



IN THE INDUSTRIAL COURT OF SWAZILAND

INTERIM JUDGMENT

Held at Mbabane

Case No.215/14

In the matter between:

PHUMZILE MAGAGULA

1st Respondent

ALDONA LAPIDOS

2nd Respondent

MANDLA NXUMALO

3rd Respondent

And

STANDARD BANK SWAZILAND LIMITED

1st Respondent

PHILEMON MNISI

2nd Respondent

RIFKA HASSEN

3rd Respondent

Neutral citation:

*Phumzile Magagula v Standard Bank Swd Ltd,
Commissioner of Labour, Phumzile Magagula & Two
Others (215/14) [2014] SZIC 28 (JULY 16 2014)*

Coram:

NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)

Heard: 07 July 2014

Delivered: 16 July 2014

Summary : Labour Law--- Contempt of Court---Employer failing to abide by the ruling of the Labour Commissioner in terms of Section 26 (3) of the Employment Act and an interim Order of the Court.

Held---The effect of the Labour Commissioner's ruling is that the status quo ante is automatically restored.

Held further---The Court having issued an interim order, the employer has a duty to fully abide by the Court Order failing which it will be held to be in contempt.

INTERIM JUDGMENT

1. The three Applicants before the Court are employees of the 1st Respondent.

2. The 1st Respondent recently engaged in a restructuring exercise which led to the Applicants seeking the intervention of the Labour Commissioner as they felt that the restructuring exercise negatively affected their terms and conditions of employment.

3. They referred the matter to the Labour Commissioner in terms of Section 26 of the Employment Act (Act No.5 of 1980 as amended).
4. In terms of Section 26(3) of the Employment Act, the Labour Commissioner is empowered to give an opinion on the matter brought to her. If in her opinion the changes would result in less favourable terms and conditions of employment than those that they previously enjoyed, the changes are rendered void and of no effect. In the present case the Labour Commissioner indeed found that the changes would result in less favourable terms and conditions of employment than those previously enjoyed by the Applicants at the 1st Respondent's workplace.
5. The 1st respondent was not happy with the Labour Commissioner's opinion and applied for its review in terms of Section 26(4) of the Employment Act. The Labour Commissioner called for the grounds for the review from 1st Respondent. The 1st Respondent failed to do so. The labour officer who was handling the application, Mr. M.N. Tsabedze stated in the report that;

“The bank failed to provide the grounds for the application, but maintained that the application was based on the submissions the bank had earlier made during the initial hearing”.

6. The Labour Commissioner proceeded with the review exercise by way of conciliation and conducting an investigation with a view to finding an amicable solution. The results of the exercise revealed that the 1st Respondent had not complied with the decision of the Labour Commissioner. The matter was accordingly referred to the court in terms of Section 26 (4) of the Employment Act.
7. Whilst the matter is pending before the court, and the decision or opinion of the Labour Commissioner which was issued in terms of Section 26(3) of the Employment Act having not been set aside, the *status quo ante* is automatically restored. However, whilst the matter was pending before the court, the 1st Respondent attempted to defy the court and the laws of the country by placing the Applicants on paid leave. The court is saying that the 1st Respondent attempted to defy the court processes and the laws of the country because 1st Respondent swiftly reconsidered its position and withdrew the letters placing the Applicants on paid leave with effect from 01st July 2014.
8. The court can commend Mr Sibandze, the 1st Respondent's counsel for the timely legal advice to his client. The 1st Respondent is not just a reputable corporate citizen of this country, it is also an internationally renowned

financial institution. It certainly cannot augur well for the 1st Respondent to be seen to be deliberately flouting the law.

9. The Applicants after having been served with the letters placing them on paid leave with effect from 01st July 2014, they instituted proceedings before this court under a certificate of urgency on 01st July 2014. Their prayers were in part as follows;

“3. Pending finalization of this application;

3.1 The Respondent be and is hereby interdicted and restrained from putting Applicants on compulsory leave with effect from 1 July 2014 until further notice;

3.2 The Respondent be and is hereby directed to restore the Applicants’ access to all bank systems and all other amenities enjoyed by employees of the Respondent.

