IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 170/2021

In the matter between:

SWAZILAND UNION OF FINANCIAL INSTITUTIONS & ALLIED WORKERS 1st Applicant

CHARLES MTHETHWA 2nd Applicant

And

STANDARD BANK ESWATINI LIMITED 1st Respondent

NOMFUNDO MYENI N.O. 2nd Respondent

In re:

SWAZILAND UNION OF FINANCIAL INSTITUTIONS & ALLIED WORKERS 1st Applicant

CHARLES MTHETHWA 2nd Applicant

And

STANDARD BANK ESWATINI LIMITED 1st Respondent

NOMFUNDO MYENI N.O. 2nd Respondent

Neutral Citation: Swaziland Union of Financial Institutions & Allied Workers and Another vs. Standard Bank Eswatini Limited and Another ***In re***: Swaziland Union of Financial Institutions & Allied Workers and Another vs. Standard Bank Eswatini Limited and Another (170/2021) SZIC 73 (08 June 2022)

Coram: **V.Z. Dlamini – Acting Judge**
(Sitting with D. Mmango and M.T. E Mtetwa – Nominated Members of the Court)

LAST HEARD: 09 May 2022

DELIVERED: 08 June 2022

Summary: ***Applicants instituted an urgent application seeking an order staying the disciplinary enquiry against the 2nd Applicant pending the appeal noted by the Applicant in the Industrial Court of Appeal against the judgment of the Court dismissing the main application for an order declaring the disciplinary enquiry time-barred. 1st Respondent opposes the application and contends in limine that the relief sought is incompetent as no prayer for stay of execution of the Court's order is sought. Further that the requirements of the grant of a stay were not established.***

Held: ***The Court has inherent power to regulate its orders; consequently, in the circumstances of the case, the relief sought was found to be competent, but if the Court were to uphold the point, it would be elevating form over substance even where no prejudice is occasioned to the 1st Respondent. Further, while the Applicants' failed to sufficiently deal with the requirement of potentiality of harm to be suffered by the 1st Respondent, granting a stay subject to conditions would be just and equitable in the circumstances.***

JUDGMENT

INTRODUCTION

[1] On the 21st April 2022, the Court delivered Judgment dismissing the application in the main matter where the Applicants sought *inter alia* an order declaring an on-going disciplinary enquiry instituted by the 1st Respondent against the 2nd Applicant to be time-barred in terms of the provisions of the Collective Agreement.

BACKGROUND

[2] Being dissatisfied with the Judgment of the Court, the Applicants noted an appeal to the Industrial Court of Appeal on the 28th April 2022. The Applicants' noting of an appeal coincided with the 2nd Applicant's attendance at the disciplinary hearing, which was re-convened by the 2nd Respondent on the same day, following the decision of the Court. At the 2nd Applicant's request the hearing was postponed to the 6th May 2022, presumably to afford the Applicants the opportunity to file an application for a stay of the disciplinary hearing pending the appeal.

[3] The Applicants then instituted the present application seeking the following orders:-

1. Dispensing with the usual forms and procedures as relates to the time limits and service.

2. *Condoning the Applicant's non-compliance with Rules of Court.*

3. *Staying the disciplinary hearing pending determination of the Appeal pending before the Industrial Court of Appeal Case No.10/2022.*

4. *Further and/or alternative appropriate remedy.*

POINTS *IN LIMINE*

[4] In opposing the application, the 1st Respondent raised two points *in limine* in addition to responding to the merits. The first point related to urgency; it being contended that it was self-created because the 2nd Applicant had failed to file the application within the first two days of the resumption the hearing, but waited until the eleventh hour.

[5] Secondly, that the relief sought was incompetent as the 2nd Applicant sought a stay of the disciplinary hearing as opposed to an order staying the operation of the judgment. Furthermore, the Applicant was enjoined to approach the Court in terms of **Section 19 (4)** of the **Industrial Relations Act, 2000 (as amended)** to stay the operation of the judgment, which in turn would have the effect of staying the disciplinary hearing.

INTERIM RELIEF

[6] Following arguments of the points *in limine* on the 6th May 2022, the Court enrolled the matter to be heard urgently and stayed the disciplinary hearing pending determination of the merits. In addition, we ordered the Applicants to pay costs at the ordinary scale to the 1st Respondent for bringing the

application on stringent timelines. The determination of the point on Applicants seeking an incompetent relief was deferred to be decided concurrently with the merits.

