

**IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE**

CASE NO. 440/09

In the matter between:

ABEL NSIBANDZE

APPLICANT

And

STANLIB SWAZILAND (PTY) LTD

1st RESPONDENT

LIBERTY LIFE SWAZILAND (PTY) LTD

2nd RESPONDENT

CORAM:

D. MAZIBUKO

JUDGE

A. M. NKAMBULE

MEMBER

M.T.E.MTETWA

MEMBER

JUDGEMENT - 20th JUNE 2011

Noting of appeal to Industrial Court of Appeal - no automatic stay of execution.

Section 19 (4) Industrial Relations Act - Application necessary for stay of execution pending appeal. Finalisation of a matter in court - noting of appeal interrupts finalisation of matter until decision on appeal.

1. The Applicant Mr Abel Nsibandze is employed as a country managing director by both the 1st and the 2nd Respondents. The Applicant is presently on suspension with pay since 24th June 2009.

2. The 1st Respondent is Stanlib Swaziland (Pty) Ltd a company duly registered and incorporated in accordance with the laws of Swaziland.

3. The 2nd Respondent is Liberty Life Swaziland (Pty) Ltd a Company duly registered and incorporated in accordance with the laws of Swaziland. The 1st and the 2nd Respondents operate business under the same premises and are affiliated to the same parent company.

4. This application is a sequel to several matters that have been heard and decided by various Courts of the land involving the same parties namely, the Industrial Court, the Industrial Court of Appeal, the High Court and the Supreme Court of Swaziland.

5. The Applicant has moved an urgent application for relief as follows;

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

(2) Condoning Applicant's non compliance with the said rules and provisions as relating to form, service and time limits and hearing this matter as urgent.

*(3) Directing the Respondents to maintain the **status quo ante** existing prior to the handing down of the Judgment of this Honourable Court of the **12th November 2010** pending the outcome of the appeal noted by the*

*Appellant in the Industrial Court of Appeal of Swaziland, under **Industrial Court of Appeal Case No. 5/2010.***

ALTERNATIVELY;

*(4) Interdicting the Respondents from holding a disciplinary hearing against the Appellant pending finalisation of the Appeal under **Industrial Court of Appeal Case No. 5/2010.***

*(5) Interdicting the **Respondents** from stopping or in any way adversely changing the **Applicant's** remuneration, pending the finalisation of the Appeal under **Industrial Court of Appeal Case No. 5/2010.***

*(6) Directing that **Prayers 3,4 and 5** herein above operate as an interim order pending finalisation of this Application.*

*(7) That a rule **nisi** do hereby issue calling upon the Respondents to show cause on a date to be determined by this Honourable Court why the Orders stated in **prayers 3,4 and 5** above should not be made final.*

(8) Granting the Applicant the costs of this Application in the event of opposition thereto which costs are to include the certified costs of Counsel.

(9) Granting Applicant any further and/ or alternative relief.

6. In the year 2010 the Applicant moved an application before the Industrial Court in which he claimed inter alia, the following orders (in paraphrased form),

(a) setting aside the disciplinary charges which the Respondents preferred against the Applicant;

(b) alternatively, interdicting and restraining the employer (Respondents) from proceeding with a disciplinary enquiry against the employee (Applicant) on the basis that it is a sham and unfair labour practice;

(c) Costs of suit;

(d) Ancillary relief.

7. On the 12th November 2010, the Industrial Court dismissed the Applicant's main and alternative prayers by written judgment. A copy of that judgment is attached to the Applicant's affidavit marked **A1**. The said application is registered under the Industrial Court case No. 440/2009 (unreported).

8. The Applicant appealed the judgement of the Industrial Court (annexure **A1**) to the Industrial Court of Appeal. A copy of the Notice of Appeal and grounds of appeal are attached to the Applicant's affidavit marked **A2**.

9. Upon noting an appeal the Applicant was subject to time limits as prescribed by the rules of Court regarding filing the record and heads of argument. The appeal was supposed to be heard in the March 2011 sitting of the Industrial Court of Appeal. However, the matter did not proceed as scheduled for reasons which are discussed in the succeeding paragraphs.

