



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1409/2014

In the matter between

SWAZILAND GOVERNMENT

Applicant

And

**ANNA NOZIZWE NTEZINDE
THE PUBLIC SERVICE PENSION FUND**

**1st Respondent
1st Respondent**

Neutral Citation: *Swaziland Government vAnna Nozizwe Ntezinde And Another (1409/2014) [2014] SZSC 392 (31st October 2014)*

Coram: **Dlamini J**

Heard: **26th September 2014**

Delivered: **31stOctober 2014**

Application for interdict pendete lite – where applicant has established a clear right not open to doubt and balance of convenience favours applicant, court to grant same even though irreparable harm or prospect of success not established.

Summary: By way of motion proceedings under a certificate of urgency, the applicant seeks for an interdict *pendete lite* against 2nd respondent from paying out pension benefit to the 1st respondent . 1st respondent strenuously opposes the application on the basis that it has fallen short of the requirements of an anti-dissipation interdict and that she has a *bona fide* defence.

Parties' contention

[1] The applicant has based its case, on the following depositions:

AD BACKGROUND

“7. *The first respondent was employed by the Swaziland Government on the 30th January, 1979 and was on the 12th April, 2006 appointed to the post of Head Teacher – St. Anne’s High School.*

8. *An audit inspection was conducted at St. Anne’s High School for the calendar year ended 31st March 2013, which revealed first respondent’s non compliance with the Schools Accounting Regulations, 1992. On or about the 7th May, 2014 we were called to appear before the Public Accounts Committee to answer audit queries raised by the Auditor General in her report amongst which was the issue of St. Anne’s High School. It was before this Committee that it was revealed that first respondent failed to comply with the Schools Accounting Regulations and thus could not account for funds amounting to E3, 728,059.26 (Three million Seven hundred and twenty eight thousand Fifty nine Emalangeneni and Twenty six cents*

9. *On the 12th September 2014 a letter was written and sent to Applicant through her Attorneys demanding that she pays Government the funds that were unaccounted for or alternatively make an acknowledgment of the debt stating how she intends to settle the debt. On the 19th September 2014 we received a reply from Applicant’s Attorneys disputing any liability to pay the Swaziland Government alleging that all the money was used for school activities and was not used by Applicant for her personal needs.*

PRIMA FACIE RIGHT

10 *The Applicant has a prima facie right to apply to this Honourable Court for an order interdicting the second respondent from paying out the*

pension benefits due to the first respondent pending the finalisation of the action under case number 1366/2014. The Applicant suffered a huge loss through the unlawful and negligent activity of the first respondent.

IRREPARABLE HARM REASONABLY APPREHENDED

12. *The applicant will suffer irreparable harm if the interim order is not granted because the first respondent will receive her pension benefits before the final determination of the action instituted against her.*

NO OTHER ALTERNATIVE REMEDY

13. *The applicant has no other alternative remedy other than an interdict to ensure that the first respondent does not rob the applicant. As the first respondent has retired from the Teaching Service, the applicant has no power to continue with her disciplinary hearing.*

BALANCE OF CONVENIENCE

14. *The balance of convenience favours the grant of the interim order to the applicant. If the interim order is not granted the applicant will suffer prejudice since the second respondent will pay out the pension benefits to the first respondent and the applicant will be robbed.”*

The respondent contests:

- “6. *I must mention at the outset that I was never charged by the applicant whilst employed for misappropriation of the above sum nor was a finding of guilty on same made by any disciplinary tribunal and/or The Teaching Service Commission which is responsible for disciplining teachers. I was only charged for not producing receipts for the school expenditures. The reason I could not produce the receipts was because of the following reasons:*

- 6.1 *In around November 2011 I was told by the Schools Manager Mr. Steven Motsa that auditors are coming to the school in January, 2012 to audit the school books and I must make available all the books, receipts, vouchers and folders or slips. I then took all the schools financial books, receipts, school slips, vouchers, cheque books, used cheques and cheques*

stubs and placed them in my desk in December 2011. At that time I was the only one who had access to my office.

6.2 *At the same time I was stopped by the applicant from signing and/or making and/or approving school cheques and/or payments.*

6.3 *Soon afterwards I fell seriously ill with my husband Mr. Napoleon Ntezinde. I was unable to return to the school until the 21st February 2012. When I returned I found that the lock system at the door to my office had been changed without my knowledge. I was then given a duplicate key and the deputy head-teacher MsSihawukeleni Khumalo kept the original. I also found that a new secretary had been employed in my absence. This meant that the deputy had access to my office as well as the schools manager.*

6.4 *To my shock I found that most of the receipts, expenditure cheque files, used cheque stubs, bank statements and some payments were missing on my desk and later noticed that some had been moved to a place unknown to me. I looked for these documents without success. The auditors then arrived in October – November 2012 and carried out the audit. They requested the financial documents and I provided them those that were readily available and told them that some had been lost in my absence as set out above. They carried on with the audit nonetheless.*

6.5 *Later in the year 2012, the auditors then requested supporting documents to certain payments made and found out that those supporting documents had been lost. For example, cheque stubs, receipts, bank statements, two expenditure files for 2006 and used cheques. I tried to get all these supporting documents and failed as they were stolen by unknown persons in my office during my absence. I even went to the bank to request the used cheques and the bank advised me that it will charge the school close to E1,000,000.00 (One million Emalangeni) as bank charges for the lost cheques for the period between 2006 – 2011*

and due to the fact that I did not have that amount I was unable to get help, nor to expose the school to further expenses.

