IN THE INDUSTRIAL COURT OF APPEAL

Case No. 16/24

In the matter between: -

MELUSI TSABEDZE Appellant

and

NEDBANK ESWATINI LIMITED 1st Respondent

BAWINILE SHONGWE N.O. 2nd Respondent

Neutral citation: Melusi Tsabedze v. Nedbank Eswatini Limited and Bawinile Shongwe N.O. (16/24) *[2024]* SZICA 19 (20 August 2024)

Coram: **A.M. LUKHELE JA, N. NKONYANE JA, AND D. MAZIBUKO JA**

Date Heard: 13 August 2024

Date delivered: 20 August 2024

RULING ON POINT OF LAW (lis pendens)

A.M. LUKHELE J.A.

I. INTRODUCTION

1.1. The main matter pending before this Court is an appeal awaiting hearing and determination.

1.2. Presently serving before Court is an application filed by the Appellant for an order for the urgent enrolment and hearing of the appeal.

II. PARTIES

2.1. The Applicant is **MELUSI TSABEDZE**, an adult male LiSwati and employee of the First Respondent.

2.2. The First Respondent is **NEDBANK ESWATINI LIMITED,** a financial institution established in accordance with the laws of Eswatini having its principal place of business in Mbabane, also referred in the proceedings as "the bank".

2.3. The Second Respondent is **BAWINILE SHONGWE**, sued in these proceedings in as her capacity Chairperson of an ongoing

disciplinary hearing initiated by the bank against its employee, the Applicant.

III. FACTUAL BACKGROUND

3.1. The pertinent facts of this application are common cause and are that: -

3.1.1. the Applicant is an Appellant in a matter presently awaiting hearing in this court;

3.1.2. on the 12th June, 2024 the Industrial Court delivered judgment in a matter that had been filed by the Applicant against the Respondents;

3.1.3. in the Court a quo the Applicant had by way of an urgent application approached the Court for, *inter alia,* the following orders: -

> *"1. Dispensing with normal forms, time limits and service relating to institution of and that the matter be heard as one of urgency;*
>
> *2. that the Applicant's non-compliance with the above said forms, time limits and service be condoned;*

3. *reviewing, correcting and/or setting aside the ruling of the 2nd Respondent dated the 13th March 2024;*

4. *declaring that the Respondents are time barred from proceeding with the disciplinary hearing which involves the Applicant and the First Respondent hereof.*

5. *Interdicting and/or restraining the Respondents from proceedings with the disciplinary hearing pending final determination of this application."*

4. The First Respondent opposed the application in the Court a quo through an answering affidavit filed by the Bank's Head of Human Resources, Mr Edward Sithole.

4.1. After hearing arguments the Court a quo in its ruling of the 12th June 2024, issued the following order viz:

"[30] In the premise, the Court orders as follows:

30.1 The application is dismissed;

30.2 There is no order for costs."

5. Being dissatisfied with that Court's judgment, the Appellant filed an appeal to this Court by way of his Notice of Appeal dated the 17th June, 2024.

IV. GROUNDS OF APPEAL

6. The grounds of appeal on which the Appellant relies are that: -

*"1.1. The Court a quo erred in law when holding that a strict adherence to the time-limit set by **Clause 1.11** should apply where the employer is the sole cause of the delay in prosecuting disciplinary charges against the employee and does not have a reasonable explanation yet no other explanation can be proffered by the employer except on the aforementioned instances of police investigation and litigation, as contracted by the parties on a voluntary basis, when concluding the disciplinary code.*

*1.2. To that effect, the Court a quo erred in law when it disagreed with the obiter observation in **Swaziland Union of Financial Institutions & Allied Workers v Eswatini National Provident Fund** that the solution when the employer is faced with a situation wherein it is on the verge of its hearing taking more than the prescribed time limits lies on amendment of the clause through negotiations as the parties were well aware of all intricacies which were surrounding the clause and so the clause is binding, and cannot be merely derogated upon by any party willy willy.*

*1.3. As such, the Court a quo erred in law when applying the case of **Max Bonginkhosi Mkhonta v. Royal Swaziland Sugar Corporation** and Another in the facts of the matter wherein the 2nd Respondent, although not prompt on finalising the disciplinary hearing, adopted a lax approach when it granted a long postponement on a simple matter of availing further particulars to the Appellant, which could be attended to on a single day and thereby disregarding the time limit which is envisaged in **Clause 1.11** of the disciplinary code."*

7. On the 1st August 2024 the Applicant filed the present application for the hearing of this appeal on an urgent basis seeking, *inter alia*, the following orders: -

"3. Directing that the main matter which is pending before the Honourable Court on appeal be heard as one of urgency.

4. Staying Applicants' disciplinary hearing which is conducted by 2nd Respondent pending finalisation of this matter before Court."

