IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 314/18

In the matter between:

LAWRENCE NSIBANDZE Applicant

and

ESWATINI ELECTRICITY COMPANY Respondent

Neutral citation : Lawrence Nsibandze vs Eswatini Electricity Company [314/2018] [2018] SZIC 130 [2018]

Coram : **L. MSIMANGO – ACTING JUDGE**
[Sitting with Mr. P.S. Mamba and Mr. E.L.B. Dlamini Nominated Members of the Court]

Date Heard : 15th October 2018

Date Delivered : 27th November 2018

SUMMARY: **Applicant was transferred to another position which he claims he is not qualified for. He refused to take up the position and was served with a letter of suspension pending a disciplinary hearing for failure to take up the**

position. The Applicant is now interdicting the employer from proceeding with the disciplinary hearing on the basis that the suspension is illegal.

JUDGEMENT

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[1] The Applicant is Lawrence Nsibandze, an adult male of Nkoyoyo, Mbabane in the Hhohho District, a Senior Executive of the Eswatini Electricity Company.

[2] The Respondent is Eswatini Electricity Company, a statutory institution established in terms of the Swaziland Electricity Company Act, 2007 carrying on its business in Mbabane.

[3] The Applicant brought an urgent application to Court seeking an order in the following terms:

(a) Dispensing with the normal forms and time limits relating to service and hearing the matter urgently.

(b) Declaring that the purported appointment of the Applicant to the position of General Manager Support Services at Eswatini Electricity Company is null and void.

(c) Setting aside the letter of Notice of Suspension dated 2nd October 2018.

(d) Directing and ordering the Respondent to re-instate the Applicant into the position of General Manager Finance.

(e) Directing and ordering the Respondent to give full possession of and access to the General Manager Finance ellipse profile to Applicant.

(f) Costs of suit.

(g) Further and / or alternative relief.

[4] The Applicant averred that he was recruited into the Company to the position of General Manager Finance around 1st August 2014. The appointment was made in terms of the Public Enterprises Control and Monitoring Act of 1989, particularly, Section 8 (2) after an evaluation of all the applications by SCOPE.

[5] The Applicant was engaged on a contractual basis for a period of three (3) years which lapsed around July / August 2017. On or about 31st October 2017, he was re-engaged for another period of three (3) years to the same position of General Manager Finance.

[6] It must be mentioned that besides the Applicant, one Patrick Mathunjwa was also a candidate for the same position of General Manager Finance. However, he was not successful, and according to Applicant's recollection, he was third placed during the recruitment exercise.

[7] On the 12th September 2018, the Applicant received a letter from the Company's Managing Director around 12:45 pm and it stated as follows: "On behalf of the Board of Directors of EEC, having astutely considered the strategic aspirations of the organization we are pleased to advise you of your appointment to the position of General Manager, Support Services. This appointment decision has been informed by the desire to optimally deploy all resources for the benefit of the organization and all stakeholders. Your appointment is with effect from Monday, 17th September 2018 and does not constitute a new contract of employment." The letter is annexure "LN2" of Applicant's book of pleadings.

[8] In terms of the letter the Applicant was required to arrange to complete a new performance agreement, which was said to be a pre-requisite to the new position. The Applicant did not accept the appointment nor sign a new performance agreement.

[9] The Applicant submitted that he was surprised by the letter and he responded to it on the 13th September 2018, wherein he requested the Managing Director to furnish him with a legal instrument from SCOPE or the Public Enterprise Unit supporting the decision to appoint him to the position of General Manager Support Services.

[10] The Applicant stated that the reason he was surprised by the purported appointment was that:

10.1 It was done without any prior consultation with him.

10.2 He had never applied for the position of General Manager Support Services.

10.3 He is an experienced Chartered Accountant by profession and was employed essentially on that basis.

10.4 The position of General Manager Support Services entails, amongst other duties, surveying and drawing, environment and safety, and transport / fleet Management. It has nothing to do with finance and accounting. It is an entirely different kind of work.

