IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVIL CASE NO. 3444/09**

In the matter between:

ABEL SIBANDZE **APPLICANT**

VS

STANLIB SWAZILAND (PTY) LIMITED **1st RESPONDENT**
LIBERTY LIFE SWAZILAND (PTY) LTD **2nd RESPONDENT**
TINEYI MAWOCHA **3rd RESPONDENT**
CALVIN MASEKO **4st RESPONDENT**
RUDI MALAN **5st RESPONDENT**
NICK HAINES **6th RESPONDENT**
LARRY SHEAR N.O. **7th RESPONDENT**

CORAM MAPHALALA MBC, J

FOR Applicant MR. Z. SHABANGU

FOR RESPONDENT ADVO. G. HULLEY

Instructed by
Attorney Z. Jele

JUDGMENT
DECEMBER 2009

[1] This application was brought on a certificate of urgency by the Applicant on the 25th November 2009 for the following prayers:

1. Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as urgent.

2. Condoning applicant's non-compliance with the said rules, and provisions as relating to form, service and time limits and hearing this matter as urgent.

3. Interdicting the Respondents from implementing the recommendations of the disciplinary chairperson of the 20th November 2009.

4. Setting aside the decision of the chairperson of the disciplinary enquiry of the 20th November 2009.

5. That the Orders referred to in 3 and 4 above should operate with immediate and interim effect pending finalization of this application.

6. A rule nisi do hereby issue calling upon the Respondents to show cause on or before the 27th November 2009, why;

6.1 The Third Respondent as Chairman of the First and Second Respondents' Board of Directors should not be committed to gaol for a period of sixty (60) days for Contempt of the Court Order granted by this Honourable Court dated 16th November 2009.

6.2 The Fourth, Fifth and Sixth Respondents as Directors of the First and Second Respondents should not be committed to gaol for a period of sixty (60) days for Contempt of the Court Order granted by this Honourable Court dated 16th November 2009.

6.3 The Orders referred to in 3 and 4 above should not be made final.

7. Costs of this application on the scale between attorney and own client.

[2] When the application was heard on the 25th November 2009, the Respondents had only filed their Notice of Intention to Oppose and had not yet filed their Opposing Affidavit.

[3] It is common cause that the present application is a sequel to another application heard on the 28th October 2009 in the matter of **Stanlib Swaziland (Pty) Ltd and Liberty Life Swaziland**

(Pty) Ltd v. Abel Sibandze & the Presiding Judge of the Industrial Court of Swaziland, Civil Trial Case No. 3444/2009. The latter case was presided over by Justice Agyemang.

[4] The earlier urgent application before Justice Agyemang was for the following:

> 1. Dispensing with the normal provisions of the rules of this honourable court relating to form, service and time limits and hearing this matter as urgent.
>
> 2. Reviewing, correcting or setting aside the ruling of the Industrial Court under case No. 473/2009.
>
> 3. Declaring that the disciplinary enquiry against the First Respondent proceed as a matter of urgency in Johannesburg, Republic of South Africa.
>
> 4. Granting applicants the costs of the application.
>
> 5. Granting applicants any further or alternative relief.

[5] On the 16th November 2009, Justice Agyemang made the following orders which constitute the executive part of her judgment:

> 1. The application for the review of the judgment of the Industrial Court of Swaziland delivered on the 15th September 2009 in the

case described as **Industrial Court Case No. 473 / 2009** is hereby granted and the said judgment is set aside.

2. The application for an order directing that the pending disciplinary inquiry proceed in Braamfontein, Johannesburg as a matter of urgency, is hereby refused.

3. An order is made referring the matter back to the Court *a quo,* differently constituted for the merits of the application described as: **Industrial Court Case No. 473/2009** to be heard as an urgent matter.

4. Costs to the applicants.

[6] It was argued on behalf of the applicant that the purpose of the present application was to enforce the judgment of Justice Agyemang delivered on the 16th November 2009.

[7] Applicant's Counsel further argued that this Court had refused to issue an order directing the pending disciplinary inquiry to proceed in Braamfontein, Johannesburg; and that this Court made an order referring the matter back to the Court *a quo,* differently constituted, for the merits of the application to be heard as an urgent matter.

[8] It is common cause that after Her Ladyship had delivered her judgment on the 16th November 2009, Attorneys for the First and Second Respondents based in South Africa, being Hlatshwayo du Plessis Van der Merwe Nkaiseng faxed a letter to applicant's attorney in Swaziland Magagula Hlophe

Attorneys on the 18th November 2009 notifying the applicant to attend a disciplinary hearing on the 20th November 2009 at 1100 hours in Braamfontein, Johannesburg. This letter appears as annexure "A2" at pages 58-59 of the Book of Pleadings.