ARGUMENTS

[7] Regarding the point on Applicants seeking an incompetent relief, the 1st Respondent referred the Court to the provisions of **Section 19 (4)** of the **Industrial Relations Act, 2000 (as amended) (the Act)**, which regulate applications for stay of execution of the orders of this Court. In terms of that section, the noting of an appeal does not stay the execution of the Court's Order unless the Court on application directs otherwise. According to the 1st Respondent, no such application was filed; instead the Applicant filed an application for stay of the disciplinary hearing. Consequently, the 2nd Respondent was entitled to proceed with the enquiry to its finality.

[8] We note that even though Mr. Jele was steadfast in his oral submissions on the point, he conceded at **paragraph 21** of his Heads of Argument that in approaching this Court seeking a stay of the disciplinary hearing, the Applicant was in fact seeking a stay of the execution of the judgment authorizing the resumption of the enquiry. Counsel nonetheless contended that even if that was the case, the Applicant had failed to establish the requirements for the grant of a stay of execution pending appeal which were formulated in the celebrated case of **South Cape Corporation v Engineering Management Services 1977 (3) SA 534 (A).**

[9] The requirements are: the potentiality of irreparable harm or prejudice to either party if the stay is granted or refused, prospects of success, including the question whether the appeal is frivolous or vexatious, and where there exists the potentiality of irreparable harm to both parties, the balance of hardship or convenience as the case may be.

[10] It was also 1st Respondent's submission that the Applicant's prejudice, if any, could not outweigh its prejudice of having to pay him a full salary in excess of a year while he was on suspension and avoiding the disciplinary hearing; its prejudice and irreparable harm was serious both financially and operationally.

[11] Furthermore, 1st Respondent contended that not only had the Applicant acquiesced to the judgment, but the appeal had no prospects of success because the Court came to the correct conclusions on both the facts and law.

[12] In addition to the **South Cape Corporation (supra)**, Counsel referred the Court to the following authorities: **De Wet and Others v Western Bank Ltd 1979 (2) SA 1031**; **Atlas Motors (Pty) Ltd v John Kunene (Case No. 178/1997 SZIC)**; **Paul Siba Simelane v Tibiyo TakaNgwane (Case No.171/1998 SZIC)**; **Standard Bank Swaziland Limited v Thembi Dlamini (Case No. 57/2000 SZIC)**; **Small Enterprise Development v Phyllis Ntshalintshali (Case No. 140/2004 SZIC)**.

[13] Other cases are **Abel Sibandze v Stanlib Swaziland (Case No. 440/2009 SZIC); Lidlelantfongeni Staff Association (LISA) v Swaziland National Provident Fund (Case No. 50/2014 SZIC); Gugu Fakudze v Swaziland Revenue Authority (Case No. 101/2017); Mbongeni Nkambule v Majozi Sithole N.O (Case No 122/2018); Nedbank Swaziland Limited v Phesheya Nkambule (205/2019) [2020] SZIC 58 (13 May 2020).**

[14] In response, the Applicants' counsel argued that since the Court had simply dismissed the application in the main matter without making a specific order, it would have been an incompetent prayer to seek an order "*staying the dismissal of the application by the Court*". Counsel further submitted that in raising the second point the 1st Respondent had adopted a technical approach based entirely on semantics. In any event, it is trite that where there was no prejudice occasioned to a party, substance prevailed over form. The application was therefore properly structured and the provisions of **Section 19(4)** of **the Act** had been invoked.

[15] It was Mr. Ndlangamandla's contention that the Applicants' appeal had good prospects because this Court had erred in its interpretation of the relevant clauses of the 1st Respondent's Disciplinary Code thus resulting in the dismissal of the main application. The interpretation of the provisions of the clause in issue required a plain reading as it was not vague, but this Court imported certain procedures that were not envisaged. Furthermore, the Court erred by not considering the clause in issue in the context of another clause that underpinned the Applicants' interpretation. Counsel added that the Court

erred in deviating from the provisions of the Code to which the parties agreed to be bound.

[16] Regarding the requirement of potentiality of irreparable prejudice or harm to each party, the Applicant submitted that he stood to suffer irreparable harm if the disciplinary hearing was not stayed because by the time the appeal is heard, it might be academic through the very same enquiry. Furthermore, the Applicant contended that the balance of convenience when weighing the prejudice he stood to suffer if the hearing was allowed to proceed despite the pending appeal favoured him because the prejudice far outweighs any prejudice that might be occasioned to the Respondent, if any.