- 6.6 *On or about July 2013 I managed to find two expenditure files that were hidden by someone in the storerooms where we store cleaning materials. I also found some of the lost receipts. I made copies of all these documents and then submitted to the Auditor General on the 1st day of October, 2013.*

7. *I must mention that the Auditor also requested my personal bank statements for the period in question (2006 – 2011) which I provided. There was nothing I heard from her nor to explain any transactions from my bank statements. I assumed that all was in order as I had not misappropriated any amounts from the employer.*

9. *My disciplinary hearing could not take off as I was repeatedly sick until I finally retired on the 12th September 2014. I intended to plead not guilty to the charges as I am convinced that it was my deputy and the School Manager/Grantee that stole all the supporting documents to spite me.*

11. *Furthermore, I was not the only one who made payments on behalf of the school during the period 2006-2011. I made the payments with the approval of the School Chairman Mr. Mandla Mabuza and in all the payments he approved it as was for the school activities and then there were supporting documents. The fact that I do not have supporting documents, I am advised, does not mean I misappropriated the sum of money as alleged. All the money was used for school activities.*

**POINT IN LIMINE – APPLICATION LACKS NECESSARY
AVERMENTS NECESSARY TO SUSTAIN A CAUSE OF ACTION**

13. *The applicant is seeking a Mareva interdict or an anti-dissipation order. The object is to restrain me for dissipating or alienating the pension*

money pending the finalisation of the action proceedings. The legal requirements for an interdict are well known:

13.1 a prima facie right;

13.2 a violation or well grounded apprehension of that right to be infringed;

13.3 the applicant has no satisfactory remedy and the applicant will suffer irreparable harm if the interdict is not granted; and

13.4 the balance of convenience favours the grant of the interdict.

14. I am advised and verily believe that the applicant has failed dismally to prove any prima facie right to the relief they seek. The application lacks necessary averments to sustain the cause of action. There is no finding that I am guilty of misappropriating the sum of money by any disciplinary tribunal whilst employed by the applicant. I never also admitted guilty of the said misappropriation of funds charge. Furthermore, there was no money found in my bank account belonging to the applicant. All the evidence show that I lost only supporting documents and I have explained that some people stole them not that they were not available. I was also not charged for misappropriating those sums of money. I am therefore not guilty on the face of the evidence before Court of misappropriating any monies. The applicant has therefore failed to establish any prima facie right necessary to sustain a cause of action.

15. Furthermore, I am advised that the applicant had to plead and prove that I will dissipate my assets and my conduct shows that I am likely to do that. This has not been pleaded by the applicant and that is fatal to this application. There are no reasons advanced by the applicant why I will dissipate my assets. In fact, it is not the applicant's case that I do not have any assets apart from my pension. The fact of the matter is that my family has a number of assets in motor-vehicles, cows, and other movable assets. I had not been alleged that I have spirited my assets out of the jurisdiction of the Court or dissipated them. On that ground again

the applicant's application stands to be dismissed, with costs, as it lacks necessary averments to sustain a cause of action."

- [2] In its heads of argument, the applicant disputes that its application is based on the anti-dissipation interdict. The applicant has referred the court to section 32 (3) of the Retirement Funds Act 2005.

Adjudication

Principle of law

- [3] As correctly pointed out by respondents' Counsel, the *classicus* case of **Setlogelo v Setlogelo 1914 AD 221** sets out the requirements of an interlocutory interdict. **Innes JA** at page 227 propounded:

"The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any ordinary remedy."

- [4] On the point advanced that in as much as a clear right might be established, the application ought to fail by reason that no irreparable harm had been established, the learned judge stated:

"The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in Van der Linden's Institutes where he enumerates the essentials for such an application. The first, he says, is a clear right, the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt. In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party: Van derLinden, Inst. (3, 1, 4,7). But he certainly does not lay down the doctrine

that where there is a clear right the injury complained of must be irreparable in order to justify an application for an interdict.”