[11] The Applicant submitted further that, pursuant to the unlawful transfer, the Managing Director transferred the General Manager Finance ellipse profile to Mr. Patrick Mathunjwa without his knowledge and consent and due to the fact that access to the system had been taken from him, he did

not have access to his work. He was actually barred from carrying out his duties as General Manager Finance.

[12] The Applicant told the Court that as a result of his refusal to take up the unlawful transfer he was served with a suspension letter by the Managing Director on the 2nd October 2018, pending a disciplinary hearing. The Applicant argued that he was denied the right to be heard before the decision to suspend him was made.

[13] In response to the Applicant's application the Respondent raised points of law, which the Honourable Court will deal with, without going into the merits of the matter.

URGENCY

13.1 Urgent applications are governed by Rule 15 of the Industrial Court

Rules of 2007. Wherein the Applicant is required by this rule to explicitly set forth the circumstances and reasons which render the matter urgent, the reasons why the provisions of Part VIII of the Act should be waived and the reasons why the Applicant cannot be afforded substantial relief at a hearing in due course. On good

cause shown the Court may direct that the matter be heard as one of urgency.

13.1.1 One of the reasons the Applicant has advanced for the urgency is that the intended disciplinary hearing maybe convened at any time in light of the high handed approach employed by the Respondent, further that, the disciplinary hearing is premised on an unlawful basis and therefore the suspension is liable to be set aside by the Court instead of allowing the matter to proceed in a disciplinary hearing.

13.1.2 On the other hand the Respondent argued that, the fact that the Applicant has been suspended pending disciplinary action is no grounds for urgent relief. All the explanations that the Applicant is seeking to bring before the Court, are explanations that the Applicant should tender to the disciplinary committee, therefore the Court should not be asked to usurp the functions of an internal disciplinary tribunal, hence the matter is not urgent for that reason and it should be dismissed.

13.1.3 The principle remains though, that the Court will not lightly interfere with an employer's prerogative to discipline, even dismiss staff. This principle was emphasized in the case of **GUGU FAKUDZE VS THE SWAZILAND REVENUE AUTHORITY**

AND OTHERS – INDUSTRIAL COURT OF APPEAL CASE NO. 08/2017, where the Court held that:-

> "It is a trite position of the law that the Court cannot come to the assistance of an employee before a disciplinary enquiry has been finalised. The reason being that the Court does not want to interfere with the prerogative of an employer to discipline its employees, or even to anticipate the outcome of an incomplete disciplinary process. This would be the case even if the employee is in a situation where his pre-dismissal rights have been infringed or where there have been unfair labour practices. In such a case the Court would only be able to grant relief after the fact. Conversely, the Court has jurisdiction to interdict any unfair conduct including disciplinary action in order to avert irreparable harm being suffered by an employee, Put differently, where exceptional circumstances exist for the Court to intervene, it will."

13.1.4 It is the Court's considered view that there is, however, nothing in this matter to suggest that exceptional circumstances exist for the Court to intervene. In order to succeed in obtaining an interdict of this nature the Applicant must establish the following requirements:

(i) the existence of a clear right.

(ii) apprehension of irreparable harm.

(iii) the absence of alternative relief.

(iv) the balance of convenience.

13.1.5 In the case of **MAGAGULA & OTHERS VS ACTING JUDGE OF THE INDUSTRIAL COURT AND ANOTHER, HIGH COURT CASE NO. 112/14,** the Court held that:

> "A Court must be satisfied that the balance of convenience favours the grant of an interim interdict. It must juxtapose the harm to be endured by an Applicant if interim relief is not granted with the harm the Respondent will bear if the interdict is granted. Thus a Court must assess all relevant factors carefully in order to decide where the balance of convenience rests."

