IN THE INDUSTRAIL COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 144/2020

In the matter between:

VACLAV VANEK **APPLICANT**

AND

LOMATI MINE (PTY) LTD **RESPONDENT**

Neutral citation: Vaclav Vanek v Lomati Mine (Pty) Ltd (144/2020) [2022] SZIC 107 (13 September 2022)

Coram: **THWALA - JUDGE**
(Sitting with Mr M. Mtetwa and Mr A.M. Nkambule, Nominated Members of the Court)

Heard: 12 JULY 2022

Delivered: 13 SEPTEMBER 2022

RULING ON POINT OF LAW

Background

[1] When this matter was called before us, Mr Sibandze, who appeared on behalf of the Respondent, brought it to the attention of the Court that this matter had already been to the Industrial Court of Appeal (ICA) for two preliminary issues, namely a demand for Respondent to furnish security for costs, and an order for the stay of the present proceedings pending the finalization of an action that respondent had instituted against the applicant before the High Court.

[2] Notwithstanding the outcome of its appeal on these two points of law, Respondent has deemed it proper to initiate yet another set of preliminary points, the source of which is exactly the same founding affidavit that was used initiated by the Applicant in June 2020. No explanation was given, nor were we able to discern from Respondent's papers, the legal basis for the filing of a " preliminary answering affidavit" when the relevant provision of this Court on urgency makes no mention for such. **Rule 14 of the Industrial Court Rules, 2007**, governs the initiation of proceedings before the Court by way of notice of motion. The rules of this court are clear that:

> ***"14(7) a party who oppose the application shall attend court on the date stated in the notice of motion and deliver an answering affidavit of the party in open court".***

[3] Most importantly though, is **Rule 14(8),** whose contents are mandatory and it stipulates that:

> *"14 (8) The answering affidavit shall contain the information required in subrules 14 (4) (a), (b) and (c) and must clearly and concisely set out-*
>
> *(a) Any preliminary legal issues which the respondent wishes to raise;*
>
> *(b) Which allegations in the founding affidavit are admitted and which are denied;*
>
> *(c) All material facts and legal issues upon which the respondent relies in its defence.*

Rule 14(8) is mandatory and it makes it clear that whilst the filing of preliminary points is permitted, however same cannot be done in a piecemeal fashion, but must appear within Respondent's answering affidavit. It is this piecemeal procedure that is now the concern of this Court. The persistent practice of taking inappropriate points in limine appears to have established its footprint within the procedures of this Court, notwithstanding the fact that it clearly has no legal basis.

[4] Perhaps time has come for this Court to pronounce that in dealing with points in limine in motion proceedings, the correct procedure is for the Court to regard Applicant's founding affidavit as true, before determining the validity of any points in limine that might have been raised. This is so because unlike particulars of claim, an affidavit contains evidence, not allegations of fact which stands to

be proved at a later stage, i.e at the trial. This therefore means that in motion proceedings, the default position must be that Applicant's founding affidavit and the averments contained therein are regarded as true, especially where same have been queried such that they do make out a prema facie case. In the case of **Mokoala v Mokoala**[1], the Court of Appeal of Lesotho, had this to say:

> *"[5] .....Moreover a court when faced with an application for only a preliminary point to be argued, should be astute not to grant that relief readily, mindful of the need to avoid piecemeal hearings with concomitant delays and the incurring of additional costs."*
>
> *[6] There is also a further matter of importance, namely that a court should not adopt a supine attitude when it is faced with a point in limine. It is the duty of the court to regulate procedural matters in a reasonable way in order to ensure the smooth progress of litigation.* Per Melunsky JA with Ramodibedi JP and Howie AJA concurring.

[5] In line with the principle that underpins the enactment of the **Industrial Relations Act, 2000**, as amended, see **Section 4**-this Court cannot add much to the view held by our law towards piecemeal proceedings than to cite Masuku, J.'s sentiments, who upon being faced with a similar situation said[2]:

> ***"[23] I now revert to the issue raised in paragraph (14) above, viz that the Defendants contented themselves with raising points of law, without descending into the arena and dealing with the summary***

[1] LAC 40 (2009-2010) at 42 paragraph 5-6. See also Valentino Globe BV V Phillips and Another 1998 (3) SA 775 (SCA) at 779 F-G.

[2] In Standard Bank of Swaziland Ltd v Protronics Networking Corporation Ltd and Another High Court CIV. Case No. 1125/2009 (Unreported) at paragraph 23.

judgement on its merits. A party who follows that course is actually courting disaster

should the Court, as it may do, find that the points of law are not meritorious. This is exemplified by the judgement of Standard Bank of South Africa Limited v RTS Techniques and Planning (PTY) Ltd 1992(1) SA. 432 at 442 A-C, where the learned Daniels J, said the following.

