

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

Case No 20/2022

In the matter between:

THEMBA VUSI DLAMINI

Applicant

And

**THE EXECUTIVE SECRETARY CIVIL SERVICE
COMMISSION**

1st Respondent

THE PRINCIPAL SECRETARY OF PUBLIC SERVICE

2nd Respondent

**THE PRINCIPAL SECRETARY MINISTRY OF
AGRICULTURE**

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Neutral citation: Themba Vusi Dlamini v The Executive Secretary Civil Service Commission & Three Others [20/22] [2022] SZIC 72 (07 June, 2022)

Coram: **NGCAMPHALALA AJ**
*(Sitting with Mr. M.P. Dlamini and Mr. E.L.B. Dlamini,
Nominated Members of the Court)*

DATE HEARD: 27th April, 2022

DATE DELIVERED: 07th June, 2022

SUMMARY: Application to stay disciplinary hearing and review stoppage of Applicants salary- infringement of Applicants section 20 & 21 right in term of the Constitution of Eswatini Act,2005- Applicant invokes section 35 (3) of Constitution-Points in limine raised by Respondent- doctrine of avoidance argued by the Respondent.

Held — Matter is stayed pendant determination of the question whether Applicant's right to equality before the law has been infringed. Referred to the High Court in terms of section 35(3) of the Constitution of Eswatini,2005

JUDGMENT

- [1] The Applicant is Themba Vusi Dlamini an adult Liswati male employed by the Government of Eswatini under Ministry of Agriculture based at the Malkerns Research Station.
- [2] The first Respondent is Executive Secretary of the Civil Service Commission, cited herein in his official capacity as the recipient and the officer responsible for actioning any document on behalf of the CSC. The Commission's official place of business is situated at the Inter-ministerial Building in Mbabane.
- [3] The second Respondent is the Principal Secretary of the Ministry of Public Service, cited herein in his official capacity. The ministry is cited herein on the basis that it is the Ministry responsible for the terms and conditions of service of all civil servants. It has its business premises situated in Mbabane.

- [4] The third Respondent is Principal Secretary Ministry of Agriculture, cited herein in his official capacity. The Ministry is cited herein on the basis that it is the Ministry responsible for the implementation of the total salary stoppage of the affected employee. It is situated in Mbabane at the Ministry of Agriculture Building opposite Fire and Emergency Services Station.
- [5] The fourth Respondent is The Attorney General N.O cited in these proceedings in its nominal capacity as the party against whom any legal proceedings against the Government of Eswatini is to be instituted by service of same. The Attorney General's official place of business is situated at the Ministry of Justice Building in Mbabane.

BRIEF BACKGROUND

- [6] The matter came before Court by way of application, wherein the Applicant was seeking the stay of a disciplinary hearing that had been instituted by the Civil Service Commission against him. Further he seeks the Court to review, correct or set aside the decision of the 1st Respondent to stop/ withhold his salary. Alternatively, that same be declared null and void. Finally, the Applicant seek to refer **Section 52(1) (2) of the Public Service Act,2018** read together with **Regulation 31(3) and (4) of the Civil Service Board General Regulation of 1963**, to the High Court for determination, to wit unconstitutional.
- [7] The Applicant has now approached this Court on a normal application, seeking an order in the following terms:

7.1 Staying the disciplinary process currently being instituted at Civil Service Commission against the Applicant pending finalization of these proceedings.

7.2 Reviewing, correcting and setting aside the decision to stop or withhold the salary of the Applicant from the date of the order or judgment.

ALTERNATIVELY

7.3 Declaring the decision to stop or withhold the salary of the Applicant as unlawful, null and void ab initio.

7.4 Reinstating the Applicant's salary forthwith from date of the order or judgment of the Court.

7.5 Directing the Respondents to pay arrear salaries of the Applicant forthwith.

7.6 Declaring **Section 52(1), (2)** read together with **Regulation 38 (4)** of the Civil Service Board (General) **Regulations of 1963** to be unconstitutional and therefore struck down.