[17] In his Replying Affidavit, the 2nd Applicant amplified his contention regarding the potentiality of prejudice or harm to be suffered by him. He added that if the hearing was allowed to proceed whilst he had challenged it, this may result in his dismissal, an occurrence that takes years to ameliorate. On the other hand, the 1st Respondent's right to discipline him remained intact.

[18] In support of the application, the Applicant's counsel relied on the following authorities: **Derrick Dube v Ezulwini Municipality & 3 Others (468/15) SZIC 59 (October 30 2015); Desmond Khalid Golding v Regional Tourism Organisation of Southern Africa & 21 Other Case No. J 2501/17**; and **Max Bonginkhosi Mkhonta v Royal Swaziland Sugar Corporation Ltd and Advocate Thando Ntsonkota (04/2019) SZIC 08 [2019].**

ANALYSIS

[19] The stay of execution of the orders of this Court is regulated by **Section 19 (4)** of the **Industrial Relations Act, 2000 (as amended)**, which 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."*

[20] The Court has a wide general discretion whether or not to grant a stay of execution and this discretion, which should be exercised by the Court on the merits of each case, is part and parcel of the inherent jurisdiction that the Court has to control its own judgments. The aforegoing principles were affirmed in the matter of **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A)** cited with approval in a number of local decisions including, **Havelock Asbestos Mine Ltd v David Scholes & Another (Case No.1453/97 SZHC)**; **Paul Siba Simelane v Tibiyo TakaNgwane (supra)**; and **Small Enterprise Development Company v Phyllis Ntshalintshali (Case No. 8/2007 SZICA)**.

[21] Although we agree with Mr. Jele that the order sought by the Applicant does not *verbatim* state that it is for the stay of execution of the order granted by this Court on the 21st April 2022, we are also in agreement with Mr. Ndlangamandla that couching the prayer in the manner proposed by Mr. Jele would have rendered it incompetent as well.

[22] Court orders are generally divided into two. There are Orders *ad factum praestandum* (orders to do, or abstain from doing, a particular act, or to deliver a thing) and orders *ad pecuniam solvendam* (orders to pay a sum of money). See: **Herbstein and Van Winsen, *The Civil Practice of the Superior Court of South Africa 3rd Edition Juta at page 652.***

[23] This Court did not order either party to do or abstain from doing a particular act; we simply dismissed the Applicants' application. The effect of the dismissal of the application was that the 1st Respondent earned the right to proceed with the disciplinary enquiry against the 2nd Applicant. In essence, an application for stay of the disciplinary hearing pending the appeal constitutes an application for a stay of the order issued by this Court. While we also agree with Mr. Jele that the facts of **Derrick Dube v Ezulwini Municipality & 3 Others (supra)** are distinguishable because in that matter, the Applicant filed two applications, one for a stay of execution of the order and the other for the stay of the disciplinary hearing, we are of the view that in the peculiar circumstances of the present case, the absence of a similar prayer is not fatal to the application.

[24] Mr. Jele's concession in his Heads of Argument that a stay of the disciplinary hearing will have the effect of staying the Court's order was very prudent. The High Court in the case of **Nokuthula Mdluli v Stanley Mnisi & 4 Others (Case No. 431/2011 SZHC at paragraph 35)** had this to say:

> *"In a judgment, hot from the oven delivered on the 28th February 2011, Ota J. made the following trenchant remarks regarding putting form ahead of substance in Phumzile Myeza and Two others v Director of*

Public Prosecutions and Another Case No. 728/2009 at page 37 [para 45] 'The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities, nor in technicalities, nor is triumph of the administration of justice to be found in successfully picking one's way between pitfalls of technicalities. Justice can only be done if the substance of the matter is considered. Reliance on technicalities leads to injustice. The court will therefore, not ensure that mere form or fiction of law introduced for the sake of justice should work a wrong, contrary to the real truth or substance of the case before it.' I fully align myself with these remarks, which coincide with my own thinking."

Also see: **Van Wyk Breakdown Services (Pty) Ltd v Fidelity Security (Pty) Ltd (2616/11) [2012] SZHC 69 (13th April 2012).**

[25] Now, as regards the requirements for the grant of a stay, the Court in **Paul Siba Simelane v Tibiyo TakaNgwane (supra)** quoting from **South Cape Corporation (supra)**, said the following at **page 3**:

"...In exercising this discretion the court should in my view determine what is just and equitable in all the circumstances and in so doing would normally give regard, inter alia, to the following factors:

1. *The potentiality of irreparable harm or prejudice being sustained by the Appellant on Appeal (Respondent in the application) if leave to execute were to be granted;*
2. *The potentiality of irreparable harm or prejudice being sustained by the Respondent on Appeal (Applicant in the application) if leave to execute were to be refused;*

