IN THE HIGH COURT OF SWAZILAND

Case No. 1130/2016

In the matter between

STANDARD BANK SWAZILAND LIMITED	**Plaintiff**
and	
SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS	**1st Respondent**
DUMISANI MAZIBUKO N.O. (JUDGE OF THE IN THE INDUSTRIAL COURT	**2nd Respondent**
MATHOKOZA MTHETHWA N.O.	**3rd Respondent**
ANDREAS NKAMBULE N.O.	**4th Respondent**

Neutral citation:	*Standard Bank Swaziland Limited v Swaziland Union of Financial Institutions and Allied Workers* (1130/2016) [2016] SZHC 111 (05 July 2016)
Coram:	**MAMBA J**
Heard:	**28 June, 2016**
Granted:	**05 July, 2016**

[1] Civil Law and Procedure – urgent application per Rule 6 (25) (b) of the rules of Court. Applicant must in his Founding Affidavit state clearly and precisely why the application is urgent and why he would suffer irreparable or irreversible harm or prejudice if the matter is not heard urgently, or in other words why he would not be afforded adequate relief if the matter is heard in due course.

[2] Civil law and Procedure – applicant filing application accompanied by a Certificate of Urgency. Both founding affidavit and certificate failing to state the facts giving urgency to the matter and why the applicant may not be granted adequate relief in due course if the matter is not enrolled and heard as a matter of urgency. Application failing to meet the required threshold and dismissed with costs.

[3] Civil Procedure – application for recusal of presiding judicial officer must be made before that judicial officer. A recusal application under the guise of a review application is fatally defective and cannot succeed [obiter].

JUDGMENT

[1] The Applicant has filed this urgent application seeking, *inter alia*, for an order:

> '3.1 Reviewing and setting aside the decision/ruling of the Industrial Court handed down on 20 and 24 June 2016 to the effect that the parties should re-argue the preliminary points of law.
>
> 3.2 Remitting the matter back to the Industrial Court for it to be heard in its entirety before a differently constituted court.'

[2] The facts upon which this application is based are common cause and may be summarized as follows:

> '7. On 17th June 2016 and under Industrial Court case no. 179/2016, the applicant launched an urgent application, wherein it sought to interdict the respondent and its members

from embarking upon a strike action that was scheduled to commence on Tuesday 21st June 2016. The specific orders sought by the applicant were as follows:

7.1 ***"3.1 Interdicting and restraining the respondent and its members from pursuing and/or embarking upon a strike action scheduled to commence on Tuesday 21st June 2016.***

3.2 Declaring that the respondents are not entitled to pursue a strike action in relation to the dispute as crystalised during negotiations and certified in the certificate of unresolved dispute.

7.2 The matter was enrolled for hearing on Monday 20th June 2016 at 14:30 hours. The matters was eventually heard at 16:30 hrs, due to the courts roll being congested.

8. In its answering affidavit, the first respondent raised two preliminary points of law namely; first they contended that the matter was not urgent or that the urgency was a creation of the applicant. Second, they contended that the applicant had not made out a case for the grant of an interdict.

9. The applicant filed a replying affidavit and also prepared heads of argument which were duly filed in court. At the time of the hearing, the court was in possession of a full book of pleadings as well as the applicant's heads of argument.

10. At the commencement of the hearing, the court ruled that it wanted to hear arguments on the preliminary points of law in order to decide whether or not to enroll the matter to be heard on the merits. This was a decision of the court, in view of the fact that the first respondent's attorney had indicated that he was in the hands of the court, when asked if the matter should be dealt with on a piecemeal basis i.e. only on the preliminary points. The applicant's attorney had indicated that he would be comfortable in dealing with the matter in its entirety.

11. The first respondent's attorney then addressed the court in support of the preliminary points of law. The applicant's attorney then answered with the first respondent's attorney being given the procedural right to reply. Argument was completed at about 18:00 hrs and the court indicated that due

to the urgency and sensitivity of the matter, it would deliver an *ex-tempore* ruling. Accordingly, the court then retired to chambers in order to prepare their ruling.