7.7 Referring the Constitutional question of **Regulation 38 (4)** to the High Court for determination, to wit constitutionally.

7.8 Costs of the Application in the event of unsuccessful opposition.

7.9 Further and/ or alternative relief.

[8] The Applicant's application is opposed by the Respondents and an answering affidavit was duly filed and deposed thereto by Mr. Amos Celumusa Ngwenya, 1st Respondents Executive Secretary. The Applicants thereafter filed the replying affidavit. The matter came before Court on several dates, on the 21st February, 2022, wherein the parties agreed on the timelines for filing of the heads of argument in the matter. The matter was then scheduled to proceed on the 30th March, 2022. On the said date again, the matter did not proceed due to the unavailability of the parties, eventually the matter was argued on the 27th April, 2022, wherein judgment was reserved.

ANALYSIS OF FACTS AND APPLICABLE LAW

[9] Through the answering affidavit of Mr. Amos Celumusa Ngwenya the 1st Respondent raised the following points *in limine*;

Lack of Jurisdiction

Incompetency of the relief sought (Prayer 1 (Stay) and Prayer 3.1 (Referral)).

[10] As the parties agreed to deal with the matter holistically, the 1st Respondent Applicant was the first to adduce evidence. The brief history of the matter

is that the Applicant is an employee under the Ministry of Agriculture, was arrested in July, 2019 on a charge of theft. The Applicant was taken through a trial and was ultimately convicted and sentenced to seven (7) years imprisonment, with an option, to pay a fine of E7000.00, which the Applicant paid and was duly liberated.

- [11] In April, 2021, it is the Applicant argument that he fell ill, and was diagnosed with MDR TB, and was duly hospitalized, for almost the whole of 2021. On the 11th November, 2021, the Applicant stated that he received an invitation to appear before the Civil Service Commission, scheduled for the 17th November, 2021 at 10:00am. He duly honoured the invitation despite his illness; however, the meeting did not proceed. On the 18th November, 2021, he communicated through correspondence that he had MDR TB, and did not want to expose the Commission to it, the correspondence read;

“

18th November, 2021

The Executive Secretary

P. O. Box 158

Mbabane

Dear Sir

RE: INVITATION FOR DISCIPLINARY HEARING/MYSELF

The above captioned subject matter refers.

I acknowledge receipt of your letter of invitation to the above-dated 09th November, 2021 which was inviting me to a disciplinary hearing dated

Wednesday 17th November, 2021 at 10h00 and hereby respond to same as follows:

- 1. I did forcefully tried to attend the invited meeting on the date written on the invite wherein my intention was to report for myself my being indisposed.*
- 2. Due to the failure of the meeting to be convened I am left with no option but to write this letter and report my current condition, since I had specifically requested for a waiver from the doctor to report my being sick and not being in the right condition to proceed with the intended disciplinary hearing against myself.*
- 3. I am reporting that I am sick after being diagnosed with MDR-TB and as such hereby request for your office to postpone the intended disciplinary hearing against me to a time when the doctor certify me as fit as I am currently not in a right condition and I will not be able to fully defend myself on the charges leveled against me.*
- 4. By copy of this letter the Ministry of Agriculture -Principal Secretary is notified of my sickness and my inability to attend the intended hearing due to that I will not be able to defend myself on the charges levelled against me under my current condition.*
- 5. Under my current condition it is advisable that I do -not expose even the Honourable Commission to this airborne disease I am suffering from sine I am still under the Doctor's care.*

Attached in this communique is the copy of the Medical Doctor's report for your attention and the invite referred to.

Kindly be advised that I strictly reserve all my legal rights in regards to this matter.

Your cooperation and understanding will be highly appreciated in this regard.

Yours Faithfully

Themba Vusie Dlamini

Employment Number -3800177”

[12] He was however taken aback in November, 2021, when he did not receive his monthly salary as normal. It was his averment that he was taken aback, because he was never heard or afforded a right to make representation prior to the stoppage or withholding of his salary. Neither was he consulted nor negotiated with. It was his further submission that he was then shown a letter wherein there was a recommendation by the 3rd Respondent that his salary be stopped, which was later endorsed by the 1st Respondent. It was his argument that in the exchange of letters between the 1st Respondent and the 3rd Respondent, he was sidelined and not even copied in the letters. Therefore, the act of his salary stoppage is irregular, reviewable or susceptible to be declared unlawful.