3. *The prospects of success on appeal, including the question as to whether the appeal is frivolous or vexatious or has not been noted with the bona fide intention of seeking to reverse the judgment but for some indirect purpose e.g. to gain time or harass the other party; and*
4. *Where there is the potentiality of irreparable harm or prejudice to both the Appellant and the Respondent, the balance of hardship or convenience as the case may be."*

[26] As for the prospects of success in this matter, we align ourselves with the sentiments of the Court in **Lidlelantfongeni Staff Association (LISA) v Swaziland National Provident (Case no. 50/2004 SZIC)** at **page 3,** which reads as follows:

> *"The issue of probability of success is always a difficult one for the court that gave the judgment. Where the appeal is arguable in the sense that it is neither frivolous nor vexatious, then the court should grant a stay.*
>
> *This however should be weighed against the two pillars of the balance of convenience aforesaid. In the court's view, the issue of possible prejudice to either party or lack of it should carry much more weight in determination of the issue of stay."*

[27] We do not think that the appeal is frivolous or vexatious. The appeal process is one of the quality assurance tools of a judicial system. It is in the interest of both parties that a Superior Court interprets the contentious clause in the Collective Agreement, which exercise will bring closure to the issue.

Furthermore, in the Court's view the Applicants are not deemed to have waived their right of appeal by merely attending the disciplinary enquiry; the Applicants were still within time to file the appeal and also had a duty to appear before the 2nd Respondent to state their intention.

[28] While the 2nd Applicant adequately addressed the potential harm or prejudice he might suffer if the stay was not granted by the Court, he did not sufficiently deal with the potential harm and prejudice that would be occasioned to the 1st Respondent if the stay was granted. There is no dispute that the 1st Respondent has a residual right to discipline the 2nd Applicant; nevertheless, the latter has been receiving a salary for over a year without reciprocating his services.

[29] If the disciplinary hearing is stayed, the 1st Respondent would have to continue paying the 2nd Applicant his salary while awaiting the outcome of the appeal. Even if the appeal fails, the 1st Respondent has no right to demand a refund of the salary it paid the 2nd Applicant during the intervening period; so in that sense, it stands to suffer irreparable harm. Similarly, if the stay were not granted and the Applicant was required to go through the disciplinary enquiry culminating in his dismissal, but the Industrial Court of Appeal upholds the appeal, he would suffer irreparable harm because the consequences of a dismissal are rarely fully redressed by compensation and reinstatement may be rendered impractical because of delays in litigation.

[30] In the Court's view both parties equally stand to suffer prejudice; consequently, we have to consider the balance of hardship and convenience. During argument, we intimated the possibility of setting conditions to try and

address the parties' *bona fide* apprehensions. This is not without precedent, see: **Havelock Asbestos Mine Ltd v David Scholes & Another (Case No.1453/97 SZHC).**

[31] Both parties' concerns would be addressed if the appeal were to be prosecuted expeditiously. Although as a subordinate Court we have no control over the processes of the Industrial Court of Appeal, we may however in regulating our orders, grant the stay of the disciplinary hearing subject to the 2nd Applicant expeditiously prosecuting the appeal by filing the Record, Heads of Argument and an application to urgently enroll the appeal within a stipulated time frame. The last condition (urgent enrolment) was recently endorsed by the Industrial Court of Appeal in the case of **Eswatini Civil Aviation Authority v Sabelo Dlamini [2021] (13/2021) SZICA 01 (9 February 2022)** at **paragraphs 6** to **12.**

CONCLUSION

[32] Based on the above reasons, it is our opinion that granting the stay subject to the above conditions would be just and equitable in the circumstances. Compliance with our order is not dependent on the outcome of the application for urgent enrolment before the Industrial Court of Appeal, it will be sufficient to comply with the conditions within the period stipulated by this Court.

[33] In the result, the Court orders as follows:

[a] The application for stay of the disciplinary enquiry is granted subject to the Applicant filing the Record, Heads of Argument and

application for urgent enrolment within fourteen (14) Court days of the delivery of this Judgment.

[b] Should the Applicants fail to comply with the conditions set by the Court in paragraph [a] above; the 1st Respondent will have the right to proceed with the disciplinary enquiry.

[c] Each party to pay its own costs.

The Members agree

V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANTS : Mr. M. Ndlangamandla
(MLK Ndlangamandla Attorneys)

FOR RESPONDENTS : Mr. Z.D. Jele
(Robinson Bertram)