



IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 384/19

In the matter between:

SABELO CAIPHUS VILAKATI

Applicant

And

SOUTH AFRICAN HIGH COMMISSION

Respondent

Neutral citation: Sabelo Caiphus Vilakati v South African High Commission
[384/19] [2021] SZIC 156 (04 March 2021)

Coram : **B. NGCAMPHALALA - ACTING JUDGE**
(Sitting with N. Dlamini and D.P.M. Mmango
Nominated Members of the Court)

Heard : 16 September 2020

Delivered : 04 March 2021

Summary: *Application for determination of unresolved dispute. Does the Court have Jurisdiction to hear the matter, in terms of the Diplomatic Privileges Act 1968? Did the Respondent waive its right to immunity in terms of the Act. Contract of employment, Applicants employed by the South African High Commission based in Mbabane ESwatini. South African Commission preferred charges of misconduct against*

both Applicants and they were both dismissed following an outcome of a disciplinary hearing.

Held: *South African High Commission enjoys immunity in terms of the Diplomatic Privileges Act, 1968 and did not waive its right to immunity from prosecution.*

RULING

1. INTRODUCTION

[1] This is an unopposed application for determination of an unresolved dispute. The Applicants herein were employees of the South African High Commission based in Mbabane. The South African High Commission preferred charges of misconduct and they were both dismissed following an outcome of a disciplinary hearing wherein they were found guilty. Both Applicants are Emaswati. The first Applicant being by birth and the second Applicant by marriage registration.

[2] The application was initially brought before my brother AJA Motsa wherein the Applicants sought an *ex parte* trial on behalf of the Applicants, which was granted by my brother on the 2nd July 2020. However, upon realizing that the Respondent is the South African High Commission my brother revoked the order and directed that the Applicants come before Court to make submission on whether the Court has Jurisdiction to hear the matter taking into consideration the Immunity enjoyed by the Respondent. Further that by attending the meeting with the Labour Commissioner was the South African High Commission waiving its right to immunity.

[3] It is worth noting that the Respondent has not filed any opposing papers nor have they appeared in this matter, despite that they were duly served on the 25th March 2020. What is further puzzling to the Court is that the Application was served on the Respondent through the Ministry of Foreign Affairs and International Cooperation as the acknowledgment receipt stamp on the Application, reads “**Ministry of Foreign Affairs & International Cooperation Eswatini Principal Secretary**”, who in turn were to serve the South African High Commission, but the Respondents have failed to make appearance, yet in previous correspondence sent they had responded promptly, leaving the Court with several questions.

[4] The Application being sought by the Applicants before this Court is an order for the following:

Payment of maximum compensation for the Applicants as follows-

(a) SABELO CAIPHUS VILAKATI

Maximum Compensation unfair dismissal -	E 156,000.00
Notice Pay -	E 13,000.00
Leave pay -	E 7,500.00
Additional Notice pay -	E 32,000.00
Severance pay -	<u>E 80,000.00</u>
Total	<u>E 288,500.00</u>

(b) NONHLANHLA MARAFU KUNENE

Maximum Compensation unfair dismissal -	E 102,000.00
Notice Pay -	E 8,500.00
Leave pay -	E 3,923.04
Additional Notice pay -	<u>E 2,615.00</u>
Total	<u>E 117,038.04</u>

2. BACKGROUND

[5] It is common cause that the Applicants' were dismissed after charges were preferred against them. After being dismissed, the Applicants were desirous that their matter be heard in terms of the ESwatini law. They approached the Labour Commissioner to conciliate in terms of **section 8 of the Employment Act 1980 as amended**, which is conducted by the Labour Commissioner, it is baffling why the Applicants sought this route instead of taking the matter straight to Conciliation, Mediation, Arbitration Commission, which the **Industrial Relations Act, 2000 (as amended)** is established for purposes of, which is to expedite such matters, but eventually the Applicants did approach the Commission as it will appear below. In terms of the Applicants' submission both parties were present before the Labour Commissioner but the matter was never settled by the parties and a report was prepared. Nowhere do the Applicants in their papers imply that the Respondent waived his right to immunity in terms of **the Diplomatic Privileges Act, 1968**.