7.1. It is pertinent to state in this application that the Registrar through a roll notified to the parties and to all Attorneys has **already enrolled the appeal for hearing on the 19th September, 2024**.

7.2. The application for the urgent enrolment is opposed by the 1st Respondent.

V. POINT OF LAW *LIS PENDENS*

8. The First Respondent in its answering affidavit, has raised a preliminary point of *lis pendens*, stating that the Applicant in his prayer before this Court is seeking a prayer which is the same with a prayer he is seeking in the Court a quo, in an application before the Industrial Court in Case No. 71/2024, which application has not yet been heard and determined by the Court a quo.

VI. PARTIES SUBMISSIONS

9. In this Court it was argued on behalf of the 1st Respondent that Applicant has failed to fully disclose to this Court that there is a pending application for a stay of the disciplinary hearing which he had launched at the Industrial Court, which application is still pending.

9.1. It was further argued for the First Respondent that no answer has been averred in applicants papers on the aspect of *lis pendens*

9.2 For this argument the First Respondent relied on the case of **Sifundzani Primary School v. Priscilla and 2 Others (1679/2020) [2021] SZHC 44 (30/03/2021)** and the Court was urged to uphold the point *in limine*.

10. On the other hand, on behalf of the Applicant, it was argued *inter alia*, that: -

10.1. it is not correct that the same proceedings with a similar cause of action, are pending before the Court a quo;

10.2. it was admitted that, there are proceedings pending in the Court a quo between the same parties, but such proceedings are not for the same cause of action and the prayers sought are neither similar nor the same;

10.3. the Appellant has failed to satisfy the requirements of the plea of *lis pendens;*

10.4. consequently, the Court was urged to dismiss the plea of *lis pendens* raised by the First Respondent.

VII. ISSUE FOR DETERMINATION

11. The issue falling for determination by the Court at this stage is that of *lis pendens*. That is, whether the application proceedings under Industrial

Court Case No. 71/2024 are still pending and whether they are the same cause of action same as the one filed before this Court.

VIII. LEGAL PRINCIPLES AND AUTHORITIES ON A PLEA OF *LIS PENDENS*

12. The Authors **Herbstein and Van Winsen et al in The Civil Practice of The Superior Courts of South Africa – 3rd Edition 1979 (Juta and Company)** at Page 269 states as follows: -

> *"If an action is already pending between parties and the plaintiff therein brings another action against the same defendant on the same cause of action, and in respect of the same subject-matter, whether in the same or in a different court, it is open for such defendant to take the objections of lis pendens, that is, that another action respecting the identical subject-matter has already been instituted, whereupon the Court in its discretion may stay the second action pending the decision of the first action."*

12.1. At page 270, the above authors proceed to state that: -

> *"The requirements of a Plea of lis pendens are the same with regard to the person, cause of action and subject-matter as those of a plea of res judicata, which in turn, are that the two actions must have been between the same parties or their successors-in-title, concerning the same subject matter and founded upon the same cause of complaint."*

13. In **Sifundzani Primary School v. Priscilla and Others (supra)** the Court states as follows: -

> *"Requirements for the plea of lis pendens: -*
>
> *[9] The requirements for the plea of lis pendens in terms of the law are these: there must be pending litigation between the same parties or their privies; based on the same cause of action; and in respect of the same subject matter but this does not mean the form of relief claimed in both proceedings must be identical. The plea of lis pendens is not absolute. This means that even if it is found that the requirements have been met, the Court has discretion to allow an action to continue should it be considered just and equitable in the circumstances despite the earlier institution of the same action.*
>
> *[10] A plea of lis pendens is open to a litigant who contends that a dispute between the same parties concerning the same cause of action is pending before the same court or another court with, the same jurisdiction. The plea is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The party raising the plea of lis pendens bears the onus of proving all the requirements."*

14. It is trite that the *onus* rests upon the party raising the defence to prove its requisites (**Herbstein and Van Winsen et al in <u>The Civil Practice of The Superior Courts of South Africa</u> (supra).**

IX. ANALYSIS OF PRESENT MATTER

15. The Court will proceed to deal with the issue of whether the requirements above have been proved in the present application.

15.1. There is no dispute that an application for a stay of the disciplinary hearing was filed by the applicant against the bank. On this aspect the parties are agreed.