- 4. The Application is postponed to July 2014 for determination of the following orders;*

4.1 The Respondent’s letter dated 27 June 2014 or putting the Applicants on paid leave with effect from 01 July 2014 until further notice be and is hereby set aside;

4.2 Directing the Respondent to forthwith implement the Commissioner of Labour’s opinion dated 05 May 2014 by restoring the Applicants’ to the

terms and conditions of employment they enjoyed prior to the notification given by the Respondent to the Applicants on 05 March 2014.

5. *Costs of suit on the scale between attorney and client.*
 6. *Such further and/or alternative relief as the Honourable Court deems fit.”*
10. On that day, 01st July 2014, the court issued the Court Order which is the subject matter of the present urgent application. The court order appears as follows;

“It is ordered that;

pending finalization of the application before court;

- a) *The letters directed to the Applicants dated 27 June 2014 placing the Applicants on paid leave with effect from 01st July 2014, are hereby suspended;*
- b) *That the Respondent is hereby directed to restore the Applicants’ access to all bank systems and all other amenities enjoyed by the employees of the Respondent.*
- c) *The Respondent is to file its Answering Affidavit before close of business on Monday 07 July 2014;*
- d) *The Applicants are to file their Replying Affidavit on Friday 11 July 2014;*

e) The matter is returnable on Thursday 17 July 2014 at 09:30 A.M. for arguments.”

11. The Applicants have now instituted the present urgent application and are claiming that the Respondents are not complying with the Court Order. The Applicants are seeking an order in the following terms;

- “1. Dispensing with the usual form and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.*
- 2. Condoning any non-compliance of this application with the rules of this Honourable Court in terms of Rule 14 and waiving the provisions of Part viii of the Act, on grounds of urgency, set out in the finding Affidavit filed herewith.*
- 3. The Respondents are hereby interdicted and restrained from breaching the order of this court dated 01 July 2014.*
- 4. A rule nisi do hereby issue calling upon the Respondents to show cause before this court on Wednesday, 09 July 2014 at 09:30 A.M.*

why:

 - 4.1 The Respondents should not be declared to be in contempt of the said Order of Courts.*

- 4.2 *The Respondents should not be sentenced, in the case of the 2nd and 3rd Respondents to such a term of imprisonment as the court may determine and in the case of the 1st Respondent to a fine or such other penalty as the court deems appropriate for contempt of the said Order of Court;*
- 4.3 *The Respondents should not pay the costs of these proceeding on a scale applicable to attorney and client.*
5. *Costs on suit of the scale between attorney and client.*
6. *Such further and/or alternative relief as the Honourable Court deems fit.”*

12. The Respondents duly filed their answering affidavit. The Applicants elected not to file a replying affidavit.

13. In its answering affidavit the 1st Respondent informed the court in terms of paragraph 10 and 11 that it has since terminated the services of the Applicants. The letters of termination are dated 08th July 2014 and the termination is with effect from 07th July 2014. The letters of termination are annexed to the answering affidavit and marked annexure “B”.

14. The Respondents’ learned counsel argued before the Court that there was nothing preventing the 1st Respondent from going ahead and dismissing the

Applicants because there was no court order in place to restore the status quo ante. He argued that the interim order issued by the court on the 1st July 2014 merely directed the 1st Respondent to restore the Applicants' access to all bank systems and all other amenities enjoyed by the other employees of the 1st Respondent.

15. With respect I do not agree with the learned counsel. The position of the law is clear and it leaves no room for futile hairsplitting. I say this because of the following reasons;

15.1 When a matter is pending before the Court, none of the parties is entitled to deal with the issues that await the Court's determination.

(SEE: Thandi Dlamini v Swaziland Television Authority, Case No. 49/2009) (IC).

15.2 The Labour Commissioner's ruling that the changes would result in less favourable terms and conditions of employment has not been set aside. The ruling of the Labour Commissioner is binding on the parties until is set aside. The effect of the ruling is that the changes are void and of no effect. The *status quo ante* was therefore automatically restored.

