



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 136/02

In the matter between:

C.T. M

Applicant

And

SIBONISO BHEMBE

Respondent

In Re:

SIBONISO BHEMBE

Applicant

And

C.T.M MBABANE

Respondent

Neutral citation: *C.T.M Mbabane v Siboniso Bhembe (136/02) [2018] SZIC 22 (March 29, 2018)*

Coram: N. Nkonyane, J
(Sitting with G. Ndzinisa and S. Mvubu
Nominated Members of the Court)

Heard submissions: 16/03/2018

Delivered judgement: 29/03/2018

SUMMARY---Application for stay of execution---Factors to be taken into account---Whether it would be possible to restore the status quo ante if the appeal were upheld---Whether the appeal is frivolous or vexatious---Any irreparable harm that may be done to either party.

JUDGEMENT ON APPLICATION FOR STAY OF EXECUTION

1. The Applicant was the Respondent in the main application. The Applicant has instituted the present application on Notice of Motion under a certificate of urgency for an order in the following term;
 - “1. *Dispensing 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.*
 2. *That a **rule nisi** be issued with immediate and interim effect calling upon the Respondent to show cause, why an Order in the following terms should not be made final.*
 3. *That the Respondent be and is hereby directed to stay the execution of the Writ issued under the above case number pending finalization of this application.*

4. *That the Order in prayer 2.1 above operates with immediate and interim effect, pending finalization of this application.*
 5. *Setting aside of the Writ of Execution issued in the above case number.*
 6. *Further and alternative relief.”*
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2. The Applicant’s application is opposed by the Respondent who duly filed his answering affidavit. Thereafter, the Applicant filed its replying affidavit to the answering affidavit.
 3. The Respondent is a former employee of the Applicant. He was dismissed by the Applicant but he did not accept the dismissal and reported the matter as a dispute to the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute could not be resolved by conciliation and he launched an application for determination of the unresolved dispute before the Court. The matter was accordingly heard by the Court and judgement delivered on 01st December 2017.
 4. The Respondent after having obtained judgement in his favour, did not immediately do anything. The Applicant has now filed an appeal against that judgement hence the present application for stay of execution of the judgement pending the determination of the appeal by the Industrial Court of Appeal.
 5. On behalf of the Applicant it was argued that;

- 5.1 *It is the right of the Applicant to appeal against a decision of the Court that it is not happy with.*
- 5.2 *Lodging an appeal against the decision of the Industrial Court does not automatically stay or suspended the execution of the judgement in terms of Section 19(4) of the Industrial Relations Act N0.1 of 2000 as amended, hence the present legal proceedings.*
- 5.3 *The appeal was filed within the period of three months allowed by the law as per Section 19(3) of the Industrial Relations Act.*
- 5.4 *There is no evidence that the Applicant has abandoned its right to appeal against the judgement.*
6. On behalf of the Respondent it was argued to the contrary that:-
- 6.1 *There was no urgency in the matter as the judgement appealed against was delivered on 01st December 2017. It was argued that the Applicant has unreasonably delayed in approaching the Court.*
- 6.2 *No writ of execution has been sued out by the Respondent. The Respondent has only stated on 07th February 2018 that the writ of execution will be issued to enforce compliance with the Court Order.*

6.3 *The Applicant has failed to establish grounds for stay of execution.*

6.4 *The Applicant is only out to frustrate and delay justice.*

6.5 *There are no prospects of success on appeal.*

7. **ANALYSIS OF THE ARGUMENTS AND THE LAW APPLICABLE:**

It is trite that, at common law, the noting of an appeal suspends the execution of the judgement appealed against unless the Court otherwise directs. (See:- **Herbstein and Van Winsen:**

The Civil Practice of the Supreme Court of South Africa, 4th edition, page 888 -889)

8. The judgement appealed against is a judgement of the Industrial Court. The position of the law applicable to the judgements of the Industrial Court is enshrined in Section 19 (4) of the Industrial Relations Act which states that;

“The noting of an appeal under subsection (1) shall not stay the execution of the Court’s Order unless the Court on application directs otherwise.”

It was precisely because of Section 19(4) that the Applicant filed the present application for the stay of execution. The Court in deciding whether to allow or not to allow the stay of execution must take into account, *inter alia*, whether it would be possible to restore the *status quo ante* if the appeal were to succeed. In judgements sounding in money the Courts usually do not have a difficulty and they often grant the leave to execute subject to security *de restituendo*. In casu, no security has been provided by the Respondent.

9. The golden rule is that each case must be determined in terms of its own peculiar facts and circumstances. In casu, the judgement of the Court appealed against was delivered on 01st December 2017. For the whole months of December 2017 and January 2018, both parties did not do anything about the judgement. The Respondent in his answering affidavit stated in paragraph 18 that;

“The time that Applicant spent before instituting this application defeats the whole purpose and as submitted, the month of December and January was enough to bring the application in the normal way instead of coming three months late.”

10. The same argument can be made against the Respondent. The Respondent himself, for the months of December and January, did not demand payment as per the judgement. If the Respondent was able to be patient and not do anything about the judgement for the past two months, the Respondent should be able to wait for one month to allow the Industrial Court of Appeal to hear the appeal. The Industrial Court of Appeal is going to sit as from 03rd April 2018 to 03rd May

2018. The appeal filed by the Applicant would be heard by the Industrial Court of Appeal on 16th April, 2018.

11. The duty of the Court in application such as the present one is to decide, taking into account all the circumstances of the case, what would be just and equitable. The Court must decide, *inter alia*, whether the appeal is frivolous or vexatious. On the papers filed of record by the Applicant, the Court is unable to come to the conclusion that the appeal was not filed with the bona fide intention to test the judgement in question.
12. Taking into account all the evidence before the Court, the circumstances of the case, the interests of justice and fairness, the Court will make an Order staying the execution of any writ pending the finalization of the appeal process. There is no Order as to costs.
13. The members agree.

A handwritten signature in dark ink, consisting of a large, stylized 'N' followed by a series of loops and a long horizontal stroke extending to the right.

N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant/Respondent : Mr. S.B. Dlamini
(Attorney at Musa M. Sibandze Attorneys)

For Respondent/Applicant : Mr. Reuben Ndlangamandla
(Labour Law Consultant)