

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT
MBABANE

Case No: 356/21

In the matter between:-

KWANELE VILANE

1st APPLICANT

SANDILE MAMBA

2nd APPLICANT

And

ESWATINI DEVELOPMENT

RESPONDENT

AND SAVINGS BANK

Neutral citation: Kwanele Vilane and Another v Eswatini Development and
Saving Bank (356 /21) [2022] SZIC 06 (18 February 2022)

Coram:

MSIMANGO, ACTING JUDGE

(Sitting with Mr S.P. Mamba and Ms N. Dlamini nominated
Members of the Cami).

Date Heard:

21st DECEMBER 2021

Delivered:

18th FEBRUARY 2022

Summary: The Applicants have brought an application to comi to declare the on going recruitment by the Respondent for the position of Manager IT Infrastructure and the position of Network Administrator as being improper and unlawful for the reason that the Industrial Comi of Appeal directed that the Industrial Comi should determine the issue of whether or not the Applicants have been dismissed, and then make an appropriate order. The Respondent argues that the Applicants failed to file an application for the stay of the operation of the judgement of the Industrial Comi as envisaged by **Section 19 (4) of the Industrial Relations Act**, further that, the Respondent has carried into effect the judgement, hence, the recruitment.

JUDGEMENT

1. The applicants brought an urgent application to comi seeking an order in the following terms:-
 - a) That an order be issued dispensing with the normal forms of service and time limits and the matter be heard on an urgent basis.
 - b) That a rule nisi be issued calling upon the Respondent to show cause why: an order should not be issued stopping the on-going recruitment by the Respondent for the positions of Manager, IT infrastructure and Network and Systems Administrator pending finalization of the matter.
 - c) That the rule nisi issued operates with immediate interim relief pending finalisation of this matter.

- d) That an order be issued declaring that the on- going recruitment for the position of Manager, IT Infrastructure and Network and Systems Administrator as advertised by the Respondent in the local print media is wrongful and unlawful.
 - e) Costs of application against the Respondent.
 - f) Further and/or alternative relief.
2. The Applicants allege that during or around the month of September 2020 were charged by the Respondent on allegations of gross insubordination and gross negligence.
 3. On being charged by the Respondent, the Applicants instituted an urgent application to the above Honourable Court, in which they were seeking an interim order stopping the disciplinary hearing pending determination of certain fundamental and constitutional rights relating to representation and other substantive issues.
 4. The interim order was not granted and the application was dismissed.
 5. After the dismissal of the application, the Applicants noted an appeal against the decision of this Honourable Court.
 6. Despite having been served with the notice of appeal, the Respondent proceeded to conduct the disciplinary hearing against the 2nd Applicant and thereafter terminated his services prior to the appeal being heard.
 7. The 1st Applicant's disciplinary hearing on the other hand was still on going when the appeal was finally heard by the Industrial Court of Appeal.

8. On the 24th September 2021, the Industrial Comi of Appeal delivered its judgement, whereby the matter was referred back to this Honourable Comi for a determination of whether or not, constitutionally, the Applicants should be allowed representation by a Union of their choice.
9. Despite the fact that 1st Applicant's disciplinary hearing was on gong Respondent, acting in contempt of the Industrial Court of Appeal's judgement proceeded to terminate his services, this rendering the court's judgement in effective.
10. Following the non- compliance of the Appeal's comi judgement by the Respondent, the Applicants then instituted contempt proceedings against the Respondent. On the other hand the Respondent has also filed a separate application for recusal of the judges of the Industrial Court of Appeal. In addition, the Respondent has filed a review application to the High Court against the judgement of the Industrial Court of Appeal.
11. The 1st Applicant submits that the Respondent acted contemptuously by seeking to terminate his services knowing very well that a cou1i of law had referred the matter back to this Honourable Comi.
12. In respect of the 2nd Applicant, the Industrial Court of Appeal directed that this Honourable Court should determine the issue of whether or not he had indeed been dismissed and then make an appropriate order.
13. The Respondent therefore cannot by law, seek to fill up these positions whilst all of these issues are pending before the Industrial Court of Appeal and this Honourable Court. The action of seeking to fill up these positions is a clear sign of continued defiance by the Respondent of the Industrial Comi of Appeal's judgement.

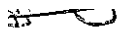
14. The Respondent submits that it is resisting the contempt proceedings filed by the Applicants and have filed an application for recusal to that effect, furthermore the Respondent has also instituted proceedings in the High Court of Eswatini for the review and setting aside of the judgement of the Industrial Court of Appeal and the matter is pending before the High court.
15. The Applicants argue that the filing of the review application by the Respondent suspends everything incidental to this matter, for the reason that if the positions are filled then the judgement of the Industrial Court of Appeal would be rendered useless.
16. The Applicants are now seeking the court's intervention in stopping the Respondent from filling the positions, and have applied for an order restraining the Respondent in this regard pending the determination of the review application.
17. The Court is satisfied that the Applicants have made out a case for the order sought. The outcome of the review application will necessarily and materially inform as to what will happen next between the parties. Hence, it is absurd for the Respondent to advertise the positions while the review application is pending, and the result of which is not yet known.
18. In the case of **SABC v DA 2016 (2) S.A 522 SCA**, the court held that:-
- "It is well settled in law that until a decision is set aside by a court in proceedings for Judicial review it exists in fact and it has legal consequences that cannot simply be overlooked."***
19. It would be in the best interest of justice to stay the filling of the positions pending finalisation of the review application, for the reason that the judgement

of the Industrial Court of Appeal has not yet been set aside, thus it would be rendered worthless if the Respondent were to fill the positions.

20. In this regard the court makes the following order:

The on going recruitment by the Respondent, for the positions of Manager IT Infrastructure and Network and Systems Administrator is hereby suspended pending finalisation of the review application filed by the Respondent at the High Cami and the contempt application at the Industrial Comi of Appeal.

The Members Agree.



L.MSIMANGO

ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicants : Mr B. S. Dlamini. (B.S. Dlamini & Associates)

For Respondent : Mr Z.D. Jele. (Robinson Bertram)