[9] Applicant's attorneys responded in writing and advised the South African attorneys to serve the Notice to the Applicant in person because his Attorney Mr. Hlophe has since been appointed to the bench of the High Court of Swaziland; and, that their Law firm had not been given instructions by the applicant on the matter.

[10] Applicant's attorneys further stated:

> "4. We do however note that the Court has in its judgment expressly refused to grant you permission to proceed with the disciplinary hearing in Johannesburg, South Africa. Instead the Court Ordered that the matter be referred to the Industrial Court for determination of that issue...
>
> 5. It therefore defeats logic that you now seek to proceed with the Disciplinary Hearing in South Africa after the Court has expressly refused your request to do so. Your conduct under the circumstances exhibits a condescending attitude to disregard and to look down upon the judgments of Swaziland Courts and is contemptuous to say the least...."

[11] The above response appears as annexure "A3" at pages 60-61 of the Book of Pleadings.

[12] The First and Second Respondents proceeded with the disciplinary hearing in Johannesburg on the 20th November 2009 in the absence of the applicant and/or his attorneys; the applicant was found guilty and dismissed instantly.

[13] A copy of the outcome of the disciplinary hearing appears as annexure "A3B" in page 62 of the Book of Pleadings, and, it is signed by the Seventh Respondent as Disciplinary Chairperson.

[14] On the 23rd November 2009, Applicant's attorneys wrote a letter to the chairman of the First and Second Respondents expressing their dismay that the Disciplinary hearing proceeded in the face of a Court Order prohibiting the holding of the hearing in Johannesburg. Furthermore, the letter called upon the First and Second Respondents to withdraw their letter of dismissal of the Applicant not later than 12 noon of the same day failing which they were instructed to institute Contempt of Proceedings to have the disciplinary inquiry set aside.

[15] It is worth mentioning that the Third Respondent is the Chairman of the Board of Directors of the First and Second Respondents. The Fourth, Fifth and Sixth Respondents are directors of the First and Second Respondents.

[16] Subsequently, Applicant's attorneys received a fax from Respondents' attorneys in South Africa Hlatshwayo du Plessis Van der Merwe and Nkaiseng advising that they;

> "respectfully disagree with the interpretation by yourself of the current situation in law and /or the effect of the judgment handed down by the high court of Swaziland under Case No. 3444/2009..."

This fax appears as annexure A6 in page 67 of the Book of Pleadings.

[17] Thereafter, Respondents' Attorneys in Swaziland, Robinson Bertram Attorneys, wrote a letter to Applicant's attorney stating, *inter alia,* that:

> "....6. It is therefore denied that the disciplinary inquiry against your client, was either unlawful, unfair or in Contempt of any Court Order from any court from the Kingdom of Swaziland.
>
> 7. The interpretation by yourself of the Order of the High Court under Case No. 3444/2009 dated the 16th November 2009 is respectfully clearly incorrect.
>
> 8. A proper reading of the aforesaid Court Order does not prevent our client from proceeding with the disciplinary inquiry in the matter that it did ...."

[18] The above letter appears as annexure "A7" at pages 6768 of the Book of Pleadings.

[19] The Respondents are opposing the application.

[20] On the 25th November 2009, after hearing both Counsel, the Court issued a *rule nisi* in terms of prayers 1, 2, 3, 4, 5, 6, 6.1, 6.2, 6.3 and 6.5. The *rule nisi* was returnable on the 4th December 2009. Costs were to follow the event.

[21] Pending the return date, the Respondents' attorneys filed their Opposing Affidavit as well as their Heads of Argument; and applicant's attorneys filed their Replying Affidavit as well as their Heads of Argument.

[22] In their Opposing Affidavit, the Respondents submited that there was no order restricting or prohibiting them from proceeding with the disciplinary hearing in Johannesburg, and, that they could therefore not act in conflict with the terms of such an order. They further argued that, they could not be held to have acted contemptuously of a non-existent Court Order; hence, there was no legal basis for a Committal Order.

[23] They made it clear that they do not accept the interpretation placed on Justice Agyemang's judgment by the applicant as prohibiting them from proceeding with the disciplinary inquiry in Johannesburg.

[24] The Respondents went further to challenge the joinder and citation of the Third, Fourth and Fifth Respondents on the basis that they were not part of the decision to hold the disciplinary

inquiry in Johannesburg; that they had no involvement in such decision or its implementation.

