IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.273/2022

In the matter between:

MBUSO MDLULI Applicant

And

CHILDREN'S CUP ORGANISATION First Respondent

NCAMSILE MBINGO N.O Second Respondent

TAMARA BANDA Third Respondent

In Re:

MBUSO MDLULI Applicant

And

CHILDREN'S CUP ORGANISATION First Respondent

NCAMSILE MBINGO N.O Second Respondent

TAMARA BANDA Third Respondent

Neutral Citation : Mbuso Mdluli v Children's Cup Organisation and 2 others In Re Mbuso Mdluli v Children's Cup Organisation and 2 Others [273/2022]

Coram	:	**MSIMANGO J** *(Sitting with Mr. S. Mvubu and Mr. E.L.B. Dlamini - Nominated Members of the Court)*
DATE HEARD	:	30th November, 2022
DATE DELIVERED	:	16th December, 2022

SUMMARY : **This is an application for a stay of the operation and implementation of this Honourable Court's judgement issued on the 11th November 2022 in favour of the Respondents. The Applicant argues that the Honourable Court was incorrect in finding that he acquiesced to the participation of the 3rd Respondent during the disciplinary hearing proceedings.**

JUDGEMENT

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[1] The Applicant is Mbuso Mdluli an adult LiSwati male of Mbekelweni area in the Manzini District an employee of the 1st Respondent.

[2] The 1st Respondent is CHILDREN'S CUP ORGANISATION, an institution established in terms of the laws of Eswatini. It has limited capacity to sue and be sued in its own name, with its principal place of business at Mbekelweni area in the Manzini District.

[3] The 2nd Respondent is Ncamsile Mbingo N.O an adult LiSwati female cited in these proceedings as the Chairperson of the disciplinary hearing.

[4] The 3rd Respondent is Tamara Banda employed by the 1st Respondent and is the human resources representative in the disciplinary hearing.

[5] The Applicant has brought an Application against the Respondents seeking an order in the following terms:-

5.1 Dispensing with the usual forms and procedures as relating to service and institution of proceedings and allowing this matter to be heard as one of urgency.

5.2 Condoning the Applicant's none compliance with the rules of this Honourable Court.

5.3 Staying the disciplinary hearing pending determination of the Appeal before the Industrial Court of Appeal.

5.4 Further and/or alternative relief.

[6] The Applicant argues that the Appeal pending at the Industrial court of Appeal will determine whether the decision of the Chairperson was lawful or not. If the Appeal is successful, the Applicant submits that, it will mark the end of the hearing. Hence, it is in this premise that he has approached the Honourable Court to seek a stay because it will be a pointless exercise to have the hearing proceed in the face of the Appeal which shall determine its propriety in the first place.

[7] The Applicant submits that he has good prospects of success in the Appeal for the following reasons:-

7.1 The Industrial Court was approached for orders premised on the fact that 3rd Respondent be declared an illegal worker or employee by virtue of not having a work permit.

7.2 A point of law was raised on the 18th August 2022 during the hearing and such point was dismissed by the 2nd Respondent, who found that the 3rd Respondent has been in the hearing since it began on the 5th August 2022, and that any comments on her participation should have been raised then.

7.3 **The Honourable court found that the decision of the Chairperson was lawful in that the Applicant had acquiesced to the participation of the 3rd Respondent during the proceedings. The Applicant submitted that this is not what the doctrine of acquiescence stipulates, as it is succinct as to when this doctrine applies and that the party raising acquiescence should raise it as a defense and further prove before court how such acquiescence came about.**

[8] The Application is opposed by the Respondents and an answering Affidavit was duly filed, wherein the Respondents raised points of law. The court dealt with the points of law together with the merits and will deliver a final judgement on the matter. The points of law are as follows:-

8.1 **LACK OF URGENCY**

The Applicant submits that the matter is urgent by virtue of the fact that a verdict tainted by irregularities to wit, the Chairperson denied the raising and canvassing of a point *in limine* has been issued as of the 29th August 2022. Hence, the hearing is clearly unfair and will result to an adverse sanction which Applicant pre-empts to be summary dismissal yet the proceedings are just a nullity. Further that, the matter is of sufficient urgency more so because the recommendations and the summary dismissal have not yet been issued but they are clearly imminent.

