



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

193/2010

CASE NO.

In the matter between:-

PATRICK NGWENYA

APPLICANT

AND

AUDITOR GENERAL

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

In re:

PATRICK NGWENYA

APPLICANT

AND

COMMISSIONER OF LABOUR

1ST RESPONDENT

TEACHING SERVICE COMMISSION

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

Neutral citation : *Patrick Ngwenya v Auditor General & Another In re Patrick Ngwenya v Commissioner of Labour & Others*

(193/2010) [2012] SZIC 22 (18 June 2012)

CORAM : **DLAMINI AJ,**
(Sitting with D. Nhlengetfwa & P. Mamba
Nominated
Members of the Court)

Heard : **21 MARCH 2012**
Delivered : **18 JUNE 2012**

Summary: ***Labour law - Civil procedure - Applicant injured on duty - granted order for compensation in terms of Workmen's Compensation Act - No compliance from Respondents - Applicant instituting contempt proceedings later to be withdrawn with sound reason - Respondent not entitled to costs - Rule 30 - Technical objections in absence of prejudice should not interfere with decision of Court in the merits - Applicant entitled to order.***

1. The Applicant in this matter is Patrick Ngwenya, a teacher employed by the Swaziland Government through the Teaching Service Commission - the 2nd Respondent in the main application - and stationed at Lusoti High School in the Lubombo Region. In October 2004 whilst executing his duties the Applicant injured his right hand. He reported the injury to the Deputy Principal and was thereafter attended to at a local clinic where he was treated.
2. Some two (2) years after the incident, the Applicant would occasionally experience some discomfort on the hand as a result of the injury. He then requested his immediate supervisor to report the injury in terms of the Workman's Compensation Act.

And on the advice of the Principal he continued undergoing treatment at the Simunye Clinic. When he enquired about the progress of his injury report with the department of Labour in terms of the Act, he was advised by the principal to get treatment at a hospital as opposed to a clinic.

3. Acting on that advice the Applicant proceeded to the Mankayane Hospital where he was referred to a neurosurgeon at the Mbabane Government Hospital. He was operated by the neurosurgeon on 26 March 2009. Apparently the injury he sustained resulted in partial deformity of his hand as a result of which he is now unable to use his fourth and fifth fingers properly.
4. After the operation he approached the Teaching Service Commission's Human Resources office where he was assisted in filing a report of injury with the Commissioner of Labour. Apparently a certain officer at the Commissioner of Labour's office informed him that his claim would not be processed since it was time barred. It is for this reason that the Applicant initially approached this court seeking orders as follows;

4.1 Compelling the 1st Respondent to facilitate payment of Workman's Compensation.

4.2 Directing the 2nd Respondent to take all steps necessary in ensuring payment of the Workmen's compensation.

5. On the 27th May 2010, an order was granted by this Court in terms of which the Commissioner of Labour was compelled to facilitate payment of compensation for the Applicant in terms of

- the Workmen's Compensation Act. The court further directed that the Teaching Service Commission should take all steps necessary in ensuring payment of the compensation to the Applicant. This was also accompanied by an order for costs.
6. After a period of close to five (5) months with no compliance in terms of the order of the Court, the Applicant's attorneys instituted urgent contempt proceedings against both the Commissioner of Labour and the Teaching Service Commission. The Commissioner of Labour vigorously opposed this application raising a number of points *in limine* amongst which was that of non-joinder of the Auditor General, as he has a substantial interest in the outcome of the matter - being the relevant government department responsible for making payments.
 8. On the 11th April 2011, the Applicant, through his present Attorneys, prepared, filed and served with this court and the Auditor General another application wherein he sought an order directing the Auditor General to issue payment in respect of Workmen's Compensation. Then on the 13th April 2011, the Applicant withdrew the contempt proceedings against the Commissioner of Labour and the Teaching Service Commission on notice to the Attorney General. No reasons were forthcoming for such withdrawal and it was not accompanied by a tender for costs.
 9. Upon receipt of the application against the Auditor General, the Attorney General instituted a rule 30 application in terms of which they seek to set aside the application dated 11 April 2011, for failure to comply with rule 14 of the Industrial Court rules. The Attorney General also objects to the withdrawal of the contempt

proceedings without a tender for costs in terms of rule 17 of the Rules of this Court.

10. Mr. Dlamini for the Respondents argued that a notice of withdrawal of application must be accompanied by a tender for costs as provided for in terms of rule 17 of the rules of this court. Dlamini further submitted that the Respondents in casu had been unnecessarily put out of pocket opposing the contempt proceedings which were to be withdrawn after they had filed their papers in opposition. This, he argued, amounted to 'testing the waters' by the Applicant at the cost and inconvenience of the Respondents.
11. On the rule 30 objection, the Respondents' counsel contended that after withdrawing the contempt application, Applicant's counsel then prepared and filed another interlocutory application in terms of which he now introduced a new party into the picture altogether. This, he argued, is in contravention of rule 14 of the rules of this court because the new party now being introduced, the Auditor General, was not a party in the main application.
12. Attorney Mamba for the Applicant started of his submissions by giving a brief background on the history of this matter as outlined afore. According to him, his firm wrote a number of correspondences directed to the Commissioner of Labour on the matter after the order of this court granted in May 2011, the last of which was dated 16 November 2011. And all these were not favoured with the courtesy of a response. Seeing that nobody was willing to at the least update them on what the position was in relation to the compensation of the Applicant, it was then that the contempt proceedings were initiated.

