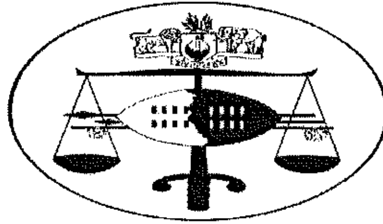

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE	**Case No.** 279/2022

In the matter between:

THULANI DLAMINI	Applicant
And	
CENTRAL BANK OF ESWATINI	1st Respondent
PHILILE NXUMALO N.O.	2nd Respondent

In re:

THULANI DLAMINI	Applicant
And	
CENTRAL BANK OF ESWATINI	1st Respondent
PHILILE NXUMALO N.O.	2nd Respondent

Neutral Citation: Thulani Dlamini vs. Central Bank of Eswatini and Another *In re*: Thulani Dlamini vs. Central Bank of Eswatini and Another (279/2022) SZIC109 (09 October 2023)

CORAM: **V.Z. DLAMINI – JUDGE**

Heard: 09 October 2023

Delivered: 09 October 2023 (Ex Tempore)

Summary: Applicant filed an urgent application against the Respondents seeking an order staying the judgment of the court pending an appeal noted by him at the Industrial Court of Appeal. The impugned decision of the Court held that one of three disciplinary charges preferred against the Applicant was not time-barred. The basis of the appeal is that since the court held that the three charges were connected, it should have found that all the charges were time-barred because the upheld charge emanated from the defunct charges. 1st Respondent opposed the application and contended that the requirements of the grant of a stay were not established. Principally, the 1st Respondent argued that the appeal lacked prospects of success and was frivolous because it impugned factual findings of the court.

Held: Distinction between questions of law and questions of fact discussed. The court affirmed the provisions of section 19 (1) of the Industrial Relations Act of 2000 (as amended) that appeals against decisions of the Industrial Court to the Industrial Court of Appeal shall be on questions of law. The court found that the appeal was devoid of prospects of success and also frivolous as it was based on factual finding. The court also held that the balance of convenience favoured

the 1st Respondent; consequently, it dismissed the application for stay of execution.

REASONS FOR EX TEMPORE RULING – 24 October 2023

INTRODUCTION

[1] On the 9th October 2023, having considered the parties' papers, including heads of argument and oral arguments, the court issued an *ex tempore* ruling dismissing the application for stay of execution filed by the Applicant following a judgement of the court delivered on the 21st September 2023 in terms of which one disciplinary charge out of three preferred against the Applicant by the 1st Respondent was found not to be time-barred.

BACKGROUND

[2] The judgment of the 21st September 2023 followed an application by the Applicant wherein he sought *inter alia* a declaratory order that three charges of misconduct preferred against him by the 1st Respondent were time-barred; therefore, unlawful. The court agreed with the Applicant only in respect of two charges.

[3] Being dissatisfied with the judgment of the court in respect of the one charge, the Applicant noted an appeal to the Industrial Court of Appeal on the 3rd October 2023, based on the following grounds: -

1. *The Court a quo erred in law by holding that the 1st Respondent was not time-barred from proceeding with the Appellant's disciplinary hearing in respect of* ***Charge 3*** *when interpreting Clause 1.9 of the disciplinary code and procedure which was entered into by and between the 1st Respondent and Swaziland Union of Financial Institutions and Allied Workers wherein the Appellant is a subscribing member.*

    1.1 *The Court a quo, having found that* ***Charge 3*** *was connected to* ***Charges 1*** *and* ***2*** *which had already been found to be time-barred in terms of the disciplinary code and subsequently set aside, was enjoined to decide* ***Charge 3*** *on the same footing on the basis that the letter of the 20th December 2021 which gave rise to the same* ***Charge 3*** *emanates from the defunct* ***Charges 1*** *and* ***2*** *hereof.*

    1.2 *To that effect, the Court a quo erred in law by holding that* ***Charge 3*** *is capable of being independently decided.*

ANALYSIS

[4] An application for stay of execution of orders of this court pending appeal is regulated by **Section 19 (4)** of the **Industrial Relations Act, 2000 (as amended) (the IRA)**, 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".