[13] It was the Applicant's further submission that the CSC Regulations as relied upon by the Respondents when suspending his pay, deprived him of his right to be heard prior to the stoppage of his salary. It is his averments that **Section 52(1) and (2) of the PUBLIC SERVICE ACT 2018**, which is identical to **Regulation 38(4)**, promote an unconstitutional approach. He averred further in his pleadings that the regulations and the **Section 52(1) and (2)** are clearly not consistent with the spirit of the Constitution, in particular **section 20 and 21 of the Constitution of Eswatini Act, 2005**.

- [14] Applicant avers that to add salt to the wound on the 12th January, 2021 he was furnished with correspondence by the 1st Respondent purporting to take away his right to a fair hearing. The letter addressed to him suggested that a decision to dismiss him had already been taken in a reverse onus manner, and he is solely being called upon to state why the decision to dismiss him should not be implemented.
- [15] In rebuttal, the Respondents dealt with their points *in limine* as raised in their answering affidavit. The Court will not deal with the points as raised in this instance, but the pertinent issue of the referral of the matter to the High Court in terms of **Section 35(3)** of the Constitution as raised by the Applicant. In response to the Applicant's argument on the referral of the matter to the High Court, in terms of **Section 35(3)** of the Constitution, it was the Respondent's submission that the Applicant's Constitutional question is both frivolous and vexatious. It was the Respondent's averment that the Applicant's claim does contain any contravention of any provisions of the Constitution.
- [16] The Respondents averred that the challenge of **SECTION 52 (1) AND (2) OF THE PUBLIC SERVICE ACT 2018 AND REGULATION 38(4) OF THE CIVIL SERVICE BOARD 1963** have not been invoked in a manner as alleged by the Applicant. It was the Respondent's argument that the Applicant has not been affected by the provisions as alleged and in the circumstances, and as such, a declaratory cannot be sought by the Applicant against these provisions in terms of the law. Therefore, the referral application does not meet the **Section 35 (3)** threshold.

[17] It was the Respondents further contention that the referral of the alleged question to the High Court in terms of **Section 35(3)** finds no applicability in the present matter, as the Industrial Court has exclusive jurisdiction over labour matters which the High Court does not. It was their further contention that the Court should not decide the Constitutional provision, as the principal of Constitutional avoidances, provides that where it is possible to decide any cause without reaching a Constitutional issue, that course should be followed. Further it requires a Court to decline to determine a Constitutional provision, unless that provision applies against an affected party, which in this case is not the position, as the Applicant has not been affected by the provision as alleged. In support of this argument the Respondents cited the cases of;

MINISTRY OF TOURISM AND ENVIRONMENTAL AFFAIRS AND ANOTHER V STEPHEN ZUKE AND ANOTHER (96/2017) [2019] SZCS 37 (2019), ASHWANDER V TENNESSEE VALLEY AUTHORITY, 297 U.S 288 (1936) MCOSINI V MANCOTJWA & ANOTHER (1998) 19 ILJ (TK) AT 1417 C NATIONAL PUBLIC SERVICE AND ALLIED WORKERS UNION (NAPSAWU) V PRINCIPAL SECRETARY – MINISTRY OF PUBLIC WORKS TANSPORT AND 5 OTHERS (197/2020) [2020] SZIC 124.

[18] To wind up its case it was the Respondents contention that the Applicant's argument that there is a conflict between **section 52(1) and (2) of the Public Service Act 2018, read together with regulation 38(4) of the Civil Service Board Act 1963**, with the Constitution is misguided as these provisions do not do away with the *audi alteram partem* principle. The regulations are invoked subject to due process of labour law, inclusive of the right to fair hearing, therefore there is no such conflict, as in the sphere of labour law,

labour law becomes dominant with limitations to the applicability of the Constitutional provisions. It was the Respondents submission that the finding to be made by the Honourable Court is that there is no conflict between **section 52(1) and (2) of the Public Service Act of 2018 and Regulation 38 (4) of The Civil Service Board of 1963** with the **Constitution of Eswatini**, and that the application be dismissed with costs.