10. On the 15th December 2010 the 1st and 2nd Respondents wrote the Applicant's attorney a letter the contents of which have a bearing on the matter before Court. The letter is attached to the Applicant's affidavit marked **A3**. The letter is on the 1st Respondent's letter heads. It reads as follows:

15th December 2010

Magagula & Hlophe Attorneys
Mbabane

Dear Sir

Without Prejudice" LIBERTY LIFE & STANLIB SWAZILAND-

ABEL SIBANDZE

Reference is made to the above matter.

This is to inform you that the Boards of both Liberty Life and Stanlib Swaziland deliberated on the dispute between both companies and your client Mr Abel Sibandze during their meeting held on December 03, 2010. The Board has not finalised and reached a conclusion on the matter but will be in a position to inform you on its decision after January 30, 2011.

In the interim period we request all parties to put in abeyance any further action pending our feedback to you.

Yours faithfully
Chairman of the Board,

cc: Robinson

11. According to the Applicant his understanding of annexure **A3** was that the Respondents are contemplating settling out of court the ongoing legal dispute between the parties. The board of directors of the 1st and 2nd Respondent's are engaged in a discussion regarding the proposal to settle. While the discussion is ongoing on the Respondents' side, the Applicant is requested to hold the matter in abeyance.

12. The Applicant welcomed the Respondents' expressed intention to have the matter settled amicably. The Applicant further noted that the Respondents' suggestion was consistent with the recommendation that had been made by the Supreme Court of Swaziland. In the Supreme Court case no. 65/2009 (unreported) dated 30th November 2010 involving these and other parties the Supreme Court suggested at Paragraph [38] that the parties should consider settling this matter through alternative dispute resolution mechanisms.

13. The Applicant states that he decided to give the Respondents a chance to pursue the settlement option. As a result the Applicant did not prosecute the appeal which he had noted in November 2010. According to annexure **A3**, the Respondents requested time to deliberate on their own proposal to settle the matter. The Respondents had promised to finalise their discussion by 30th January 2011 and advise the Applicant of the outcome thereof.

14. The Applicant argues further that, upon noting an appeal he was entitled to apply to Court for a stay of disciplinary enquiry pending finalisation of the appeal. Upon receipt of annexure **A3** such an application was no longer necessary.

15. Another reason for not applying for a stay of execution was the consent Order of the 11th December 2009. That order is attached to the Applicant's replying affidavit marked **SIB 1**. According to the Applicant a consent order was entered into between the parties to the effect that the Respondent will not proceed with the disciplinary enquiry against the Applicant until case 440/2009 is finalised.

16. An extract of that consent order (annexure **SIB 1**) reads as follows:

"1. By consent of the parties the Agreement between the parties is made an Order of Court which is to say that;

*1.1 The Respondents hereby undertake not to proceed with a disciplinary enquiry against the Applicant either in the **Republic of South Africa** or **Swaziland** or anywhere else pending finalisation of the proceedings in **Case No. 440/2009**.*

*2. **Case No. 440/2009** is postponed for hearing of arguments on **Monday** the **14th** day of **December 2009**.*

*3. Costs in **Case No. 473/2009** are reserved to be determined at a later stage on a date to be arranged by the parties."*

17. According to the Applicant case No. 440/2009 is not finalised yet even though the Industrial Court delivered its judgment on the matter dated 12th November 2010 (annexure **A1**). The matter is now at appeal stage before the Industrial Court of Appeal as stated in paragraph 8 above.

18. Despite writing annexure **A3** the Respondents proceeded to set the appeal down for hearing before the Industrial Court of Appeal. That caused the Applicant to move an application for a postponement of the appeal. The application for a postponement was heard and decided in favour of the Applicant. The appeal was postponed to the next session of the Industrial Court of Appeal. A written judgment of the Industrial Court of Appeal was delivered under case no. 5/2010 on the 23rd March 2011 and is marked **A7**.