[25] However, the Respondents in paragraph 4.10 of their Opposing Affidavit turned around and said:

> "The First and Second Respondents have since decided to abandon the disciplinary inquiry process which was held in Johannesburg and the decision taken at the conclusion of that inquiry"

[26] Having said that, the Respondents proceeded to state that their decision did not mean any admission that they had acted contemptuously of the Court Order but that it was intended to avoid any further legal challenge to the inquiry held in Johannesburg.

[27] The Respondents further stated in paragraph 4.11 of their Opposing Affidavit that it was imperative to hold a fresh disciplinary inquiry in Swaziland against the Applicant as soon as possible in view of the seriousness of the charges he faces.

[28] It is implicit in the Respondents' Opposing Affidavit that since the First and Second Respondents have abandoned the disciplinary inquiry held in Johannesburg and the consequences flowing therefrom, the application was now academic. In addition, they stressed and maintained that in their own interpretation of the Order, they did not act in Contempt because

the Order did not prohibit them from holding the inquiry in Johannesburg.

[29] It is my considered view that in as much as the First and Second Respondents have abandoned the disciplinary inquiry, the application cannot be said to be academic for two reasons: First, they deny that they acted in Contempt of the Order and insist that the order did not prohibit them from holding the inquiry in Johannesburg. Secondly, they maintain that they want to hold a disciplinary inquiry in Swaziland against the Applicant as soon as possible. This undertaking goes contrary to the judgment of Justice Agyemang who referred the matter back to the Court *a quo* for the merits of the application to be heard urgently as well as the interdict issued by the **Industrial Court under Case No. 473/2009** restraining the Respondents from holding a disciplinary hearing in Johannesburg until the matter was finalized. I refer to annexure "ASRI" at page 155 of the Book of Pleadings. Furthermore, to make an order for costs, it is necessary to decide whether or not the Respondents were in contempt.

[30] In addition, and depending on the interpretation of the judgment by Justice Agyemang, Order No. 2 provides that:

> "The application for an order, directing that the pending disciplinary inquiry proceed in Braamfontein, Johannesburg as a matter of urgency is hereby refused".

[31] In his Replying Affidavit, the Applicant submits correctly that the central issue in this application is whether or not the Respondents are in violation of the Court Order, and that in interpreting the Order what is decisive is the executive part of the judgment where the Court makes directives and prohibitions; that the reasoning in the judgment is only relevant where there is ambiguity in the interpretation of the executive portion of the judgment.

[32] After analyzing the judgment, the applicant concludes that there is no ambiguity and that it is apparent that the Respondents were prohibited from holding the disciplinary hearing in Johannesburg.

[33] The Respondents in their Heads of Argument re-iterate that prayers 3 and 4 have become academic since the First and Second Respondents have resolved to abandon the disciplinary inquiry held in Johannesburg and the ruling made in that inquiry; that the only issue which remains is the order for committal of the Third, Fourth, Fifth, Sixth and Seventh Respondents.

[34] As stated in the preceding paragraphs, I do not agree with this submission for the reasons stated therein. On the contrary, it is the order for committal that has been rendered academic because by abandoning the disciplinary hearing, the Respondents have in effect purged their contempt.

[35] The issue for the Court to decide is whether or not the Respondents acted in contempt of the judgment of Justice Agyemang in holding a disciplinary hearing in Johannesburg on the 20th November 2009 against the Applicant.

[36] Herbstein & Van Winsen, "The Civil Practice of the Supreme Court of South Africa" 4th edition, page 689 deals with the interpretation of a judgment or Court Order:

> "The basic rules for interpreting the judgment or Order of a Court are no different from those applicable to the construction of documents. The Court's intention has to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. The judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary qualify or supplement it. But if any uncertainty in meaning emerges, the extrinsic circumstances surrounding or leading up to the court's grant of the judgment or order may be investigated and taken into account in order to clarify it."

[37] This principle of our law has been confirmed and applied in the following cases: **Firestone SA (Pty) Ltd v. Gentiruco AG 1977 (4) SA 298 (A)** at **304 D-H;** Administrator, **Cape: Another v. Ntshwaqela & Others 1990 (1) SA 705 (A)** at **715 F-I; Battiss & Another v. E/Centre Group Holdings Ltd & Others 1993 (4) SA 69 (W)** at **72 E G** and **Rossing Stone Crushers Pty Ltd v. Commercial Bank of Namibia & Another 1994 (20 SA 622 (NM)** at **631 C-G.**

[38] The learned authors went on to state that:

> "The rule that no evidence is admissible to contradict, amend or add to an order which is clear and unambiguous is a rule of law not merely a rule of evidence that can be waived by the parties", page 689-690.