[5] The requirements for the grant of a stay of execution were pronounced in **Paul Siba Simelane v Tibiyo TakaNgwane (Case No.171/1998 SZIC)** at **p. 3** as follows:

> *"...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."*

Also see: **Small Enterprise Development v Phyllis Ntshalintshali (Case No. 140/2004 SZIC).**

[6] In the court's view, not only is the appeal devoid of prospects of success, it is frivolous. In terms of **section 19 (1)** of **the IRA**, an appeal against a decision of this court to the Industrial Court of Appeal shall be on questions of law. The present appeal is based on the factual finding of the court. The court found that **charge 3** was not time-barred because the 1st Respondent initiated disciplinary action against the Applicant within the *dies* prescribed by Clause 1.9 after the alleged misconduct giving rise to that charge was brought to the attention of 1st Respondent's management.

[7] For the distinction between a question of law and a question fact, the court referred to the following authorities: **Trevor Shongwe v Machawe Sithole**

and Another [2021] (08/2020) SZICA 1; The Chairman of the Civil Service Commission v Isaac M.F. Dlamini (14/2015) [2016] SZICA 01 (31 March 2016); Swaziland Electricity Board v Collie Dlamini SZICA Case No. 2/2007 and **Media Workers Association of South Africa and others v Press Corporation of South Africa Ltd 1992 (4) SA 791 (A).**

[8] As for the distinction between questions of law and questions of fact, the Industrial Court of Appeal in **Swaziland Electricity Board v Collie Dlamini (above)** at **para: 6**, quoted with approval a statement of law by Grosskopf JA in **Media Workers Association of South Africa (above)** as follows:

> *"The question that immediately announces itself in this enquiry is what is meant by a question of law as opposed to a question of fact.*
>
> *In **MEDIA WORKERS UNION OF SA v PRESS CORPORATION OF SA LTD, 1992 (4) SA 791(A) @ 795 E M GLOSSKOPF JA** referring to **SALMOND ON JURISPRUDENCE** 12th edition @ 65-75 stated that:*
>
> *"The term "question of law" ...is used in three distinct though related senses. In the first place it means a question which a court is bound to answer in accordance with a rule of law – a question which the law itself has authoritatively answered to the exclusion of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. <u>Thus, an appeal on a</u>*

question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. A third sense in which the expression "question of law" is used arises from the division of judicial functions between a judge and jury in England and formerly, in South Africa. The general rule is that questions of law in both the aforegoing senses are for the judge, but that questions of fact (that is to say, all other questions) are for the jury."

And at 796, the learned Judge of Appeal referring to the notions of question of fact and question of judicial discretion quoted SALMOND where the author states that:

"Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but argument, and are submitted to the reason and conscience of the court. In determining questions of fact the court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the accused has committed the criminal act with which he is charged is a question of fact; but whether, if guilty, he should be punished by way of imprisonment or only by way of fine, is a question of judicial discretion or of right. ...

Matters and questions which come before a court of justice, therefore, are of three classes:

(1) Matters and questions of law – that is to say, all that are determined by authoritative legal principles;

(2) Matters and questions of judicial discretion – that is to say, all matters and questions as to what is right, just, equitable, or reasonable, except so far as determined by law.

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment in order to ascertain the right and justice of the case. In matters of the third kind, [fact] its duty is to exercise its intellectual judgement on the evidence submitted to it in order to ascertain the truth." [Underlining by Industrial Court of Appeal].

[9] The Applicant has not impugned the court's interpretation of the provisions of Clause 1.9 which is rendered in paragraphs **62** and **71** of the judgment of the 21st September 2023. The Applicant's grievance is not that the court either failed to apply a relevant legal principle to the evidence before it or made a legal conclusion that was not supported by the evidence, which error led to an erroneous judgment.

[10] Furthermore, apart from the assertion that charge 3 was connected to charges 1 and 2 because the former charge emanates from the defunct latter charges and therefore should have be declared unlawful just like the others, the Applicant does not propound any legal principle (overlooked by the court), which provides that all the charges should have been declared time-barred by virtue of that connection, despite the court's factual finding as to the period each alleged offence was brought to the attention of 1st Respondent's management.

(B.S. Dlamini and Associates)

For 1st Respondent : Mr. E. Shabangu

(Robinson Bertram)