12. At approximately 18:35 Hrs, and on resumption, the court made the following ruling (I am not quoting the entire ruling at this stage but a full transcript shall be attached to this application in due course).

"…The issues that have been raised in this matter are not straight forward issues, they require us to consider very carefully especially the question whether there is a dispute of right or dispute of interest in the matter before court. We therefore say that by 21st June which is Tuesday, the parties can file written submissions and we come back for argument on Friday 24th June, in the meantime we order that the status quo be maintained because we do not know what the outcome is but we do not see any prejudice because if by Friday it turns out that the union are entitled to strike, they can strike, the effect will still be the same.

If not, there will be restrained but it will be dangerous to decide a serious matter like this within a space of a few minutes, the interest of the parties may be compromised

because we have not been given enough time to consider and one of the parties submitted heads and we have not even read the heads that have been file, so justice cannot be done, so that is the order gentlemen. Do tell your clients that the matter has not be finalized, please restrain your clients from any further breach of law until then, because that will jeopardise the matter …"

…

15. When the matter resumed on Friday 24th June, the court directed that the parties (applicant and respondent's attorneys) should once again argue the preliminary points of law together with the merits of the matter. The applicant's attorney (Mr Jele) objected to this approach, contending that to his understanding, the preliminary points had been argued and were awaiting determination by the court. Mr Jele indicated that he was only prepared for arguments on the merits of the matter and that the applicant would be prejudiced if required to reargue the preliminary points particularly because, he was unprepared on that score.

16. The court reaffirmed its position but in the course of so doing, also had occasion to respond to a query raised by the

respondent's attorney (Mr Muzi Simelane). Mr Simelane suggested to the court that in view of the fact that it had heard argument on the preliminary points, would it not be advisable for the court to simply have regard to his heads of argument and thereafter issue a ruling. The court insisted that it wanted to hear argument once again and proceeded to make a statement that raised a sense of disquiet on the part of the applicant. In response to this suggestion from Mr Simelane, the court said words to this effect. We have sought in vain to obtain a transcript of the ruling made by the court on Friday 20th to no avail. I refer the Honourable Court to the supporting affidavit of Nontsikelelo Msibi in this regard."

[3] Based on the above facts, the applicant submits that:

'21. … the decision of the Industrial Court to require that the parties re-argue the preliminary points of law, and in particular in reference to the comments made by the Court on Friday 24 June 2016 is irrational, and unreasonable. The Court has exhibited an element of bias in favour of the respondents, by seeking to afford them a further opportunity to make submissions on an issue that they had not only advanced an argument but had also had occasion

to reply. They respondent never sought a postponement or even an opportunity to amplify its submissions on the preliminary points of law.

…

23. The applicant is entitled to a fair hearing before [an impartial] Court and is entitled to the determination of issues that have been argued before the Courts. …

24. The comments attributed to the Honourable Judge, indicate an inclination towards the Respondent, which compromises the applicant's right to a fair hearing. I submit that it is in the interests of justice that the decision to proceed to re-argue the preliminary points before His Lordship Justice Mazibuko and the Court as constituted, be set aside and that the matter be remitted back to the Industrial Court to be heard before another Judge and members.'

[4] I have quoted the above excerpts from the applicant's founding affidavit to set out the grounds upon which the application is based or founded. The above excerpts constitutes, either individually or cumulatively, or jointly, the crux of the applicant's complaint or reason for dissatisfaction with the ruling of the learned Judge in the Court *a quo*. In a word, the applicant submits that he was brazenly biased in favour of the respondent. For this reason, he is conflicted and therefore disqualified from hearing

the matter and the case must thus be heard by a differently constituted court that would be impartial and bring its mind to bear fairly on the issues at hand.