13. Mamba further brought it to the attention of this court that they only got to know for the first time in November 2011, after the contempt application, that in fact it was the Auditor General who was refusing to effect payment. It was for that reason therefore that they withdrew the contempt proceedings and filed the proceedings seeking to direct the Auditor General to issue payment in terms of the order of this court. As far as attorney Mamba is concerned, the contempt application was justified in the prevailing circumstances and would not have been necessary, had the Commissioner of Labour responded to their many letters to say that his office was working on facilitating payment with the relevant authorities.
14. On the rule 30 application, counsel for the Applicant argued that the Respondent was only raising a technical objection which is not prejudicial to the Respondents and has not pleaded to the merits of the matter. Should this court dismiss the technical objection, he submitted, then his client should be entitled to the orders sought.
15. Rule 17 of this Court's rules provides as follows;
 - (1) A party who initiates proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of court withdraw such proceedings and shall deliver a Notice of Withdrawal of Action as soon as possible.*
 - (2) If costs are not tendered, the other party may apply to court on Notice for costs.*

16. In this matter the Applicant withdrew the contempt proceedings after receiving the Respondents' opposing papers, from which his attorneys learnt for the first time that the Commissioner of Labour had in fact initiated the process for compensating their client. All along they had been writing to the Commissioner with no joy. A question lingering constantly to this court is whether it would have been necessary for the Applicant to institute the contempt proceedings had the Commissioner of Labour been courteous enough to respond to his attorney's correspondences? The obvious answer to this question is that it would not, and we do not think they would have done so either.
17. In the contempt application, the Applicant stated that he had been advised and was of the belief that the Respondents were willfully and deliberately disobeying the order of this court that he be compensated for his injury on duty. And he only became aware after initiating the contempt proceedings that in fact, it was the Auditor General who was 'refusing' to effect payment. This court accordingly makes a finding that the Applicant cannot be faulted for the filing contempt proceedings. He was induced to proceed in the manner he did because of the failure of the Commissioner to advice on the progress in his claim for compensation. This is a sound reason for the Respondents in this matter not to be entitled to their costs. The principle is that he, through whose fault costs have been needlessly incurred, should bear those costs.
18. On the rule 30 application, the objection by the Respondents is that the Applicant filed the interlocutory application in which he has introduced a new party who was not included in the main application, the Auditor General. Interestingly, the same

Respondents had raised, as one of their points in limine, the objection of non-joinder, to the effect that the same Auditor General should have been joined in the proceedings. When the Applicant's attorneys then cited the Auditor General the Respondents immediately question his involvement since he was not initially included.

19. We should immediately point out that this court is not strictly bound by the rules governing procedure which apply in civil proceedings. Using its discretion this court may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice. The words of the Court of Appeal in the matter of ***Gideon Gama V Peter Masango Civil Appeal Case No. 20/1997*** are apposite in this regard. The court in that matter had this to say:

“Rules governing procedure, such as the rules of court, are not made to enable lawyers representing parties to score points off one another, without advancing the resolution of that dispute in any way. They are guidelines aimed at obliging the litigants to define the issues to be determined, within reasonable time, and enabling the courts, as a consequence, to organize their administration as quickly, effectively and fairly as possible”

20. In ***Mynhardt V Mynhardt 1986 (1) SA 456 (T)*** the court stated as follows:

“Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to

interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits”

21. This court is concerned with substantive justice, not technicalities. It is for the aforementioned reasons that this court, using its discretion, disregards the technical irregularity alluded to by the Respondents since we are of the view that it does not or is not likely to result in a miscarriage of justice in this matter.

22. It would seem Respondents’ counsel was only content with raising the procedural objection in terms of rule 30 and was least bothered about pleading on the merits, only confident that his procedural objection would suffice. As is, the disposal of this objection leaves the version of the Applicant that the Auditor General is unlawfully withholding payment uncontroverted and intact. In fact we do not think the Auditor General has a justiciable reason for so doing. The conduct of the Auditor General is only meant to delay and frustrate the Applicant despite having obtained an order of this court for payment of compensation for his injury on duty. The Auditor General displays a conduct that not only erodes the authority of this court but further undermines the confidence and administration of justice. We cannot turn a blind eye to such wanton disregard of the authority and dignity of this court. We accordingly make orders as follows;

a) The 1st Respondent (Auditor General) is hereby directed to forthwith issue payment in respect of Workmen’s Compensation for the Applicant (Patrick Ngwenya)

b) The Respondents are hereby ordered to pay costs of suite on the ordinary scale.

The members agree.

T. A. DLAMINI
ACTING JUDGE - INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 18TH DAY OF JUNE 2012

For the Applicant: S. Mamba. (S.P. Mamba Attorneys).

For the Respondent: E. Dlamini. (Attorney General's Chambers).