at paragraph 28 (v) of the founding affidavit that the matter is

urgent *"due to the respondent's action of vigorous intentions of going ahead with disciplinary hearings at all costs and concurrently with the Magistrate Court is Unfair, Injustice and unfair Labour practice which is tantamount to the perpetration of Intimidation, Harassment and Victimization to Applicants; making this matter to fall within matters that needs urgent attention of this Honourable Court."*

[8] They also explain that the delay in approaching the Court was caused by their attempt to have the matter settled without coming to court, by seeking the intervention of the Commissioner of Labour. It is common cause that such action was unsuccessful since the respondent indicated by letter dated 11th March 2009 that it intended to proceed with the hearings. It was at that stage that the applicants sought the intervention of the Court.

[9] What the Applicants complain of is that the Respondent has shown an intention to proceed with the disciplinary hearings despite their attempt to resolve the matter. The Applicants further attempted to iavehre the issue but these efforts were rebuffed by the Respondent.

[10] It seems to the Court that the Applicants can not be faulted for the delay in bringing the matter. As this Court has previously said it is encouraged that parties to a dispute first try to resolve their disputes outside the Court. We find thereafter that the Applicants did not unduly delay this application and that it ought to be heard as a matter of urgency.

[11] On the issue as to whether the Applicants have established a **prima facie** right to the relief they seek, what the Applicants essentially seek to do is to interdict the disciplinary hearings until the criminal charge they face is disposed of. They say that the recognition agreement, in particular paragraph 6.9 thereof, does not entitle the Respondent to proceed with the disciplinary enquiry in view of the fact that the police are now involved and the Applicants face a criminal charge. They argue that the Applicant's civil rights can not be respected because they will have to say something at the disciplinary hearing whereas in the criminal case they may wish to exercise their right to remain silent.

[12] Mr. Masuku for the Applicants argued that the results of the disciplinary enquiry would result in the miscarriage of justice and that the hearings must be stayed pending the hearing of the criminal matter at the Magistrate Court. He referred the Court to the Case of **Nonhlanhla Mhlanga vs E -Top Up (Pty) Ltd IC Case** N2 **182/07** for that proposition.

[13] The Respondent argued that the recognition agreement particularly article 6.9

thereof does not preclude it from proceeding with the disciplinary hearings nor does it extend to the applicants the right to stay the disciplinary hearings until the finalisation of the criminal trial.

[14] Article 6.9 reads as follows:

"Whenever a disciplinary manager finds that an employee has committed an act of theft or fraud against the Company the matter must be referred to the local police for prosecution after the Company's disciplinary action has been finalised, unless the Group Industrial Relations Manager agrees that circumstances exist which make prosecution inappropriate. In some cases the Police may be involved prior to the disciplinary action being invoked, which may require that the civil right of employees must be respected. In the case of fraud, the provision of GFA SPF2.13.1 must be observed."

[15] The Court's view is that the Applicants have misconstrued article 6.9 of the recognition agreement. What the article seeks to do is to ensure firstly that where an employee is found guilty of theft or fraud in a disciplinary hearing, that matter is referred to the police for prosecution unless the Group Industrial Relations Manager deems prosecution in appropriate. Secondly it seeks to ensure that where the police are involved in a matter before a disciplinary hearing is held, the employee's civil rights are respected. There is nothing in article 6.9 of the recognition agreement that precludes the Respondent from proceeding with a disciplinary hearing where the police are involved in a matter prior to a disciplinary hearing.

[16] Mr. Sibandze for the Respondent referred the Court to the Case of **Davis vs Tip N.O and Others 1996 (1) SA 1152 (W)** which happens to be on all fours with the case before us. In that case the Applicant relied of section 25 (3) of the **South African Constitution** which guarantees to every person the right to a fair trial including the right:

"to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial."

While section 21 of the **Constitution of Swaziland Act** guarantees the right to a fair trial it does not include the right to remain silent during plea proceedings or trial. The Applicants in this case therefore rely on the common law right to remain silent.

[17] In the **Davis** case (supra) the Court stated that *"It is well established that a Court*

will intervene to protect the right to remain silent in criminal proceedings even if the threat thereto is only an indirect one."

[18] The learned Nugent J (as he then was) quoted Trengrove J as having said (in the case **Irvin and Johnson Ltd vs Baxon 1977 (3) SA 1067 (J))** that *"The principle as I understand it, is that, if it is shown that proceedings in an insolvency, and the examination of an insolvent, are likely to prejudice the insolvent in his defence in related criminal proceedings, the Court has a discretion to stay all proceedings against him until the criminal proceedings have been concluded...."*

[19] This position was also stated by this Court in the matter of **Nhlanhla Mhlanga vs E Top UP** (supra) where in the President of the Industrial Court-stated: *"The Court has a discretion to stay the proceedings an a civil smith if, in the interests of justice it is necessary that a criminal charge be first disposed of a such stay will only be granted if it can be shown that the accused person may be prejudiced in his defence in the criminal prosecution or where the administration of justice is likely to be prejudiced." >*

[20] The Applicants state that their defence to the criminal prosecution will be prejudiced if the disciplinary hearings are not stayed pending the finalisation of the criminal trial. They submit that they deny being involved in the issues relating to the criminal charges and it can reasonably be deduced that they intend to plead not guilty to the criminal charges. They state that if the hearings proceed, they will have to say something in answer to the evidence given against them which can then be used against them at the Magistrates Court where they may wish to remain silent as per their rights.

[21] What the authorities seem to be agreed upon is that pending criminal charges do not give rise to a right to postponement of a disciplinary hearing. The matter remains in the Courts discretion. (See **John Grogan - Work Place Law page 174)**

[22] In the **Davis** case (supra) it was said that the Courts have always intervened where there was potential for State compulsion to divulge information and that even where there was such compulsion the Courts have not generally suspended the civil proceedings but have ordered that the element of compulsion should not be implemented. The Applicants have already spoken to the police and most likely given statements in denial of the charges they face. The Court can not see how they will be prejudiced at the disciplinary hearings if they continue with their denials. /Such denials have already been made to the police during the

interrogation/investigation and can not prejudice the Applicants at the criminal trial.

interdicts

[23] The Applicant's application is primarily for an interdict. Inline clicks are based upon right. Which in terms of substantive law are sufficient to sustain a cause of action. An Applicant for an interdict must show a right which is being infringed or which he apprehends will be infringed and if he does not do so the application must fail. (See **C.B. Prest - Interlocutory Interdicts at page 56).**

[24] The Applicants have not established any right to the staying of the disciplinary hearings pending the outcome of the related criminal case.

What they seek to do is to avoid the possibility of information damaging to them being disclosed by themselves at the disciplinary hearings. As the learned Nugent J (as he then was) states in the **Davis** case (supra), the right to remain silent derives from an abhorrence of coercion as a means to secure convictions by self-incrimination; it exists to ensure that there is no potential for this to occur. It achieves this by protecting an accused person from being placed under compulsion to incriminate himself; not by shielding him from making legitimate choices.

[25] In this case, the Applicants may well be required to choose between incriminating themselves or losing their employment. If they choose to rely on their right to silence even in the disciplinary hearings they do at the risk of an adverse inference being drawn against them. That is a legitimate choice they must make which does not prejudice their right to remain silent. ^^^^ ^ Their right to remain silent does not in our view shield them from making that choice - difficult as it may be.

[26] The Court comes to the conclusion therefore that the point raised in limine must succeed. The application is dismissed. There is no order as to costs.

The members agree.

<u>SIFISO NSIBANDE</u>

ACTING JUDGE OF THE INDUSTRIAL COURT