[6] When the Applicants then approached the Conciliation, Mediation and Arbitration Commission (CMAC), who in terms of **section 76** of the **Industrial Relations Act 2000 as amended** is seized with the powers to hear disputes. The matter was accordingly filed with CMAC, who responded by letter dated 10th December 2020, which read as follows:

“Reference is made to your letter dated 3rd December 2020.

*We note that the South African High Commission enjoys immunity in terms of the **Diplomatic Privileges Act of 1968** and unless that immunity is waived the Commission does not have jurisdiction over the dispute.”*

3. ANALYSIS

[7] It is common cause that the question to be determined by this court, is whether the Court has Jurisdiction to hear a matter over a foreign state within one’s country being the South African High Commission that enjoys diplomatic privileges and immunity. Further whether by attending the meeting with the Labour Commissioner in terms of **section 8 of the Employment Act 1980 as amended**, the Respondent waived its right to immunity.

[8] **The Diplomatic Privileges Act 1968**, confers diplomatic privileges and immunities on representatives of foreign states in accordance with the Articles of the Vienna Convention 1961 and on representation of public international organizations of which ESwatini is a member.

[9] The privileges and immunities of foreign states and certain international organizations and courts and certain persons connected with them are governed by the **Vienna Convention on Diplomatic Relations signed in 1961**, as well as **the Diplomatic Privileges Act of 1968** of Eswatini.

[10] This Act stipulates that **Articles, 22,23,24 and 27 to 40 of the Vienna Convention** shall have the force of law in Swaziland and references therein to the receiving state shall have construed as references to the Government. It is only by invoking the provision of this Act that the immunities and privileges of a state may be revoked.

[11] Our own law **The Immunities and Privileges Act 1961**, then further stipulates the procedures to be put in place for those states and, international organizations which enjoy immunities and privileges within Eswatini. **Section 5 of the Act** states that;

- (1) The Minister shall cause a register to be kept in which there shall be entered the names of all persons and missions entitled to the immunities and privileges conferred under this Act and every registration shall be cancelled upon such a person ceasing to be so entitled.
- (2) The Minister shall cause every registration or cancellation under sub section (1) to be published in the Gazette.
- (3) At least once each calendar year the Minister shall cause to be published in the Gazette a complete list of all persons in such register.
- (4) A copy of this list shall be lodged with the Registrar of the High Court and shall be available for inspection by the public free of charge during office hours.

(5) The Registrar shall amend the list from time to time in accordance with any notice published under section (2).

[12] There is nowhere in the Applicants submission where the Respondent stipulates that the Applicants do not enjoy the privileges as set out in paragraph 3,4 and 5 of the **Diplomatic Privileges Act, 1968**. It is their argument that by attending the conciliation in terms of **section 8 of the Employment Act 1980 (as amended)**, the Respondent waived its right to immunity.

[13] The Court has read the report filed by the Applicants which was prepared by the Labour Commissioner in particular paragraph 3, the Labour Commissioner stated;

...Respondent was invited to a conciliation meeting scheduled for the 22nd August 2019 in order to secure a voluntary settlement. However, the Respondent failed to attend the said meeting, but however responded through a letter dated 26th August 2019, with attached documents, i.e. notice of disciplinary hearing, finding and sanction, outcome of hearing and the detailed grounds of appeal regarding the dismissal of Mr. Sabelo Caiphius Vilakati and Ms. Nonhlanhla Marafu Kunene.

