



IN THE INDUSTRIAL COURT OF ESWATINI

CASE NO. 67/2019

In the matter between:-

**SWAZILAND ASSOCIATION FOR CRIME
PREVENTION AND REHABILITATION OF
OFFENDERS (SACRO)**

Applicant

AND

**GOODMAN SIMELANE
BANELE HLATSHWAKO
NATIONAL COMMISSIONER OF POLICE
ATTORNEY GENERAL**

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

*Neutral citation: Swaziland Association For Crime Prevention and
Rehabilitation of Offenders (SACRO) vs Goodman Simelane & Others
67/2019 SZIC 45 (30 April, 2019)*

Coram:

N.NKONYANE, J
*(Sitting with G. Ndzinisa and S. Mvubu, nominated
Members of the Court.*

Heard submissions: 01/04/19

Judgement delivered: 30/04/19

SUMMARY---Labour Law---Applicant instituting an ex parte application interdicting the 1st and 2nd Respondents from coming to its premises---Requirements for ex parte applications---Failure to make a full disclosure of all material facts.

Held---In ex parte applications all material facts must be disclosed which might influence a Court in coming to a decision---The Court once apprised of the true facts has a discretion to set aside the provisional order obtained.

JUDGEMENT

1. The Applicant instituted the present application against the Respondents on 05th March 2019 under a certificate of urgency. The Applicant is seeking an order in the following terms;

“1. Dispensing with the normal forms of service and time limits provided by the Rules of this Honourable Court and hearing this matter urgently.

2. *Condoning the Applicant for the non-compliance with the rules of this Honourable Court and that the matter is heard on an ex parte basis;*
3. *Interdicting and restraining the 1st and 2nd Respondents from setting foot any of the business premises of the Applicant;*
4. *Directing and authorizing the 3rd Respondent to assist the Applicants in the Executive of any order of the Court in this matter;*
5. *Costs of this Application against the 1st and 2nd Respondents;*
6. *Further and/or alternative relief.*

2. When the matter was called in Court on the 05th March 2019, there was no appearance for the parties. The matter was accordingly struck off the roll.

3. The matter was re-instated on the Court's roll on the 06th March 2019. On that day there was an appearance for the Applicant, there was no appearance for the Respondents.

4. The Applicant's attorney submitted before the Court that the matter had been brought to Court as an *ex parte* application and he applied for a *rule nisi* in terms of prayers 3 and 4 of the Notice of Application. The Court granted the application and the *rule nisi* was issued returnable on 13th March 2019.
5. On the 13th March 2019, the 1st and 2nd Respondents appeared before the Court and they were represented by an attorney. After brief arguments before the Court, the matter was postponed until 18th March 2019. On that day it transpired that there were other documents that the Applicant needed to file and the matter was postponed until the following day, the 19th March 2019. On that day there was no appearance by both parties and the matter was again struck off the roll.
6. The application was reinstated on the Court's roll and was called on the 01st April 2019 and the matter was argued in full the parties having filed their heads of argument. After the arguments the Court reserved its judgement.
7. Although the matter had come to the Court as an urgent application, the Court was unable to deliver the judgement soon after the hearing of

arguments because of an administrative problem that was experienced by the Court, hence the delay in delivering the judgement.

8. In their answering affidavit the 1st and 2nd Respondents raised two points of law. The parties however agreed that the points of law raised be argued simultaneously with the merits.

9. The facts in this matter are simple and straightforward. The 1st and 2nd Respondents are employed by the Applicant. During the course of the year in 2018, the staff members of the Applicant, including the 1st and 2nd Respondents, caused a petition to be drafted and signed by the staff members and was presented to the Chairman of the Board of Directors of the Applicant. The employees were complaining about the conduct of the Executive Director who is the deponent of the founding affidavit. The copy of the petition was annexed to the answering affidavit and marked "GS2".

10. The things that the employees were complaining about included, *inter alia*, that;

10.1 "The Executive Director always borrows Petty Cash for personal use;

- 10.2 *Taking Petty Cash items such as Milk, Sugar, Tea Bags, Kettle, refrigerator etc. to his homestead.*
- 10.3 *Allowing the Organization's motor vehicle to be driven by his children.*
- 10.4 *The Director usually borrows money from tenants for his personal use, thus resulting from the tenants refusing to pay rent.*
- 10.5 *Threatening to shoot staff members.*
- 10.6 *The cleaner does not have protective clothing....”*
11. The petition by the staff members was received by the Board and the Chairman committed to responding by the end of January 2019 by letter dated 03rd December 2018, **Annexure “GS3”**. The Board, however, did not respond as per its undertaking to do so by the end of January 2019. Instead, the Executive Director summoned the staff members and informed them verbally that all the issues that they had raised in the petition had been resolved by the Board. The staff members were not satisfied by that response as they were expecting a formal response from the Board and not from the very person that they were complaining about. They asked the Executive Director for furnish them with minutes of the Board's meeting. The Executive Director produced a document dated 19th February 2019, **Annexure “GS4”**.

12. The document dated 19th February 2019 does not have the Applicant's letterheads. It was also not signed by the Chairman of the Board. The staff members, being led by the 1st and 2nd Respondents, had issues with the authenticity of the document and insisted on a proper document. Whilst the staff members were awaiting the proper document and insisting that their matter be dealt with by the Board, the two ringleaders being the 1st and 2nd Respondents were served with suspension letters on 20th February 2019 by the Executive Director.
13. Even though the 1st and 2nd Respondents were suspended from work, they continued to come to the workplace. According to the 1st Respondent, he was told by the Chairman of the Board, Mr. Musa Dlamini to go back to work as their issue was still pending before the Board. Mr. Musa Dlamini did not file any affidavit to dispute this.
14. The Executive Director on seeing that the suspended employees were coming to the workplace, launched the present application on an urgent and *ex parte* basis to seek an order interdicting the 1st and 2nd Respondents from setting foot on any of the Applicant's premises. A rule nisi was granted by the Court. The 1st and 2nd Respondents filed an answering affidavit to the Applicant's founding affidavit and the Applicant thereafter filed its replying affidavit thereto.