8.1.1 The 1st Respondent argued to the contrary that, the Applicant has launched the urgent application calling upon the Respondents to appear in court at 11.00am. The Application was served on the Respondents at approximately 10:10 a.m. on the hearing date, the Respondents were given less than an hour at which to consider, take instructions and respond to the

Application. The Respondent argued further that, the Application is premised on the judgement of this Honourable Court which was granted on the 11th November 2022. The Applicant has waited for a period of more than a week only to launch the Application at the eleventh hour. The abridgement of the time limits is extreme and is an abuse of court process. The conduct of the Applicant amounts to litigation by ambush which ought not to be countenanced by this court, and that the Applicant has thus failed to satisfy the peremptory requirements for the exercise of this court discretion for the enrolment of this matter on an urgent basis.

8.1.2 The view of the court on this point is that the Appeal has been filed within the period of three months allowed by the law as per Section 19 (3) of the Industrial Relations Act, furthermore the parties have since filed all sets of papers before the court and the matter has been argued wholistically. In the result the point of law on urgency is hereby dismissed.

8.2 **NO APPEAL PENDING AT THE INDUSTRIAL COURT OF APPEAL**

The 1st Respondent argued that the present Application is premised on the fact that there is an appeal currently pending at the Industrial Court of Appeal. The 1st Respondent submits that no appeal has been noted for the reason that the annexure attached to the Application falls short of the requirements for noting an appeal as it has not been registered with the Industrial Court of Appeal nor has it been allocated a case number, and this is fatal to the Applicant's case.

8.2.1 The court has also observed that the notice of appeal attached to the application is not registered with the Industrial Court of Appeal, for the following reasons:-

(a) It is not signed by the Applicant or his Attorneys.

(b) It does not bear a date stamp of the Industrial Court of Appeal.

(c) It does not have a case number.

(d) It also does not have a date on which the appeal will be heard.

8.2.2 The Applicant's failure to attach signed papers renders the notice of appeal totally defective. It is the court's considered view that the unsigned notice of appeal cannot be said to be properly before court or registered with the Industrial Court of Appeal. The fact that it is attached to the Application before court does not assist the Applicant, the responsibility lies with the Applicant to ensure that his papers are in order. For the above reason this point of law succeeds.

[9] On the merits the Applicant argued that the court a quo was clearly incorrect in its finding at paragraph 24 of its judgement when it stated that, by the Applicant agreeing to proceed with the hearing after his point of law was dismissed by the Chairperson he acquiesced to the continuation of the proceedings. Therefore, in law he cannot be allowed to challenge the proceedings. The Applicant argued further that, this is not what the doctrine of acquiescence stipulates, as it is succinct as to when the doctrine of acquiescence applies. The party raising acquiesce should raise it as a defense and further prove before court how such acquiescence came about.

[10] The Applicant submitted that he has a prima facie right to be heard by the Industrial Court of Appeal, in that the prejudice he stands to suffer is that in the event the hearing is not stayed, by the time the Appeal is heard, it might be academic having been rendered by the very same decision of the hearing which is the subject of the Appeal.

[11] The Applicant submitted that irreparable harm would occur if the disciplinary hearing is allowed to proceed and the Applicant is dismissed, and then ultimately the Industrial Court of Appeal sets aside the decision of the Industrial Court, the foreseeable harm of unfair dismissal would not be reversible yet the disciplinary hearing can be stayed pending appeal and no prejudice will be suffered by the Respondents as they retain their right to discipline the Applicant.

[12] The Respondent argued to the contrary that:-

12.1 In the judgement delivered by the court on the 11th November 2022, there were a number of findings which read together made up the decision to dismiss the Application. The Respondents had raised a point of law that the Applicant has failed to demonstrate any exceptional circumstances to warrant intervention of the court in the ongoing disciplinary hearing. After considering the submissions by both parties the court upheld the point *in limine*. The point on intervention was dispositive of the matter, however, the court notwithstanding the upholding of this point went further and considered the matter on the merits, particularly to demonstrate that even if the point *in limine* had not been upheld the application would not have succeeded.

12.2 On the merits the Court found that the question of whether the 3rd Respondent had the necessary work permit was not for the

Honourable court to decide. The court found that the mere fact that one does not have a work permit does not invalidate the employment contract. The effect of this is that the challenge of the permit status of the 3rd Respondent was not relevant. The permit status did not taint the initiation of the disciplinary process against the Applicant.