However, the Respondent later sent Miss Maria Bokaba Jali, Corporate Service Manager and Miss Salome Myeni First Secretary Immigration who both represented the Respondent. The meeting was held on the 3rd October 2019, however they both declared during the meeting that they did not have a mandate from the Respondent, but only were attending the meeting to record the Applicants submission. They indicated that the High Commission would send a representative with a mandate in the next meeting, however

they then responded through correspondence dated 31st October 2019, which the Court is not privy to and would have greatly assisted it to know the position of the Respondent. It is obvious from the submission from the report filed by the Labour Commissioner that the intention of the officers who attended the meeting from the South African High Commission was to take notes of the proceeding, not to partake in a conciliation nor waive the High Commissions right to immunity.

[14] It can therefore not be said that the South African High Commission submitted itself to our local jurisdiction by merely attending a meeting where the attendees explicitly said they were there to take notes.

[15] It is common cause that the Applicants were not employed by individuals or personnel working within the commission, however they were employees of the South African High Commission itself, in its official capacity. It was the South African High Commission in its official capacity that conducted the hearings and found the Applicants guilty and accordingly dismissed them for work, in their official capacity as employees.

[16] The Applicants during its submission averred that the Respondent cannot enjoy absolute immunity, which the court concurs with, however again the Applicants in its submissions rightly makes reference to the case of **Ministry of Defense of Government of the United Kingdom vs Joe Ndegwa 1983 EkLr**, where the court buttressed the application of restrictive immunity as follows;

“It is apparent that there is no absolute sovereign immunity. The test is whether the foreign sovereign government was acting in governmental or private capacity, then the doctrine will apply otherwise, it will not afford protection to a private transaction. The nature of the act is therefore important.”

[17] Therefore, the nature of the action itself is important. In this particular case as is evident the South African High Commission acted in its official capacity, as a representative of a sovereign state. The Applicants were employees, employed by the South African High Commission in its official capacity as a representative of the South African government, and were charged whilst carrying out official duties in their official capacity.

[18] The only way for the Applicants to bring a civil suit against the Respondent was if the Respondent had withdrawn its diplomatic immunity in terms of the **Vienna Convention on Diplomatic Relations** and or through the invoke of **section 4, 6 of the Diplomatic Privileges Act of 1964**.

[19] Therefore **Article 31 of the Vienna Convention on Diplomatic Relations** it is evident from the submissions made by the Applicants does not suffice in the present circumstances as the Article states the following:

“1. A Diplomatic agent shall enjoy immunity from criminal and civil jurisdiction of the receiving State. He shall also enjoy immunity from civil and administrative jurisdiction, except in the case of:

- a) *A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission.*
- b) *An action relating to succession in which the diplomatic agent is involved as executor administrator, heir, or legatee as a private person and not on behalf of the sending State:*
- c) *An action relating to any official or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.*
 1. *A diplomatic agent is not obligated to give evidence as a witness.*
 2. *No measure of execution may be taken in respect of a diplomatic agent except in the cases coming under sub paragraph (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.*
 3. *The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.*

Article 32 of the Convention further states;

1. *The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.*
2. *Waiver must always be express...*

[20] Having regard to the evidence placed before me and the submissions made on behalf of the Applicants, and having considered the principles of International law on both criminal and civil matters, I can come to no other

conclusion than that the Respondent enjoys diplomatic immunity and privileges under the law within Eswatini and the Vienna Convention to which Eswatini is a member. Furthermore, that by the Respondent sending its representatives to the meeting held with the Labour Commissioner, the Respondent did not waive its right to immunity, which if it intended to, should have done so expressly. The mandate as articulated by the Labour Commissioners report was that the representatives were merely there to take notes and not participate in the conciliation nor did they have a mandate given to them by the Respondent. This however does not mean that the Applicants have no other relief. The Applicant can pursue their matter with the South African Labour Courts, and such relief therein.

4. CONCLUSION

In the Court's view and based on the reason set out above, the Court makes the following order.

- (a) The Applicants application is therefore dismissed.**
- (b) There is no order as to costs.**

The Members are in agreement.

BANELE NGCAMPHALALA
ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For the Applicant: Mr. Kwanele Magagula (Sithole & Magagula Attorneys)

For the Respondent: No Representative