15. In the founding affidavit the Executive Director stated that the two Respondents were suspended because they were disrupting the operations and causing instability at the workplace and that they were defying the instructions by the Executive Director. The Executive Director further stated that his relationship with the two Respondents “*had broken down and excruciating*”.
16. The Executive Director did not disclose to the Court in his founding affidavit in what way were the two Respondents causing the instability at workplace. The failure by the Director to fully disclose all the information led to the Respondents raising the point of law that the application ought to be dismissed for failure to disclose fully in the founding affidavit the relevant information to the Court. It is indeed a requirement of the law that there must be full disclosure in the supporting affidavit in an application such as the present one. The learned authors, Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th edition page 367 addressed this issue in the following manner;

“Although, generally, an applicant is entitled to embody in his supporting affidavits only allegations relevant to the establishment of his

right, when he is bringing an ex parte application in which relief is claimed against another party he must make full disclosure of all material facts that might affect the granting or otherwise of an order ex parte. The utmost good faith must be observed by litigants making ex parte application in placing material facts before the Court, so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether willfully and mala fide or negligently, which might have influenced the decision of the Court whether to make an order or not, the Court has a discretion to set the order aside with costs on the ground of non-disclosure."

17. The Court has had the opportunity to read the whole set of affidavits filed by the litigants herein. The Court has now been apprised of the true facts. The facts before the Court revealed that the misunderstanding between the two Respondents and the Executive Director developed after the staff members started to notice some leadership gaps in the Executive Director in the way that he is leading the organization. The staff members signed a petition which they delivered to the Board and the two Respondents were in the forefront. From the evidence before the Court, it became clear that it was no co-incidence that the two were the ones that were suspended by the Executive Director taking into account their role in the whole saga of the petition against him.

18. In the letters of suspension of the two Respondents, there were no conditions attached. The two Respondents were suspended from work and there was no condition that they should not come to the premises of the Applicant. It was within the powers of the Executive Director to stipulate any conditions that he deemed just, necessary and reasonable. He did not stipulate any conditions in the suspension letters prohibiting the two Respondents from coming to the Applicant's premises or communicating with other employees at the workplace. The Respondents therefore did not breach any regulation by coming to the workplace.
19. In paragraphs 10 and 11 of the founding affidavit, the Executive Director stated that the two Respondents were disrupting the operations of the Applicant and causing instability: He did not state, however, in what way were the Respondents causing disruption and instability of the operations of the Applicant. The Respondents denied this in the answering affidavit. If the two Respondents were causing any disruption at the Applicant's place, good industrial relations dictate that the Executive Director should have simply called the Respondents to his office and served them with fresh or reviewed letters of suspension with the conditions that they should not come to the premises of the Applicant and that they should

not communicate with the employees pending their appearance before a disciplinary tribunal. He did not do that.

20. The 1st & 2nd Respondents also stated in their answering affidavit that the Executive Director first reported the matter to one of the Applicant's Directors, Mr. Frank Hurube, who is also a member of the Royal ESwatini Police Service. The 1st and 2nd Respondents stated that the Executive Director reported that employees were fighting within the premises of the Applicant. Mr. Frank Hurube showed up and found that there was no fighting and he went away. The Executive Director did not deny this in his replying affidavit and Mr. Frank Hurube did not file any affidavit in Court to dispute this evidence.

21. From the evidence before the Court there was clearly no need for the Director to resort to taking drastic measures and setting the Court processes in motion in a matter that he had control over. This much was also observed by the Board in its meeting held on 14th February 2019 where it made the following observations on page 8 paragraph 9;

"9. The Director cannot say the situation is unworkable, but must take and use his powers and call all employees to order."

If the Executive Director felt, for any reason, that it was not desirable to have the 1st and 2nd Respondents set their feet at its premises pending the disciplinary hearing, he should simply have set conditions in the suspension letters that they were not allowed to come to the Applicant's premises and communicate with the other employees during the period of the suspension. If the two Respondents were to intentionally violate those conditions, the Applicant would be justified in approaching the Court on an urgent basis to seek its intervention.

22. From the evidence before the Court, there is no doubt to the Court that Applicant failed to make a full disclosure of all the material facts in the founding affidavit. Further, the Court having considered all the evidence before it, comes to the conclusion that the version of the two Respondents is more probable than that of the Applicant especially as the Chairman of the Board and Mr. Frank Hurube failed to file any affidavits herein.
23. Having taken into account all the evidence before the Court, the Court comes to the conclusion that had the Applicant made a full disclosure of all the material facts in its founding affidavit, the Court would not have granted the provisional order that it did. It follows therefore that it cannot confirm the provisional order.

24. Taking into account all the evidence before the Court, the submissions by the parties' legal representatives, the interests of justice and fairness; the Court will make the following order;

- a) *The rule nisi is discharged.*
- b) *The application is dismissed.*
- c) *There is no order as to costs*

25. The members agree.


N.NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant:

*Mr. Beneme M. Dlamini
(Attorney at S.M. Kubheka and Associates.)*

For Respondents:

*Mr. M. Mntungwa
(Attorney at Robinson Bertram)*