19. About the 12th April 2011, through their respective attorneys, the Respondent invited the Applicant to a disciplinary hearing scheduled for the 11th May 2011. The notice to attend the disciplinary hearing is contained in a letter dated 12th April 2011 annexure **A10**.

20. In annexure **A10** the Respondents have indicated a possibility of amending the conditions under which the Applicant was suspended from work. The Respondents raised a possibility that the suspension may now be without pay. The Applicant was invited in annexure **A10** to give reasons why the proposed amendment of the condition of suspension should not be effected as suggested.

21. Annexure **A10** is written on the letterheads of the Respondents' attorneys. It reads as follows;

12th April 2011

"Magagula & Hlophe
1st Floor development House
Swazi Plaza

MBABANE

Fax No. 24040357

Dear Sir,

RE: LIBERTY LIFE (SWAZILAND) (PTY) LTD AND STANLIB (SWAZILAND) (PTY) LTD/MR ABEL SIBANDZE AND OTHERS

1. Our letter to yourselves of 7th December 2010 refers.
2. We confirm that we are acting on behalf of Stanlib (Swaziland) (Pty) Ltd and Liberty Life (Swaziland) (PTY) LTD, duly mandated thereto by our clients and acting on instructions of our correspondent attorneys, Hlatjwayo du Plessis Van Der Merwe Nkaiseng Incorporated from Johannesburg.
3. Our instructions are to record the following in respect of the topics raised herein under.

4. **THE POSSIBLE SETTLEMENT**

We refer to our client's letters to yourself dated 23rd March 2011 advising that the Boards of our clients' companies convened on the 18th March 2011 and resolved not to settle the matter between our clients and your client out of Court , but to pursue the disciplinary enquiry against your client.

5. We therefore now wish to record that it is our clients' instructions to notify your client and yourselves that the disciplinary enquiry against your client must commence as soon as is possible and without any further delay.

6. THE DISCIPLINARY ENQUIRY

In view of the fact of the aforesaid instructions of our clients, we hereby give your client and yourself notice that the Disciplinary Enquiry will commence on 11th May 2011 at 1000 hours in the conference room at the Lugogo Sun, Ezulwini and must be concluded as soon as reasonably possible thereafter. The charges against your client are set out in the charge sheet dated 29th July 2009, which is again attached hereto and which must be read with the necessary venue and date changes as set out herein.

7. We again refer to paragraphs 1 and 2 of our letter of 7th December 2010. We confirm that our clients suspended your client with full remuneration on the basis that the disciplinary enquiry would be initiated and concluded within a reasonable period. As set out in paragraph 2 of that letter, our clients remain of the opinion that the disciplinary enquiry must now proceed without delay and/or further postponement and must proceed on the basis as set out hereunder until its conclusion.

8. If your client participates meaningfully in the disciplinary enquiry as set out above and participates on the basis that the disciplinary enquiry is concluded within reasonable period, then the suspension as set out on our clients' letter of 24th June 2009, and the conditions as set out therein, will be retained.

9. If the Industrial Court of Appeal in Swaziland in case no.5/2010 or any competent court on review/appeal thereto eventually finds in your client's favour, then in that event, our client tenders to pay your client an amount equal to remuneration he would have been paid from the date of the outcome of the disciplinary enquiry to the date of the outcome such litigation in his favour in case number 5/2010, should your client be deprived of any of his remuneration, resultant from the possible outcome of the disciplinary enquiry.

10. THE SUSPENSION

Should your client not consent to attend the disciplinary enquiry as indicated above and persist with the request to stay the implementation or in any way attempt to prohibit our client from proceeding with the disciplinary enquiry, our clients will consider your client's suspension as set out in the letter of 24th of June 2009 be without remuneration.

11. Furthermore, in the event that the disciplinary hearing does not take place for the reasons as set out in paragraph 10 above, or should your client in any way unreasonably delay or interfere with the smooth running of the disciplinary proceedings, our client also reserves the right to consider to change the terms of your client's current suspension and proceed on the basis of a suspension without remuneration.