> *" Apart from the fact that the procedure is prescribed in Rule 6 (5) (d), it is , as has been indicated, the established practice that a Respondent should file affidavits on the merits, irrespective of whether a preliminary point is to be argued. He should not rely on his preliminary point only."* (Underlining is ours)

[6] In the **Standard Bank SA case**, Daniels J, proceeds to cite the case of **Randfontein Extension Ltd v South Randfontein Mine Ltd and Others**[3], where Greenberg J, as he then was, opined as follows:

> *"And I do not think the Court would countenance a procedure which would enable a Respondent to delay the case and get a postponement by raising unsuccessful preliminary points. One cannot ask the respondent to assume that his point will be successful; he must be prepared for the possibility of his point failing."* (Emphasis is ours)

In this case, it has since become obvious that Respondent has consciously taken a resolution to engage upon the proverbial Pavlovian response approach. This

[3] 1936 WLD 1 at page 5.

we say against the backdrop of the fact that it is not clear as to why the preliminary point of urgency was left behind and not argued together with the question of security for costs. This piecemeal approach to the arguing of Respondent's defences is exactly the same one that Mr Sibandze alluded to in his closing submissions before us when he prayed, in the alternative, that Respondent be afforded yet another opportunity to plead over onto the merits. Again, it is needless to state that the resolution of disputes using this piecemeal approach needs to be brought to an end. This must be so, firstly because it runs contra to the spirit and purpose of the Industrial Relation Act, i.e the speedy and expeditions resolution of labour disputes; secondly, it has the tendency to clog the roll of the Court with one and the same case to the total prejudice of other litigants who eagerly await the opportunity to ventilate their disputes before this Court. We however, pend the determination of Respondent's alternative prayer to the end of this ruling. On the other hand, to the extent that Mr Sibandze was unable to state as to why the point of urgency was never canvassed together with the other points in limine, then same stands to be dismissed.

[7] Regarding the question of the stay of these proceedings pending the conclusion of the proceedings currently pending between Respondent and the Applicant before the High Court, Mr Sibandze attributed the grant of such relief to some duty of this Court to protect the integrity of judgments of the High Court. Actually, the relief of a stay of proceedings is grantable in order to avoid duplication of actions. In fact, **Erasmus on Superior Court Practice, Main Volume pp B1-14**, says:

> **"The court may stay an action on the ground that there is already an action pending between the same parties.... based on the same cause of action, and in respect of the same subject-matter. The**

defendant is not entitled as of right to a stay in such circumstances: the court has a discretion whether to order a stay or not, and may decide to allow the action to proceed if it deems it just and equitable to do so..."

[8] The above citation is good authority where the defendant/respondent is able to demonstrate to the Court, that there is pending litigation which must not be replicated (*lis alibi pendens*); which litigation must be between the same parties; and be based on the same cause of action. In casu, it was Respondent who had the onus to establish the existence of the afore-going prerequisites. Regrettably, Mr Sibandze placed his reliance on the principle of comity of the courts. In the case of **Nestle (South Africa) (Pty) Ltd V Mars Incorporated 2001 (4) SA 542 (SCA)**: the Court there held that:

> *" There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of these elements there is no potential for a duplication of action. In my view none of these elements is present in this case. Indeed, it is difficult to see how they can exist where the matters in issue have been placed before two quite different tribunals.... each having its own peculiar functions, powers and authority. For in such a case each tribunal will, by definition, be enquiring into and ruling upon different matters, and neither will be capable of ruling authoritatively on the issues that falls within the competence of the other".*

[9] In the present case, this Court is called upon to enquire and decide as to whether there are salary arrears which were not paid for by Respondent, qua employer,

in the months of May 2019 up to May 2020. Whilst the High Court on the other hand, will be called upon to decide whether there was any delictual damages that were occasioned to the Respondent, by the Applicant, whilst he was still under the employ of the Respondent. The issues for determination are clearly not the same, nor the course of their resolution. The one operates by virtue of statute and the other as a form of delictual remedy under our common law. Respondent's application for a stay of these proceedings therefore also stands to be dismissed.