[5] Expounding on the above procedure, **Ettlinger AJ** in **Ndauti v Kgami & Others 1948 (3) S.A. 27** at 36 pointed out as follows:

“In my view, this means that where the right is clear, the damage need not be irreparable, but where the right is disputed and is therefore open to doubt the Court has a discretion, to be exercised equitably according to the magnitude of the doubt, and the balance of convenience.”

On the preponderance of probabilities, the learned judge meticulously concluded:

“In my opinion the Court has, in every case of an application for an interdict pendente lite, a discretion whether or not to grant the application and it should exercise this discretion upon a consideration of all the circumstances and particularly upon a consideration of the probabilities of success of the applicant in the action, and the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to be right, and that which the applicant, on the other hand, might sustain if the application is refused and he should ultimately turn out to be right. For though there may be no balance of probability that the applicant will succeed in the action it may be proper to grant an interim interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application even where the probabilities are in favour of the applicant if the balance of convenience is against the grant of interim relief.”

[6] **Grobler, J** in **Van Den Berg v O. V. S. LandbouIngenieurs (EDMS) BPK 1956 (4) S.A. 391** summarized the principle on interdict *pendete lite* as follows:

“The degree of proof required for success in an application for a temporary interdict in cases where irretrievable loss is concerned is as follows: (1) The applicant cannot succeed unless the Court is convinced, after weighing all the evidence and on a balance of probabilities, that the right which the applicant

wishes to protect is at least “apparent” in accordance with the requirement postulated in van der Linden’s *Judicieel Practycq*, 2.19.1 or at least that prima facie proof has been adduced of such right. Proof that the applicant has a reasonable prospect of success in the main action is normally to be regarded as constituting prima facie proof. (2) But even if the applicant adduces prima facie proof of his right or a reasonable prospect of success in the main action, it does not necessarily follow that he must succeed, although such evidence is normally sufficient. (3) If such minimum requirement as regards evidence is satisfied, the Court must, after it has weighed the prejudice or damage which the applicant may suffer from the refusal of the interdict against the prejudice or damage which the respondent may suffer from the granting of it, be convinced that the evidence adduced is sufficient and strong enough to justify the interdict asked for.”

[7] Applying the above principle, I consider section 32 (1) (2) (a) and (3) of the Retirement Fund Act 2005 which stipulates as follows:

“(2) A retirement fund may deduct an amount from the member’s benefit in respect of:-

(a) an amount representing the loss suffered by the employer due to any unlawful activity of the member and for which judgment has been obtained against the member in a Court or a written acknowledgment of culpability has been signed by the member and provided that the aforementioned written acknowledgment is witnessed by a person selected by the member and who has had not less than eight years of formal education.

(3) If for any reason, except death, a member is unable or unwilling to acknowledge any debt contemplated in subsection (2) (a), then the employer shall apply to the Court for an order authorising him to make a deduction from the member’s benefit up to an amount equal to the debt.”

[8] The above cited section gives an employer and *in casu* applicant, the right to make deduction from the 2nd respondent of “an amount representing the loss suffered by the employer due to any unlawful activity of the member”.

[9] *In casu*, it is not in issue that 1st respondent is a member of the fund and applicant her employer. To me this section points out to a clear right in favour of the employee, applicant.

[10] The respondent has submitted that the applicant failed to establish irreparable harm. The applicant having established a clear right and in following the *ratio decidendi* in *Setlogelo supra viz.*, “*But he does not say that where the right is clear the injury feared must be irreparable. The element (irreparable harm) is only introduced by him in cases where the right asserted by the applicant, though prima facie established, is open to some doubt*”, it is my considered view that the applicant need not establish any irreparable harm by virtue of the right asserted being clear and not open to some doubt.

[11] I appreciate that the 1st respondent has averred that the applicant has no case against her and therefore its prospect of success in the main action are slim. Again as evident from the decision of his Lordship **Ettlinger AJ** *supra* that “*For though there may be no balance of probability that the applicant will succeed in the action, it may be proper to grant an interim interdict where the balance of convenience is strongly in favour of doing so..*” It is my considered view that on the totality of the circumstances of this case, the balance of convenience favours a grant of the interlocutory interdict. The totality of the circumstances is that, the applicant has based the main action on the findings of an audit report. The applicant did invite the 1st respondent to a disciplinary hearing but 1st respondent failed to attend for reasons attributed at the instance of 1st respondent. These reasons persisted until 1st respondent fell out of the employ of applicant due to her retirement age. The applicant therefore has no other remedy but to proceed under section 32 of the Fund.

[12] In the totality of the above, I enter the following orders:

1. Applicant's application is granted;
2. The 2nd respondent is hereby interdicted or restrained from paying out any pension benefits to the 1st respondent pending further directive from this court based on final determination of case No.1366/2014;
3. Costs to be cost in the main action.

M. DLAMINI
JUDGE

For Applicant: N. Mavuso of The Attorney General's Chambers

For Respondents: D. Jele of Robinson Bertrams