13.1.6 The Applicant in his papers has failed to establish the necessary requirements for the granting of an interdict. The only argument put forward by the Applicant as it has been mentioned earlier on is that, the disciplinary hearing is premised on an unlawful basis, and that the suspension is liable to be set aside by the Court instead of allowing the matter to proceed in a disciplinary hearing.

13.1.7 From the aforegoing it appears that the Applicant has jumped the gun by coming to Court to interdict the employer from proceeding with the disciplinary hearing. The Applicant should attend the

hearing wherein he would be in a position to voice his grievances to the Chairperson.

13.1.8 In the case of S**.A. COMMERCIAL CATERING AND ALLIED WORKERS UNION VS TRUWORTHS 1999 (20) ILJ 639 LC**, the Court held that:

> "It is for the employer, not the Court to decide whether the employee is guilty of misconduct. Hence, the Court is loathe to usurp the discretion of the Chairperson of these disciplinary enquiries, particularly where they have not had the opportunity to exercise same."

13.1.9 The Court is accordingly of the view firstly that the Applicant has not satisfied the test of urgency and secondly that, the Applicant has alternative remedies open to him, including approaching the Labour Commissioner in terms of Section 26 of the Employment Act, or else report a dispute to CMAC as required by Section 76 of the Industrial Relations Act.

13.1.10 The afore mentioned remedies are in line with what the Court said in the case of **SWAZILAND FRUIT CANNERS (PTY) LTD VS PHILIP VILAKATI AND ANOTHER SZICS CASE NO. 2/1987** where the Court held that:-

> "Not every party to an industrial dispute is entitled to have the dispute determined by the Industrial Court. Looking at

the matter generally, the policy of the Industrial Relations Act, is that before the Industrial Court the matter must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. If the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only then may application be made to the Industrial Court for relief."

13.1.11 In the locus classicus case of **PHYLIP NHLENGETFWA AND OTHERS VS SWAZILAND ELECTRICITY BOARD SZIC CASE NO. 272/2002**, the Court said the following:-

"We must add that the 2000 Act has since created a further structure in terms of Section 62 (1) of the Act, known as the Conciliation, Mediation and Arbitration Commission (CMAC), which is an independent body with the task of resolving disputes of this nature by way of Conciliation, Mediation and Arbitration. The creation of this institution has increased the need for the Industrial Court to enforce strict observance of the dispute resolution procedures under Part VIII of the Act because we now have a more suitable structure of expeditiously, conveniently and less expensively resolving industrial disputes which otherwise find their way

unnecessarily to this Court, and in the process aggravating the backlog the Court has suffered for a long time."

13.2 NON-JOINDER

The Respondent argued that the Standing Committee on Public Enterprises (SCOPE) and Mr. Patrick Mathunjwa have a real and substantial interest in the outcome of the matter, hence the Applicant should have cited / joined them in the matter.

13.2.1 In response the Applicant argued that, SCOPE and Mr. Mathunjwa are not necessary parties in this matter, however, they are aware of these proceedings. The papers were served on Mr. Mathunjwa on the 9th October 2018 by the Deputy Sheriff for the District of Hhohho, further that, SCOPE is a Committee for Cabinet Ministers which did not exist at the time the application was instituted.

13.2.2 It was again Applicant's argument that if the Court finds that SCOPE and Mr. Mathunjwa are necessary parties to the application, then the matter is not one appropriate for dismissal, the Court should order a joinder and serving of the papers to the interested parties in the interest of the administration of justice.

13.2.3 It must be mentioned that each case is judged on its own peculiar circumstances. There are several cases where Courts have correctly dismissed proceedings on non joinder alone. The test

applied in such cases is whether a party has a direct and substantial interest in the subject matter in the litigation which may prejudice the party that has not been joined. In **GORDON VS DEPARTMENT OF HEALTH, KWAZULU NATAL [2008] ZA SCA 99 2008 (6) SA 522 (SCA)**, it was held that:-

> "if an order or judgement cannot be sustained without prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."