12. We therefore request your client to state clearly, his consent to commence with the disciplinary enquiry on the requested date and to participate fully and without any unreasonable delay or interference towards the conclusion thereof. This undertaking by your client is awaited by not later than close of business on the 18th April 2011.

13. Should your client unreasonably refuse to participate in the commencement or the smooth running or the finalisation of the disciplinary enquiry as indicated in paragraphs 10 and 11 hereof, or in the absence of a proper and timeous response by your client as requested in paragraph 12 hereof, our clients will apply their minds to the facts before them and make a decision on the suspension as soon as it will be deemed to be necessary, after 18th April 2011. In this regard your client should also give full reasons in terms of the *audi alteram partem rule*, why our clients should not proceed to suspend him without pay before close of business on 18th April 2011.

14. If your client is eventually successful in his appeal to the Industrial Court of Appeal in Swaziland under case number 5/2010, or any competent court on review/appeal in terms of paragraph 9 hereof, then evenly, our client tenders to pay him an amount equal to the remuneration he would have been paid during the period of his suspension without pay, if it was affected.

15. Kindly acknowledge receipt.

Yours faithfully

ROBINSON BERTRAM

22. The third reason advanced by the Applicant is that he has challenged the disciplinary process for being a sham and unfair labour

practice. This is the same issue on which the appeal is based. If the disciplinary enquiry proceeds before the appeal is heard that will defeat the purpose of the appeal. The decision of the Court on appeal will be rendered academic. For that reason he has applied for a stay of the disciplinary enquiry pending finalisation of the appeal.

23. The Respondents admit that they invited the Applicant to a disciplinary enquiry for the 11th May 2011. According to the Respondents, they have the right as employer to call the Applicant as their employee to a disciplinary enquiry. They suspect the Applicant to have committed a work-related offence. The Applicant has allegedly evaded the disciplinary enquiry for a period of about twenty two (22) months. The Respondents have a desire to commence and finalise the hearing without further delay.

24. According to the Respondents the delay in commencing the disciplinary hearing has resulted in them suffering prejudice. The Applicant was suspended in June 2009. Since then the Respondents are paying the Applicant a salary every month. This payment is one of the conditions under which the Applicant was suspended.

25. The delay in commencing the disciplinary enquiry has further compromised the smooth running of the business operation of the Respondents. While the Applicant is on suspension, the Respondents cannot hire a replacement country managing director. The work of the country managing director has to be done by junior officers. This has

resulted in the junior officers being overloaded with work for which they were not trained. In the absence of a country managing director the Respondents are running business without proper leadership. That exposes their business to risk of mismanagement and potential irreparable loss of investment.

26. The Respondents admit that they wrote to the Applicant the letter marked annexure **A3**. The Respondents argue that despite the contents of annexure **A3**, the parties did not enter into negotiation for a settlement of the dispute. There was therefore no settlement pending between the parties and the Applicant was aware of that. The Applicant was therefore not entitled to relax and refrain from prosecuting his appeal. The failure by the Applicant to prosecute his appeal in March 2011 was a delaying tactic on his part in order to prolong the suspension and continue to collect the monthly salary. The Respondent does not explain though, what prevented the parties from negotiating a settlement.

27. The Respondents have further challenged the Court Order which was entered by consent, annexure **SIB 1**. The Respondents do not agree with the manner the Applicant interprets the consent order as appears in the paragraph 16.

28. The contentious issue in annexure **SIB 1** is clause 1.1. The Respondents have interpreted that clause to mean that the undertaking made therein by themselves (Respondents) is valid until

the day the Industrial Court delivers its judgement under case no. 440/2009. As soon as the Industrial Court delivers its judgment, the matter is thereby finalised. The undertaking also falls away.

29. It is further argued that since case no 440/2009 was decided by the Industrial Court on the 12th November 2010, (annexure **AI**) the undertaking which the Respondents had given fell away that same day. It does not make any difference to the Respondents that the Applicant noted an appeal against the judgment of the Industrial Court under case no. 440/2009. According to the Respondents, they did not extend their undertaking to cover the appeal stage of the matter. Presently therefore, there is no undertaking from the Respondents not to proceed with the disciplinary hearing against the Applicant.