This was further confirmed in the case of **Postmasburg Motors (PTY) Ltd v. Peens & Another 1970 (2) SA 35 (NC)** at **39.**

[39] I am satisfied that on a proper reading of the judgment by Justice Agyemang, its meaning is clear and unambiguous; hence, no extrinsic fact or evidence or surrounding circumstances are admissible to contradict, vary, supplement or qualify the judgment. The Court's intention is clear from the language used in the judgment.

[40] Justice Agyemang concluded her judgment with the executive part which in my view is the most important part because it gives a direction of what the parties should do.

[41] The executive part of the judgment appears in paragraph 5 above.

[42] The Second Order clearly prohibits the Respondents from holding the disciplinary inquiry in Braamfontein, Johannesburg. It is common cause that in one of their prayers, the Respondents had asked for an order;

> "declaring that the disciplinary inquiry against the First Respondents proceed as a matter of urgency in Johannesburg, Republic of South Africa".

In the circumstances, there is nothing ambiguous about this order, and I reject the interpretation placed on the order by the Respondents.

[43] Applicant's Counsel correctly relied on the executive part of the judgment as quoted above, and the authorities are in agreement with this approach.

Herbstein & Van Winsen at page 690 is quoted with approval in the case of the Administrator, **Cape & Another v. Ntshwaqela & Others** quoted above at page **716 B-C:**

> "The Order with which a judgment concludes has a special function: it is the executive part of the judgment that defines what the Court requires to be done or not done while it may be said that the order must be read as part of the entire judgment and not as a separate document, the Court's directions must be found in the order and nowhere else. Thus if the meaning of an order is clear and unambiguous, it is decisive and cannot be restricted or extended by anything else stated in the judgment."

[44] A proper interpretation of the judgment is that the Respondents were prohibited from holding the disciplinary hearing in Johannesburg, and, the matter was referred back to the Court *a quo* for the hearing of the merits.

[45] Three requisites have to be established in an application for Contempt Proceedings. First, that an order was granted against the Respondent; Second, that the Respondent was either served with the order or informed of the grant of the order against him; Third, that the Respondent has either disobeyed the order or neglected to comply with it:

* Hebstein & Van Winsen page 825.
* Consolidated Fish Distributors Pty Ltd v. Zive & Others 1968 (2) SA 517 (C) at 522
* Culverwell v. Beira 1992 (4) SA 490 (W) at 493 D

[46] The Applicant has shown that an order was granted against the Respondents not to hold a disciplinary hearing in South Africa, but, that they disobeyed the order. The law stipulates that once the applicant has proved this, wilfulness will normally be inferred and the onus will be on the respondent to rebut the inference of wilfulness on a balance of probabilities:

* Herbstain & Van Winsen page 826
* Consolidated Fish Distributors (Pty) Ltd v. Zive and Others (supra) at 522H
* Du Plessis v. Du Plessis 1972 (4) SA 216 (O) at 220
* Putco Ltd v. TV & Radio Guarantee Co. (Pty) Ltd 1985 (4) SA 809 (A) at 836 E

[47] In an earlier case of **Clement v. Clement 1961 (3) 861 (T)** at **866,** it was held that a person's disobedience must be not only wilful but also *mala fide.*

[48] I am satisfied that the Respondents disobeyed the judgment wilfully and *mala fide.* The judgment was clear and unambiguous; hence, the Respondents cannot be heard to say that there could be another interpretation of the judgment. Similarly, if the Respondents were in doubt as to the exact and precise interpretation of the judgment, they were at liberty to make an application to this Court on notice to the applicant for an interpretation by the Court of the judgment:

- Herbstein & Van Winsen page 689

[49] In addition, Respondents were legally represented at the hearing by Counsel as well as an instructing Attorney; hence, they were aware of the judgment of the Court. In fact, they do not deny knowledge of the judgment.

[50] Two days after judgment was made, they faxed a notice advising the Applicant and his Attorneys of the disciplinary hearing in Johannesburg in forty eight (48) hours time. They were advised to serve the notice to the Applicant in person since his Attorney had been elevated to the bench; however, they ignored that and proceeded with the inquiry in the absence of the Applicant. On the same day, they issued a verdict for his dismissal.

[51] Furthermore, there was correspondence between Applicant's attorney and Respondents' attorneys from South Africa and

Swaziland relating to the interpretation of the judgment. Assuming that the meaning and interpretation of the judgment was ambiguous, Respondents' attorneys would have been expected to approach the court for an interpretation. However, the need to do so did not arise in this case in the light of the clear and unambiguous interpretation.