[19] In its opposing papers, heads of arguments the Respondents submit that the High Court does not have jurisdiction to deal with this matter because it is purely a labour dispute between an employer and an employee well capable of being resolved in terms of the legal principles of labour law. This is famously known as the exclusivity argument and is based on **Section 8 of the Industrial Relations Act 2000 (as amended)**. In the same breath the Respondents invoke the doctrine of avoidance and submit that the dispute is resolvable without the need to resort to Constitutional provisions.

[20] In the matter of **GODFREY EXALTO V ROYAL ESWATINI NATIONAL AIRWAYS AND ANOTHER HIGH COURT CASE NO 2258/20**, the court stated:

“... Section 151(2) of the Constitution places responsibility upon the High Court “to enforce the fundamental human rights and freedom guaranteed by this Constitution” and “to hear and determine any matter of a constitutional nature.” What this suggests to me is that this court is enjoined to embrace every opportunity to breathe life into this relatively new constitution and give meaning to the rights it confers. To routinely uphold the doctrine of avoidance merely because it is applicable may, in some cases,

amount to veiled dereliction of duty and this, in my view, is one such a case. I mention in passing, that the doctrine of avoidance has come under scrutiny. In the Namibian case of MONICA GEINGOS (ORN KALONO) V ABEN LINOOVENE(BISHOP)HISHOONO,(HC-MD-CIV-AC-OTTH-2021/00538 [2021] NAHCMD 48 (11TH FEBRUARY 2022) Sibeya J. posits that the doctrine of avoidance has the undesirable effect of giving precedence to Common Law and Statutory Law when the opposite should be the case.

At paragraph 44 of his judgment His Lordship states the following:

“The constitution is therefore the point of departure in a quest to protect the fundamental rights and freedoms. The supreme law, in my view, serves as the foundation on which all laws are based. It further serves as the yardstick where the validity of common law or statutory law is measured,””

The Court is inclined to agree with the views of Sibeya J in the present matter and the arguments as submitted by the Applicant.

[21] **Section 35** of our Constitution provides as follows:

“If in any proceedings subordinate to the High Court any question arises as the contravention of any provision of this chapter, the person presiding in that court may, and shall where a party to the proceeding so requests, stay the proceedings and refer the question to the High Court unless, in the judgment of that person, which shall be final, the raising of the question is merely frivolous or vexatious”.

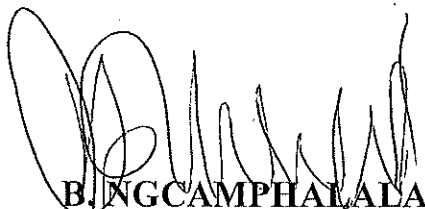
Our duty as a Court is to consider whether the raising of the question is merely frivolous or vexatious. Our view on the correctness or otherwise of the submission are neither here or there. Once we consider that the question is neither frivolous nor vexatious the Court is bound to refer it to the High Court.

[22] Having considered the submission of the parties and the relevant section of the Constitution, the Court finds that the submissions of the Applicant were neither frivolous nor vexatious and the alleged infringement of his section 20 and 21 rights must be referred to the High Court in terms of section 35(3) of the Constitution of Eswatini.

[23] Consequently, the Court makes the following order.

- 1) The matter is referred to the High Court in terms of **Section 35(3) of the Constitution of Eswatini, Act, 2005.**
- 2) The application is stayed pendant determination of the question whether Applicant's right to equality before the law has been infringed.

The Members Agree.



B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: Mr. MLK. Ndlangamandla (MLK. Ndlangamandla Attorneys).

FOR RESPONDENT: Mr. S. Hlawe (Attorney General's Chambers)