16. The Applicants having successfully challenged the changes before the Labour Commissioner, the *status quo ante* was automatically restored. When the Labour Commissioner exercises her powers in terms of Section 26(3), she is clothed with power and authority by the laws of the Kingdom of Swaziland to exercise a quasi-judicial function. Her decision can only be set aside on review by a court of law.
17. As the matter is still pending before the court, and as the ruling of the Labour Commissioner is still subsisting, the conduct of the 1st Respondent of terminating the services of the Applicants based on an issue that is currently before the court was gravely irregular and highly contemptuous of the court and the laws of the Kingdom of Swaziland. The conduct of the 1st Respondent was therefore an irregular exercise of power and the letters are of no force and effect and will have be set aside by the court.
18. The 1st Respondent will be at liberty to exercise its powers after the court has made a final pronouncement on the matter and is no longer seized with the matter. If the employer thereafter decides to terminate the services of the employees, it will have to pay all the statutory benefits due to the employees in terms of the law. If there is no fault on the part of the employees, the termination will be deemed to be unfair and unlawful and the employer will have to pay the employees maximum compensation for the unfair termination.

19. The Respondents' learned counsel also raised a point *in limine* that the application should be dismissed in its entirety as it was brought under the case number of an application that has been dismissed, that is, case No.112/14. I do not agree with the learned counsel. He did raise this point when the matter appeared before this court on 01st July 2014. The matter was resolved on that day and it was agreed that the application should appear as case number 215/2014.
20. The Applicants have, however, again brought the present application under case number 112/2014. The issue having been resolved on 01st July 2014, it was expected of the Applicants to bring this present application under case number 215/2014. No prejudice was suffered by the Respondents in this matter however, as that they were able to file the answering affidavit. The point of law is accordingly dismissed.
21. The second point of law raised on behalf of the Respondents related to urgency. It was rightly abandoned by the Respondents.
22. The third point of law raised on behalf of the Respondents related to non-service on 2nd and 3rd Respondents. It was argued that the nature of the application, being contempt of court proceedings, the law requires that there should be

- personal service on the individuals concerned. It was argued that the application in so far as it relates to the 2nd and 3rd Respondents ought to be dismissed because there was no personal service.
23. The Applicants did not file a replying affidavit to the Respondents' answering affidavit. The Respondents' version that the 2nd and 3rd respondents were not personally served therefore remained unchallenged.
24. Confronted with this argument the learned counsel for the Applicants referred the court to the case of **Swazi MTN Limited & Three others V Swaziland Posts and Telecommunications Corporation and Petros Dlamini, Civil Appeal Case No. 58/2013 (SC)** and argued that in that case an order similar to the one being sought by the Applicants was granted against the respondents in that case.
25. The **Swazi MTN Limited** case is however distinguishable from the present case. In that case there is no indication that the question of personal service of the application was raised and the Supreme Court ruled that personal service was not a pre-requisite in applications for contempt of court. Secondly; the issue in the present case is failure of personal service on 2nd and 3rd Respondents with the application, and not the court order. The evidence before the court shows that the 2nd and 3rd Respondents are aware of the Court Order and that they have

- failed fully comply with it. However, to institute contempt proceedings with a view to having their liberties curtailed, the law requires that there should be personal service.
26. In the present application however, the Applicants are seeking a *rule nisi*, not a final order. The 2nd and 3rd Respondents will therefore have the opportunity to file their papers in opposition thereto, and be heard by the court before a final order is granted. The question of service being a procedural issue, the court has a discretion, the guiding principle being prejudice to the other party. The Applicants under prayer 4 of their Notice of Motion are seeking rule nisi. The 2nd and 3rd Respondents will not therefore be prejudiced as they will get the opportunity to oppose the application on the return day. The court will not therefore dismiss the application against 2nd and 3rd Respondent.
27. The Respondents denied that they are in breach of the Court Order granted on 01st July 2014. The evidence that the Respondents are in breach of the Court Order is overwhelming. The Respondents simply decided to engage in unnecessary casuistry. For example; in paragraph 55 of their answering affidavit the deponent stated that ***“the Applicants did not obtain an Interim Order that they be removed from the Boardroom.”*** Before the matter was reported to the Labour Commissioner, the Applicants were not working from the Boardroom.