[52] I now turn to the issue of costs. I agree wholeheartedly with the Applicant that he has been put out of pocket by the contemptuous conduct of the Respondents. For this reason, I consider this case to be a proper one to grant the Applicant costs at a scale of attorney-and-client.

[53] Herbstein & Van Winsen discusses the award by the Court of attorney-and-client costs at page 718:

> "The grounds upon which the court may order a party to pay his opponent's attorney-and-client costs include the following: that he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious, or frivolous; or that he has mis-conducted himself gravely either in the transaction under inquiry or in the Conduct of the Case. The Court's discretion to order the payment of attorney-and-client costs is not, however, restricted to cases of dishonest, improper or fraudulent conduct: it includes all cases in which special circumstances or considerations justify the granting of such an order. No exhaustive list exists."
>
> - See also the case of **Rautenbach v. Symington 1995 (4) SA 583 (O)** at **588 A-B."**

[54] In the case of **Caluza v. Minister of Justice & Another 1969 (1) SA 251 (N),** the Court granted the attorney-and-client costs on the basis that the attitude of the Respondent towards the Court was deplorable and highly contemptuous.

[55] In the present case, not only has the applicant been put out of pocket by instituting these proceedings but the conduct of the Respondents has been deplorable and highly contemptuous of the judgment of this Court; this has the effect of undermining the dignity of the court and bringing its reputation into disrepute. This court has an obligation to protect its dignity and reputation from such a conduct.

[56] There has also been doubt whether or not the Third, Fourth and Fifth Respondents should have been joined in these proceedings as they are non-executive directors of the First and Second Respondents. It was submitted on their behalf that they do not participate in the daily operations of the First and Second Respondents; that they are full time employees of Standard Bank Ltd in Mbabane.

[57] I am satisfied that the said Respondents were properly joined. They passed and signed the resolution at the Directors Meeting of the 4th September 2009 authorizing the First and Second Respondents to defend the proceedings relating to the Applicant.

[58] In any event, the First and Second Respondents as corporate persons act and conduct their affairs through their Board of Directors. Since they were aware of the judgment, they were duty bound to comply with it.

[59] The said Respondents have deposed to Supporting Affidavits in which they deny involvement in the Notice calling upon the Applicant to attend the disciplinary hearing in Johannesburg on the 20th November 2009.

[60] Furthermore, they submit that they are not involved in matters involving discipline of employees.

[61] However, it is the Third Respondent who signed the letter suspending the Applicant from employment; clearly, the Third, Fourth and Fifth Respondents were properly joined in the proceedings.

[62] I am further satisfied that the Applicant has proved on a balance of probabilities that he is entitled to a final interdict. He has a clear right to enforce the order issued by Justice Agyemang prohibiting the holding of the inquiry in Johannesburg so that the merits of the matter described as **Industrial Court Case No. 473 of 2009** could be finalized.

[63] The holding of the inquiry in Johannesburg was prejudicial to the Applicant since it led to his dismissal from employment. It is common cause that the applicant was not represented during the hearing much against the principle of "*audi alteram pattern*".

Furthermore, the holding of the inquiry in the face of the Court Order prohibiting it clearly shows that it was unlawful.

[64] Bringing the application for an interdict was the only remedy available to the applicant in the circumstances.

[65] Herbstein and Van Winsen *(supra)* deals extensively with the requirements for a final interdict at pages 1064-1076.
I now make the following order:

(a) The Rule *Nisi* is hereby confirmed in respect of prayers 1, 2, 3, and 4.

(b) The Respondents are directed to pay costs of this application on a scale between attorney and client.

(c) The Respondents are directed to comply with Order No. 3 of the Executive Part of the judgment delivered by Justice Agyemang on the 16th November 2009, namely, that an order is made referring the matter back to the Court *a quo,* differently constituted for the merits of the application described as **Industrial Court Case No. 473 of 2009** to be heard as an urgent matter.

1. The Registrar of the Court *a quo* is hereby directed to allocate a date or dates within three days of this Order for the hearing of the matter described as **Industrial Court**

Case No. 473 of 2009, and that such matter be finalized within fourteen (14) days of this Order.

(b) Pending finalization of the matter described as **Industrial Court Case No. 473/2009,** no disciplinary hearing will be held as between the parties.

M.B.C. MAPHALALA
JUDGE OF THE HIGH COURT
OF SWAZILAND