30. The Respondents do not see any irregularity or prejudice to the Applicant in proceeding with the disciplinary hearing while the matter between the parties is pending before the Industrial Court of Appeal. For that reason the Respondents insist on proceeding with the disciplinary hearing as there is nothing stopping them from doing so.

31. The parties are generally in agreement regarding the facts of this matter. They disagree though on the interpretation of the facts and the law.

32 It is common cause that the application which was filed by the Applicant before the Industrial Court was dismissed by judgment dated 12th November 2010 (annexure **AI**). The Applicant noted an appeal shortly thereafter (annexure **A2**).

33. In terms of section 19 (4) of the Industrial Relations Act No.1 of 2000 (the Act), noting an appeal does not result in a stay of the execution of the Court Order. The subsection reads as follows;

"The noting of an appeal under sub-section (1), shall not stay the execution of the Court's order unless the Court on application, directs otherwise."

34. The judgment of the Court dated the 12th November 2010 (annexure **AI**) did not order the Respondents to act or refrain from acting in any particular manner. The effect of that judgment was that the Applicant failed to set aside the disciplinary charges. The Applicant further failed to interdict the Respondents from conducting a disciplinary hearing against himself (Applicant).

35. From the date the judgement of the Court (annexure **AI**) was delivered namely 12th November 2010, the Applicant was at risk of being called to a disciplinary hearing. One of the various ways of avoiding that risk was for the Applicant to move the present application and get the order for a stay of the disciplinary hearing pending the appeal.

36. The risk to which the Applicant was exposed as aforementioned was changed by letter dated 15th December 2010 (annexure **A3**). A lot turns on annexure **A3**. The letter (annexure **A3**) has been reproduced in paragraph 9.

37. Annexure **A3** *inter alia* informs the Applicant that the 1st and 2nd Respondents are looking at ways, alternative to litigation, to resolve the legal dispute between them. The Applicant is further requested to put in abeyance any further action. That meant that the Applicant is requested to refrain from filing his appeal papers as well as argue the appeal. That request further meant that it is no longer necessary for the Applicant to apply for a stay of the disciplinary hearing pending appeal.

38. Acting on the strength of the annexure **A3**, the Applicant relaxed and refrained from pursuing his rights and interest regarding the appeal. The Applicant was being reasonable and responsible in so doing. His conduct was also consistent with the content and spirit of annexure **A3**. Litigants should be encouraged to utilize alternative dispute resolution mechanisms available to them. The Applicant was correct to co-operate with the Respondent's request to put the matter in abeyance pending settlement negotiation.

39. While awaiting settlement negotiation to commence the Applicant missed a chance to prosecute his appeal. Further, the Applicant missed a chance to apply for a stay of the disciplinary hearing pending appeal.

40. About the 23rd March 2011, the 1st and 2nd Respondents addressed another letter to the Applicant's attorneys annexure **A8** and **A9**. Both annexures are similar in content. Reference to annexure **A8** shall be treated as reference also to **A9** in order to avoid unnecessary duplication. The letter reads as follows;

"23rd March 2011

Magagula & Hlophe Attorneys 1st Floor Development
House Swazi *Plaza*.
Mbabane

Dear Sir,

Without Prejudice"

STANLIB (SWAZILAND)/LIBERTY LIFE- ABEL SIBANDZE

1. We refer to the above matter and in particular to our letter dated the 15th December 2010.

2. We hereby advise that the Board convened on the 18th March 2011 and resolved not to settle the matter out of Court. Each party shall therefore pursue its course of action towards the conclusion of the matter.