[10] We now revert to Mr Sibandze's alternative prayer to the effect that in the event that the preliminary points be dismissed, Respondent must then be afforded yet another time period, in the form of a postponement in order to allow them the opportunity to file their answering affidavits on the merits. Again, it is obvious that this is an indulgence which can be accessed via the Court's discretion. In the case of **Bader and Another v Weston and Another 1967(1) SA 134 (C),** Corbett J, as he then was, stated the practice in application proceeding thus:

> **"It seems to me that, generally speaking, our application procedure requires a respondent, who wishes to oppose an application on the merits, to place his case on the merits before the |Court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of Court ..... On the other hand, I do not think that normally it is proper for such a respondent not to file opposing affidavits but merely to take the preliminary point.... Generally speaking, however, where a respondent has had adequate time to prepare his affidavits, he should not omit to prepare and file his opposing affidavits and merely take the preliminary objection. The reason is fairly obvious. If his objection fails, then the Court is faced with two unsatisfactory alternatives. The first is to hear the case without giving the**

respondent an opportunity to file opposing affidavits: this the Court would be most reluctant to do. The second is to grant a postponement to enable the respondent to prepare and file his affidavits. This gives rise to an undue protraction of the proceedings, which cannot always be compensated for by an appropriate order as to costs and results in a piecemeal handling of the matter which is contrary to the very concept of the application procedure. At 136E-137A.

[11] There is no doubt that by this application (for a postponement), Respondent is now asking to be afforded a third bite at the same cherry. This they are asking notwithstanding the fact that they defied **Rule 14(8),** and failed, from June 2020 to date, to give any indication of their defence to Applicant's claims. Respondent's non-compliance with the rules and practice of this Court leaves the Court with one consideration for the determination of this case, viz: whether Applicant has averred sufficient facts, in his founding affidavit to entitle him to the orders sought. And Applicant is seeking for an order directing the Respondent to pay him the sum of US $377,335.00, being in respect of salary arrears for the months of May 2019 up to May 2020. There are other ancillary reliefs which Applicant claim as per the parties' contract of employment.

[12] Within the context of this case, there exist the general principle of our common law that in an employment relationship, the duty of an employee is to avail himself to tender services to the employer, and that of the employer is to pay for the employee's salary in respect of those services that have been rendered whenever they fall due. It would therefore follow that a failure by an employer to pay salaries for services that have been rendered when they are due would amount to a breach of contract. And in that case the employee would have various options available, including that of holding the employer to the terms

of the agreement and claiming for payment of the arrear salaries. Speaking generally, such relief could be sought through the use of the provisions of **Rules 14** of the rules of this Court.

[13] It is regrettable that there was nowhere in Applicant's founding affidavit, where he alluded to the fact that, services were indeed rendered, by himself, to the Respondent within the period for which arear salaries are claimed. In the absence of such clear and unequivocal assertions, this Court would be reluctant to fill up the gaps to try and make out a case for the Applicant. The relief sought is not in the nature of delictual damages but rather very specific in nature. In other words, the actual number of days attended at Respondent's mining site in Piggs Peak within the months of May 2019 up to May 2020, ought to have been specifically stated and pleaded. The other reason that made the Court to be circumspect in granting Applicant's relief was his disclosure to the effect that at the time of the launch of these proceedings he was in Australia. This left the Court harmstrung because he then omitted to take the Court into his confidence by disclosing as to when he had left the Kingdom for his country of origin. This point was very pertinent because it then brings to the fore the applicability of the provisions of the COVID 19 Regulations, a legal instrument that was enacted to regulate, in part, the employer/employee relationship within the period of Applicant's claim.

[14] The above issues therefore would require further interrogation by the Court. We again, reiterates that we have arrived at this conclusion with a heavy heart, especially regarding the fundamental purpose of the Industrial Relations Act, which is to promote the expeditious resolution of labour disputes.

[15] Regarding, the question of costs, it is without doubt that Respondent's approach of placing its defences before the Courts in a piecemeal fashion has resulted in

a protracted delay in the determination of the rights of the parties, much to the prejudice of Applicant, and it therefore warrants the Court's censure. A further factor to be borne in mind is the fact that to date all of Respondent's preliminary points have been found to be without any merit. We therefore consider that justice will be met in this case by granting costs to the Applicant, as a sign of the Court's disapproval of Respondent's conduct of its case.

[16] Accordingly, it is ordered that:

16.1. Respondent's preliminary points of law are overruled;

16.2. Respondent is, however granted leave to file its answering affidavit within 7 days of the issuance of this order;

16.3. Applicant is to file his replying affidavit, if there be any, within 14 days of receipt of Respondent's answering affidavit;

16.4. The further hearing of this application is postponed to a date to be fixed by the Registrar of this Court;

16.5. The Respondent is to pay the costs incurred by the Applicant in respect of their (Respondent's) preliminary points.

The Members Agree.

M. M. THWALA

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant	: Mr L. Howe.
For Respondent	: Mr M.Sibandze.