- The effect of the Labour Commissioner's ruling was to restore the *status quo ante*.
28. On 02 July 2014 the Applicants wrote to the 1st Respondent complaining that access to all bank systems had not been restored, contrary to the Court Order. The 1st Respondent responded through its attorneys on the same day on 02 July 2014 and stated that **“our client has instructed its IT Department to restore the necessary access to the bank's systems”**. This, again, was a clear admission by the 1st Respondent that it had not yet complied with Court Order as on 02 July 2014.
29. Again, on 03 July 2014, the Applicants wrote to the 2nd Respondent reminding him to comply with the Court Order. The 1st Respondent responded on the same day on 3rd July 2014 through its attorneys and stated, inter alia, that the only option for it was to move one of the Applicants to the meeting room on the 4th floor and the other one to the meeting room on the 5th floor. As already pointed out herein, prior to 17th April 2014, the Applicants were not working from boardroom or meeting rooms.
30. The Court has no doubt from the evidence before it that the Respondents are intentionally refusing to fully comply with the Court Order. The Applicants are unjustly made to trek from pillar to post. In the process they are embarrassed in

the eyes of their colleagues. This is an unnecessary affront to their dignity by the 1st Respondent.

31. In dealing with a similar application before it, the Supreme Court of Swaziland in the Swazi MTN Limited case, Ramodibedi CJ pointed out as follows at page 17;

“The Court, and not the arbitrator, is entitled to jealously act in self-protection insofar as its orders are concerned.....”

Again at paper 32, the Learned Chief Justice stated that;

“I would stress that the court has a duty to vindicate its authority by ensuring that its orders are complied with at all times.”

32. The Applicants have applied for an order for costs on a punitive scale. An award for costs lies within the inherent discretion of the court. Such a discretion must not, however, be exercised arbitrarily, capriciously, mala fide or upon a consideration of irrelevant factors or upon any wrong principle. It is a judicial discretion. In the present case the Court Order is not difficult to carry out as the Applicants are employees of the 1st Respondent. The Respondents are

represented by senior counsel, if they had any misunderstanding of the Court Order they could simply have sought his legal assistance. Taking all the circumstances of this case into account, I accept the Applicants' counsel's submissions that it would be unreasonable for the Applicants to be out of pocket for instituting the present application which was necessitated by the Respondents lackadaisical attitude.

33. Taking into account all the evidence before the court, the arguments by both counsels, the circumstances of the case, the court will make the following orders;
- a) The Respondents are interdicted and restrained from breaching the Order of this court dated 01 July 2014.
 - b) The letters of termination written by the 1st Respondent to the Applicants dated 08th July 2014 are declared irregular and of no force or effect and are set aside.
 - c) The Applicants are to resume their duties immediately after handing down of this judgment.

d) *A rule nisi* do hereby issue calling upon the Respondents to show course on a date to be agreed upon in court why;

i) The Respondents should not be declared to be in contempt of the said Order of Court.

ii) The Respondents should not be sentenced, in the case of the 2nd and 3rd Respondents, to such a term of imprisonment as the court may determine and in the case of the 1st Respondent to a fine or such other penalty as the court deems appropriate for contempt of the said Order of the Court;

iii) The Respondents should not pay the costs of these proceedings on a scale applicable to attorney and client.

e) The 1st Respondent is to pay the costs of this application on attorney and own client scale.

The members are in agreement.

N. NKONYANE
JUDGE: INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANTS: MR. M. MAGAULA & MR L. MDZINISO
(MAGAGULA & HLOPHE ATTORNEYS)

FOR RESPONDENTS: MR. M. M. SIBANDZE
(MUSA M. SIBANDZE ATTORNEYS)