3. The matter shall therefore proceed through our Attorneys of record.

Yours faithfully

T. MAWOCHA

DIRECTOR

cc: Robinson Bertram Attorneys
Ingcongwane Building
Mbabane

41. Annexure **A3** contained information that changed the direction and speed at which the parties were to resolve a legal dispute that was pending between them. Instead of the Applicant expending energy in preparation for a contested appeal, there was now a possibility of a negotiated settlement. Instead of the Applicant rushing to meet the deadlines prescribed in the rules of court for filing the appeal papers, the Applicant was now requested to hold the matter in abeyance. Instead of the Applicant diligently preparing an application for a stay of the disciplinary hearing, he was told in annexure **A3** that such an application is no longer necessary.

42. In annexure **A8** the Respondents stated that they are no longer interested in negotiating a settlement of the dispute. Instead the parties should return to Court for a determination of the matter.

43. Annexure **A8** reversed the direction and pace which had been set by annexure **A3**. Suddenly the Applicant had to engage high gear and enforce his rights by way of litigation.

44. Annexure **A8** caused the Applicant to move an application before the Industrial Court of Appeal to postpone the appeal. The Industrial Court of Appeal granted the order postponing the appeal to the next session. A written judgement of the Industrial Court of Appeal is annexed to the Applicant's affidavit marked **A7**.

45. It was within the Applicant's right to have the judgment of the Industrial Court under case no 440/2009 annexure **AI** tested on appeal. The Court is satisfied that failure by the Applicant to prosecute the appeal in March 2011 was not a delaying tactic on his part. The contents of annexure **A3** caused the delay in prosecuting the appeal.

46. Annexure **A3** has also resulted in a delay on the Applicant's part in applying for a stay of the disciplinary hearing pending appeal.

47. In the matter that was argued before the Industrial Court (annexure **AI**), the Applicant's argument was based on two (2) main prayers namely;

(a)The Applicant sought to set aside the disciplinary charges.

(b) In the alternative, the Applicant sought to interdict the disciplinary enquiry from taking place.

48. The purpose of an appeal is to test the correctness of the judgment of the *Court a quo*. After hearing the matter the Court on appeal may either confirm or reverse decision of the court a quo completely or

partially. The parties to the dispute have no ability to predict the decision of the Court on appeal. It is however clear that, that decision directly impacts on the pending disciplinary hearing.

49. The decision of the Industrial Court of Appeal will determine the rights and duties of the parties regarding the disciplinary hearing. It is therefore in the interest of justice that the appeal be heard and finalised before the hearing commences. The appeal has the potential to influence the disciplinary hearing. If the appeal is decided in the Respondents' favour, that decision will give the Respondents legitimacy in the disciplinary process.

50. If the appeal is decided in the Applicant's favour the pending disciplinary hearing will be affected partially or completely. The Applicant would like to exploit that chance before the disciplinary hearing commences. If the disciplinary hearing proceeds now, the Applicant will be denied the benefit of having the decision of the Industrial Court (annexure **AI**) tested on appeal prior to the commencement of the disciplinary enquiry.

51. The Court has noted that the Respondents also have genuine concerns. The Respondents have complained about the delay in conducting the disciplinary hearing. The hearing has been pending for twenty two (22) months. The Respondents suffer irrecoverable economic loss on a monthly basis by way of salary paid to the Applicant without corresponding service. The Respondents suffer

prejudice daily in running a corporate entity without a managing country director. The Respondents and their shareholders are exposed to potential irrecoverable loss of their investment. The Respondents further complained about risk of losing witnesses relevant to the pending enquiry as a result of the delay.

52. A loss of a key witness may result in a party to a dispute failing to prove his/her case. Irreparable harm may occur as a result of that loss.

53. Both sides stand to suffer irreparable harm in this matter. It is however in the interest of justice that while a matter is pending before Court, the parties should maintain the status quo. The need to maintain the status quo is more compelling in this matter. It is prudent that the parties be guided by the decision of the Industrial Court of Appeal in their dispute.

54. At the hearing of this matter the Court was advised by the Applicant's counsel that the next session of the Industrial Court of Appeal is in August 2011. The Court has no reason to disbelieve the learned counsel. The Respondent's counsel did not challenge this assertion. The appeal hearing is about two (2) months away. The decision of the Industrial Court of Appeal will bring finality in this matter.