[5] The second respondent has not filed any papers in these proceedings. The first respondent has. First, the first respondent submits that the applicant has failed to state why the matter is urgent and why the applicant cannot be afforded substantial redress at a hearing in due course. Secondly, the first respondent submits that the applicant has failed to set out exceptional circumstances why this Court should intervene in a matter that has not been completed by the court *a quo*.

[6] On the merits, the first respondent submits that there was no bias exhibited by the Court inasmuch as the court did not rule that it needed only the first respondent to argue its preliminary points of law. Instead, and quite fairly, the court invited both sides to re-argue the points in question and this was after pointing out that the matter and in particular the points raised were very complex and yet very important for both parties. There was, the first respondent argues, nothing amiss, irregular, irrational, unfair or unreasonable about this.

[7] The applicant did not file a reply to the first respondent's answering or opposing affidavit and the matter was argued on the two sets of affidavits already stated. Again, in argument before me, Counsel for the applicant tactfully said nothing at all about the urgency of the application and the respondent's objection thereon. I say tactfully or adroitly, because this may be considered the best way of conceding the point without actually saying so. Indeed, in its founding affidavit, the applicant has not stated that this application is urgent. It had to say so, however, and also state the grounds for saying so and why the applicant is of the view that it would not be accorded adequate or sufficient redress in due course if the matter is not heard urgently. This requirement of the law has almost become a cliché in this jurisdiction. It has certainly become an almost tired exordium of any application sought to be heard on an urgent bases. See *Mthembu, Petros v Robinson Bertram & Another 2000-2005 (1) SLR 93 at 94-95, Humphrey H. Henwood v Maloma Colliery Limited and Another 1623/94, Nhlavana Maseko and 2 Others v George Mbatha and Another Appeal Case 7/2005, judgment delivered on 24 June 2005* and *New Mall (Pty) Ltd v Tricor International (Pty) Ltd (302/2012) [2012] SZHC 175 (10 August 2012).*

[8] This Court is, however, alive to the fact that Counsel for the applicant does state in his certificate of urgency that the matter is urgent. In this

regard, Counsel merely alleges that '…there is good cause for the applicant to obtain the order on an urgent basis so as to prevent the implementation of the unfair decision…' This assertion is of course insufficient and does not address the issue or incident of irreparable harm in the event that the matter is not heard as a matter of urgency. But more importantly, the averments of urgency must also be stated or contained in the founding affidavit. The certificate of urgency is supplementary and subservient to the said affidavit.

[9] From the foregoing, I would therefore hold that the applicant has failed to satisfy the peremptory urgency requirements set out in rule 6 (25) (a) and (b) of the Rules of this Court. Consequently this application is dismissed with costs.

[10] For the sake of completeness of the issues presented by and in this application, the following point bears mention herein. Although this case is couched or presented as an application for review, it is truly or essentially one for the recusal of the second respondent from hearing the case. The reason for this recusal is that the applicant says he has shown or exhibited bias in favour of the first respondent. When I put this point to Counsel for the applicant during argument before me, he was unable to

dispute or deny this. I do not think that any argument to the contrary would have been tenable or logical.

[11] It is trite that an application for the recusal of a judge must be made before the judge whose recusal is being sought. It is that judge who has to make the decision either to grant or refuse the application and state the reasons for doing so. It is only once a decision has been made that an aggrieved party may decide to take up that decision with a superior court or tribunal. There was, of course, no recusal application made by the applicant for the recusal of the second respondent. That being the case he did not make a decision on the issue of recusal.

[12] The present application, as already stated above, is an application for the recusal of the second respondent under the guise of an application for a review. This cannot be permitted or countenanced by this court. Therefore, this application stands to be dismissed on the merits as well. Again, because of the conclusion I have arrived at on the issue of urgency, this view is only obiter.

MAMBA J

For the Applicant : **Mr. Z.D. Jele**

For the 1st Respondent : **Mr. M.P. Simelane**