13.2.4 Once it shows that a party is a necessary party in the sense that he is directly and substantially interested in the issues raised in the proceedings before the Court, and that his rights may be affected by the judgement of the Court, the Court will not deal with those issues without such joiner being effected.

13.2.5 In the case of **COMMISSIONER OF POLICE AND ANOTHER VS MKHONDVO AARON MASEKO – SUPREME COURT OF APPEAL CASE NO. 03/11** the Court stated that:

> "non-joinder is a matter that no Court, even at the latest stage in proceedings can over-look, because the Court cannot allow orders to stand against persons who may be

interested, but have not had an opportunity to state their case. It is for that reason that the Court may refuse the issue of non-joinder mero motu in order to do justice."

13.2.6 Thus the failure by Applicant to join SCOPE is a clear case of non-joinder, despite the fact that SCOPE has a direct and substantial interest in the matter, by virtue of being the body entrusted with the duty to appoint the Chief Financial Officer of each category A Public Enterprise, as per Section 8 (2) of the PEU Act 1989. Furthermore, the position which the Applicant wishes to be re-instated in, has been filled by the said Patrick Mathunjwa. Thus the orders sought by the Applicant cannot be granted without prejudicially affecting SCOPE and Mr. Mathunjwa. The issue of non-joinder is therefore fatal to the Applicant's case.

13.3 DISPUTE OF FACT

The Respondent averred that through its Managing Director it consulted with the Applicant with regard to the transfer on the 12th September 2018, and that the Applicant was pleased with the re-deployment and accepted same. Whilst on the other hand the Applicant submitted that he was not consulted, and that the Respondent has failed to produce positive

evidence as proof that the Applicant was consulted. This then raises a dispute of fact between the parties.

13.3.1 In terms of Rule 14 of the Industrial Court Rules, where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of Notice of Motion supported by affidavit. The present application is fraught with a dispute of fact with regards to the question whether or not the Applicant was consulted concerning the transfer.

13.3.2 In the case of **ROOM HIRE COMPANY (PTY) LTD VS JEPPE STREET MANSIONS LTD 1949 (3) S.A. 1155**, the Court had this to say:-

> "An application may be dismissed with costs, particularly when the Applicant should have realized when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an Applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment….what is essentially the subject of an ordinary trial action."

13.3.3 Therefore, as it stands the dispute of fact in this matter, cannot for obvious reasons be decided on the papers, and the application stands to be dismissed on that basis.

13.3.4 This principle is supported by the case of LOMBAARD VS DROPROP CC AND OTHERS 2010 (S) S.A. 1 SUPREME COURT OF APPEAL, the Court stated as follows:-

> "Therefore, if a party has knowledge of a material and bona fide dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed."

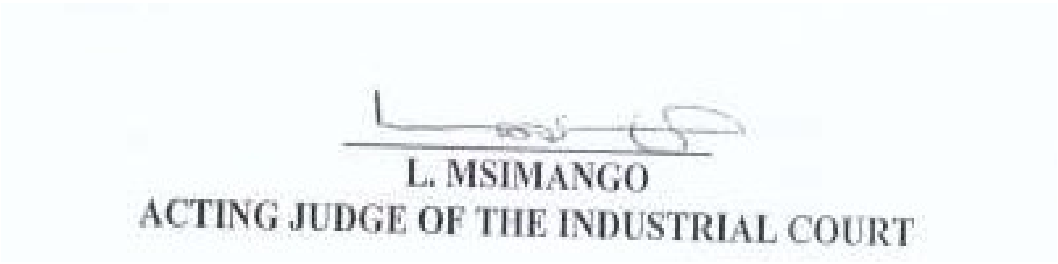
[14] In the circumstances the Court makes the following order:-

(i) The points of law raised by the Respondent are upheld.

(ii) The application is hereby dismissed.

(iii) No order as to costs.

The Members agree.



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