55. In the exercise of its discretion the Court is inclined to grant a stay of the disciplinary hearing pending the decision of the Industrial Court of Appeal. Prayer 3 is hereby granted.

56. Prayer 4 in the Notice of Motion is alternative to prayer 3. The Court has already dealt with and granted prayer 3. It follows that prayer 4 is no longer necessary.

57. In prayer 5 the Applicant has prayed the Court for an interdict restraining the Respondent from adversely changing the Applicant's salary pending the appeal hearing. So far the Respondent has not changed the Applicant's salary.

58. In annexure **A10** the Respondents have listed conditions precedent to them taking a decision to suspend the Applicant without pay. This decision once taken, will amount to an alteration of the terms and conditions under which the Applicant was suspended on the 24th June 2009. Those conditions include the Applicant's unreasonable refusal to participate in the commencement and finalisation of the disciplinary enquiry. The issue of the disciplinary enquiry has already been dealt with in the preceding paragraphs. That condition therefore does not arise. Furthermore no decision has been taken by the Respondents to withdraw the Applicant's salary. There is no basis for the Applicant to fear that such a decision is imminent. The Applicant is accordingly not entitled to the order sought in prayer 5. In his

argument, Counsel for the Applicant correctly conceded that a case has not been made out for prayer 5.

59. The Order that was made by the Industrial Court dated 11th December 2009 which was granted with the consent of the parties annexure **SIB 1**, deserves some attention. In clause 1.1 of that Order, the Respondents undertook not to proceed with the disciplinary enquiry pending finalisation of the proceedings in case no. 440/2009. That Court Order has been reproduced in paragraph 16.

60. This Court gave judgment in case no 440/2009 dated 12th November 2010 (annexure **A1**). Under Normal circumstances a judgment of the Court brings finality in a legal dispute.

61. The Applicant noted an appeal against the judgment in case no 440/2009 (annexure **A2**). The appeal is pending before the Industrial Court of Appeal under case no. 5/2010. That means that the matter is not finalised, as the Industrial Court is yet to hear the matter and deliver its judgment.

62. The noting of an appeal (annexure **A2**) interrupted the finalisation of case no. 440/2009. The matter will therefore attain finality after the judgement on appeal is delivered or if the Applicant withdraws or abandons his appeal.

63. It appears artificial to say that the judgment of the Industrial Court dated 12th November 2010 brings finality to the matter despite the

appeal to the Industrial Court of Appeal. A judgment cannot be final while it is subject to being confirmed or reversed on appeal.

64. The Court finds that the Respondents' undertaking in clause 1.1 of annexure **SIB 1** is binding while the matter is pending before the Industrial Court of Appeal. Prayer 3 of the Notice of Motion succeeds on this ground also.

65. Parties who enter into a consent order who wish to limit or qualify the extent of their consent must clearly specify such limit or qualification in their draft consent. Further they must ensure that their limitation or qualification is clearly communicated and understood before the Court is asked to make the draft consent an Order of Court.

66. In the answering affidavit the Respondents disputed that the matter is urgent. The Respondents did not however argue the issue of urgency. The Court is satisfied that the matter is urgent within the meaning of rule 15 (2) (a), (b), (c) (Industrial Court Rules). In particular, the Respondents' letter to the Applicant, annexure **A10** called the Applicant to a disciplinary enquiry for the 11th May 2011. The Applicant was entitled to approach the Court with an urgent application for relief as set out in the notice of motion hereto. The Court accordingly proceeded to hear the matter on the basis of urgency.

67. The Applicant has succeeded in persuading the Court to grant prayer 3. The Respondent has succeeded in resisting prayer 5. It is in the interest of justice that each side pay its costs.

68. The Court accordingly makes the following order;

1. Prayer 3 is granted
2. Prayer 5 is dismissed
3. Each party is to pay his/her costs.

Members agree

D. MAZIBUKO
INDUSTRIAL COURT-JUDGE