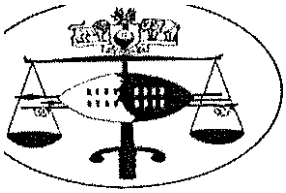

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT
MBABANE

Case No: 84/21

In the matter between:-

CUBANORA RESTAURANT APPLICANT

And

FORTUNE DLAMINI RESPONDENT

Neutral citation: Cubanora restaurant v Fortune Dlamini (84 /21)
[2021] SZIC 83 (12 November 2021)

Coram: **MSIMANGO, ACTING JUDGE**
(Sitting with Mr S. Mvubu and Mr A.S Ntiwane nominated Members of the Court).

Date Heard: **20th OCTOBER 2021**

Delivered: **12th NOVEMBER 2021**

Summary: This matter emanates from a judgement which was delivered by this Honorable court on the 30th August 2021, wherein the Applicant was to pay the Respondent a sum ofESO, 076.92 (fifty thousand and seventy six emalangeni ninety two cents) for unfair dismissal. The Applicant was given a period of twenty- one (21) days within which to pay the said amount. The twenty- one (21) day period lapsed the Respondent then instructed a Deputy Shen-iff to effect the court order. The Applicant filed a notice of appeal. The Notice of Appeal filed of record has brought about the cmTent proceedings.

JUDGEMENT

---

1. This is an application in terms of **Section 19 (4) of the Industrial Relations Act 2000,** seeking or praying for the stay of execution of a judgement of this comi. The section reads as follows,

   "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".

2. The judgement of the court was delivered on the 30th August 2021, whereby the court ordered that the Applicant herein pays a sum of ES0, 0076.92 (fifty thousand and seventy six emalangeni ninety two cents) to the Respondent within a period of21 days.

3. Prior to the filing of the Notice of Appeal, the Applicant wrote a letter to Respondent's Attorneys advising of the intention to honour the order of the court. However, the Applicant argues that he never paid a cent of the judgement, and that the writing of the letter was not in any way a waiver of his right to appeal, further that, such correspondence was not in any way acquiescing to the judgement. The letter is annexure "CB 2" attached to the notice of application.

4. It is important that the letter "CB 2" written by the Applicant be reproduced in full in this judgement. It appears as follows:

RE: FORTUNE DLAMINI/CUBA NORA RESTAURANT- INDUSTRIAL COURT CASE NO. 84/2020

The above matter refers

We are in receipt of your Court Order. We note that in terms of the order, payment has to be made within 21 days.

Our client will honour and obey the order of court but is presently in a financial difficulty. His wish is to do a once off payment, but if need we will request to make periodic payments.

Please be patient with our client. Client is working towards getting the funds for payment. In the event the full amount is not immediately sourced we will request for your indulgence on behalf of our client to do periodic payments.

We hope this is in order.

Yours faithfully

SM Maseko Attorneys

5. Despite such correspondence, the Applicant argues that he still reserved his right to appeal the judgement, and that the letter was written in good faith, hence, the subsequent noting of the appeal is not in any way frivolous or meant to frustrate the Respondent.

6. The Respondent raised the following points, and it is with regard to those points that this judgement is concerned.

(a) That the urgency is self created.

(b) Failure to comply with **Rule 15 (2)** (**c) of the Industrial court Rules.**

(c) Failure to establish requirements for interim relief, and that.

(d) The appeal is frivolous and vexatious.

7. The Respondent argued that the appeal filed of record is frivolous and vexatious, and, it is only meant to frustrate the Respondent, for the following reasons:-

(a) The Applicant had all the time to note an appeal if it was displeased with the court order. The impugned court order was granted on the 30th August 2021, wherein, the Applicant was given a period of twenty one (21) days within which to pay, but never paid. A deputy sheriff was then instructed to effect the couti order, the Applicant requested some indulgence within which to pay. However,

the Applicant then noted an appeal without complying with the court order as indicated.

(b) The appeal was filed in order to curtail the deputy sheriff from attaching the Applicant's movables.

(c) The Applicant unequivocally accepted to abide by the court order, hence, this conduct brought the doctrine ofperemption into play.

8. The doctrine of peremption was enunciated in the case of **HLATSHW AYO V MARE AND DEAS 1912 AD (242)** where LORD DE VILLIERS held that:

> ***"Where a man has two courses of action open to him and he unequivocally takes one, he cannot afterwards turn hack and take the other".***

9. According to the common law doctrine ofperemption, a party who acquiesces to a judgement cannot subsequently seek to challenge the judgement he has acquiesced. This doctrine is founded on the logic that no person may be allowed to opportunistically endorse two conflicting positions or to both approbate and reprobate, or to blow hot and cold. It may even be said that a party will not be allowed to have her cake and eat it too. The conduct of the Applicant must be unequivocal and inconsistent with any intention to appeal. **HARTELY, ROEGSHAAN AND ANOTHER V RAND LIMITED AND ANOTHER, HIGH COURT CASE No. 27612/2010.**

10. Again in **VENMOP 275 (Pty) Ltd AND ANOTHER 2014/ 14286, 2016 (1) S.A 78,** PETER J stated as follows:-

> ***"Even where a party's prospects on appeal are otherwise good, an appeal***

may be refused on the basis of peremption. The court will not come to the

aid of a party who initially expresses an intention, even if only by implication, to abide by a judgement of the court and then suddenly changes its mind. A party must make up its mind whether *it* ***is aggrieved by a decision and wants to appeal or whether it wants to pay up albeit in installments".***

11. The law prohibits such a party from later turning around to take the option he had initially rejected if it is clear he had initially and unequivocally taken the other option. It is said in law he cannot accept and reject at the same time.

12. Tmning to the letter written by the Respondent's att01neys, the only reasonable inference to be drawn, is that the Applicant had the intention to abide by the court order. There is absolutely no explanation as to why the Applicant then had a change of mind and decided to challenge the judgement in question. All these factors point to a clear and settled intention to acquiesce in the judgement of the court. This rather belated noting of an appeal is nothing but a stratagem to delay and avoid compliance with the court order. The Applicant cannot be allowed to blow hot and cold to the prejudice of the Respondent and the administration of justice in general.

13. In **STANDARD BANK V ESTATE VAN RHYN 1925 AD 266** at page 268, the court had this to say:-

"If an unsuccessful litigant by unequivocal conduct, inconsistent with an intention to appeal, shows that he acquiesces in the judgement, then he cannot continue to prosecute the appeal .....this is the doctrine, if *a*

man had clearly and unconditionally acquiesced in and decided to abide by the judgement he cannot thereafter challenge it".

14. In the circumstances the points of law that the appeal is frivolous and vexatious, and that the applicant's conduct brought into play the doctrine ofperemption are hereby upheld. It is not necessary to consider the other points raised. The court makes the following order:-

(i) The application for the stay of the *writ* of execution is dismissed.

(ii) No order as to costs.

The Members Agree.

L.MSIMANGO
ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant : Mr S. Maseko. (S.M. Maseko Attorneys)

For Respondent : Mr S. Mabuza. (Mtshali Ngcamphalala Thwala Attorneys)