15.2 A dispute only exists on whether those proceedings were for the same cause of action and prayers.

X. PROCEEDINGS AND ORDERS OF THE COURT A QUO

16. In the Court a quo, the Applicant has launched an application on an urgent basis, inter alia for the following orders: -

> **"3. Directing the Respondent to show cause on a date to be determined by this Honourable Court why a final order in the following terms should not be granted: -**
>
> **3.1. that the 1st and 2nd Respondents are hereby interdicted from proceeding with the disciplinary hearing against the Applicant pending finalisation of this application;**
>
> **3.2. that the disciplinary hearing against the Applicant be stayed pending finalisation of the appeal hearing before the Industrial Court of Appeal."**

16.1. The Court a quo was addressed on the point of urgency and refused to issue an order to enrol the application on the basis of urgency, giving its reasons and made the following orders, viz: -

> *"1.* **The Court refuses to stay the disciplinary hearing pending hearing of the matter;**
>
> **2. Reasons for the decision will follow in due course;**
>
> **3. The matter will take its normal cause."**

16.2. As expected, the parties' interpretation of the Court Order is at variance with each other. As a result of this divergent views the parties approached the Court a quo to interpret its Order. To assist the parties this Court duly made an order requesting the Court a quo to interpret its order. In its interpretation, the Court a quo stated thus: -

> ***"Following the Order of the Industrial Court of Appeal dated the 6th August, 2024, and after hearing Counsels, this Court clarified its Order issued on the 18th June, 2024, that this Court did not dismiss the entire application but refused to enrol the matter for urgent hearing. It directed that the matter takes its normal cause."***

17. In *casu,* it is important to enquire what is pending before this Court. It cannot be disputed that the matter that is pending before this Court is an appeal of the decision of the Court a quo and a subsequent application for urgent enrolment of that appeal filed by the Applicant and a prayer for a stay of the disciplinary hearing pending finalisation of the matter before Court.

17.1 The main question that arises is whether the appeal and urgent enrolment of the appeal is pending before the Court a quo. A consideration of the record filed in this Court clearly show that these issues are only pending in this court and not before the Court a quo. Accordingly, this Court has jurisdiction to deal with the urgent application as it is properly before it.

18. In any event, the plea on *lis pendens* has been raised not in respect of the entire application pending before this Court, but against a certain Prayer in that application, in particular Prayer 4 therein which the Respondent argued was also pending before the Court a quo.

19. The prayer for a stay of the disciplinary hearing was not the only prayer sought in the application before the Court a quo. An order for the interdict against the First and Second Respondent was also sought.

20. On the issue of the stay of the disciplinary hearing the Court a quo in it ex-tempore ruling of the 18th June, 2024 stated as follows: -

"1. The Court refuses to stay the disciplinary hearing pending hearing of the matter.

2. Reasons for the decision will follow in due course.

3. The matter will take its normal course."

21. In its reasons for the *ex-tempore* ruling delivered on the 09th July, 2024 the Court further stated that: -

"[21] It was for the aforesaid reasons that this Court refused to stay the disciplinary hearing pending the hearing of the present application."

22. On account of clear terms of the order and the reasons of the Court a quo in support of that order this Court concludes that the Court a quo dealt with and refused to stay the disciplinary hearing.

23. Consequently, the issue sought in Prayer 4 of the application in this Court is no longer pending before the Court a quo. Therefore, this Court has jurisdiction to entertain the urgent application before it.

24. It is trite law that all four requirements must be satisfied before the plea of *lis pendens* can succeed **(See: Sifundzani Primary School v. Priscilla and Others (supra)).** In the instant case, the argument that the litigation involving the same parties and for the same subject-matter is pending in both Courts cannot be supported.

24.1 That being the case and for the reasons aforementioned, this Court concludes that the requirements of a *lis pendens* has not been met, and the *onus* resting on the First Respondent has not been discharged to sustain a plea of *lis pendens.*

XI. CONCLUSION

25. Accordingly, the point on *lis pendens* stands to be dismissed.

XII. **ORDER**

26. **In the result, the Court makes the following Order: -**

1. **The point on *lis pendens* is dismissed.**

2. **The Court will therefore proceed to hear the urgent application before it.**

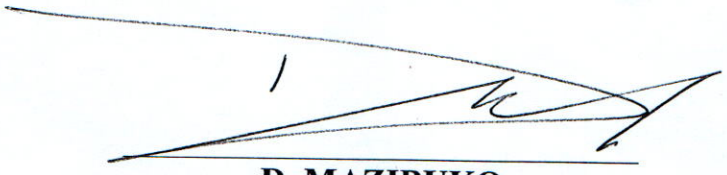
3. **The interim order, order No.2 of the 6th August 2024, which stayed the disciplinary hearing of the employee, Melusi Tsabedze, is hereby extended pending finalisation of this application.**

A.M. LUKHELE
JUDGE OF APPEAL
INDUSTRIAL COURT OF APPEAL

I agree

N. NKONYANE
JUDGE OF APPEAL
INDUSTRIAL COURT OF APPEAL

I agree



D. MAZIBUKO
JUDGE OF APPEAL
INDUSTRIAL COURT OF APPEAL

For Appellant: Mr. A.N. Dlamini
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