12.3 After finding that the permit status did not invalidate the employment contract of the 3rd Respondent, the court then went further and found that in any event the Applicant had acquiesced to the ruling against him by continuing with the disciplinary hearing by presenting his defense.

12.4 In the present application the Applicant fundamentally seeks to stay the disciplinary hearing pending finalization of the Appeal. The orders sought by the Applicant are incompetent in the circumstances for the reason that the Applicant has failed to demonstrate any prospects of success in the Appeal. The decision of the court to dismiss the application was based on a number of findings which on their own are dispositive of the matter, however, these findings are not being challenged by the Applicant. In the absence of any challenge there are no prospects of success in the Appeal.

12.5 What further compounds the Applicant's case is that he does not seek to stay the execution of the judgement of this court, what he seeks is a stay of the disciplinary hearing. No stay has been sought before the 2nd Respondent, as the hearing is proceeding before the 2nd Respondent. This court can only set aside a decision by the 2nd Respondent on review and cannot grant the stay of the disciplinary hearing at first instance. The relief sought by the Applicant is therefore incompetent in the circumstances.

12.6 The application has been only launched to delay the finalization of the ongoing hearing. There are other remedies available to the Applicant other than the stay sought. The appeal is vexatious, there are no prospects of success and there is no good cause to warrant that the court grants the orders sought. The Application has no basis and it ought to be dismissed with costs.

[13] The noting of an Appeal does not stay the execution of the Court's judgement or order. This is in terms of **Section 19 (4) of the Industrial Relations Act No.1 of 2000 as amended**. This section clearly provides that:-

"The noting of an appeal under sub-section (1) shall not stay the execution of the Court's order unless the court on application directs otherwise".

All that this section means is that there is no automatic stay of execution of the Industrial Court's judgement or orders unless the Industrial Court makes such an order on application by the affected party. In such cases the court has a duty to exercise its discretion whether or not to grant a stay of execution of a judgement or order. When exercising the discretion to grant or refuse a stay, the court exercises power conferred to it at common law as well as by the rules of court.

[14] In an application for the grant or refusal of a stay of execution of a judgement, the court is guided by the following principles which were set out by the Court in the case of **NEDBANK SWAZILAND LIMITED V PHESHEYA NKAMBULE SZIC Case No. 205/2019**, wherein the court stated as follows:-

"It is well settled that the Industrial Court has the discretion to stay the execution of its order on application, and that such discretion must be

exercised fairly and equitably on the merits of each case. In exercising this discretion the Court has to have regard to the following factors:-

(a) The potentially of irreparable harm or prejudice being sustained by the Appellant on Appeal if leave to execute were to be granted.

(b) The potentially of irreparable harm or prejudice being sustained by the Respondent on Appeal if leave to execute were to be refused.

(c) The prospects of success on appeal, including the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgement but for some indirect purpose e.g. to gain time or harass the other party.

(d) 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 maybe".

[15] Each case must however be considered on its own peculiar facts and circumstances.

[16] In this regard the court wishes to point out that the judgement was not only premised on the fact that Applicant had acquiesced to the participation at the hearing. This finding was an "in any event" conclusion. The decision dismissing the review application by the Applicant was premised on a number of different factors each of which was dispositive of the application on their own. One of these points is that the Applicant failed to demonstrate any exceptional circumstances to warrant that the court intervenes in the ongoing disciplinary hearing. This point has not been challenged on appeal by the Applicant. The Appeal cannot succeed without there being a challenge to the upholding of this preliminary point.

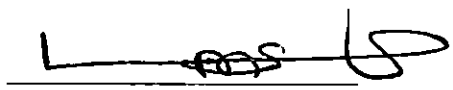
[17] Based on this observation alone and without venturing into the other irregularities contained in the Application, the court finds that the Applicant has failed to demonstrate that the appeal would be successful, therefore it cannot be justifiably said that the appeal has a high likelihood of success when prerequisite steps have not been taken to satisfy the conditions precedent for granting a stay of execution pending appeal.

[18] In the result the court makes the following order:-

(i) The stay of execution is refused and the application is hereby dismissed.

(ii) There is no order as to costs.

The Members agree.



L. MSIMANGO
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT	:	**MR. G HLATSHWAYO** **M.L.K NDLANGAMANDLA ATTORNEYS**
FOR RESPONDENT	:	**MR. E SHABANGU** **ROBINSON BERTRAM ATTORNEYS**