



IN THE INDUSTRIAL COURT OF SWAZILAND

RULING

Held at Mbabane
In the matter between:

Case No.257/2015

SOS HIGH SCHOOL

Applicant

And

BONGIWE DUBE AND 22 OTHERS

Respondents

Neutral citation: *SOS High School v Bongjiwe Dube and 22 Others (257/15)*
SZIC 55 (October 16 2015)

Coram: NKONYANE J,
*(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)*

Heard submissions : 30/10/15

Delivered judgement : 16/10/15

SUMMARY : The Applicant filed an application for stay of execution of the Court's order issued on 08th July, 2015 in its absence.

Held---The Applicant has shown that it has direct and substantial interest in the proceedings----The Applicant has also given a reasonable explanation why it did not attend at CMAC or before the Court---Application accordingly granted.

RULING 16.10.15

1. This is an application for rescission of this Court's Order which was issued on 08th July 2015.
2. The Applicant was the Respondent in those proceedings and the Respondents were the Applicants.
3. The Respondents are employed by the Swaziland Government as teachers. They are stationed at SOS High School in Mbabane.

4. The Applicant, SOS High School is a Government school. Before it became a Government school it was a private school run by an International Charity Organization by the name of SOS Children's Villages. The founder of this charity organization is Herman Gmeiner.

5. As a private school, the Applicant was paying the teachers that were employed there a stipend over and above their normal monthly salaries paid by the Government. Without notice or explanation whatsoever, the stipend was stopped. The teachers were aggrieved and they reported the matter to the Commissioner of Labour. The office of the Commissioner of Labour issued a ruling in favour of the teachers re-instating the stipend. The Applicant however did not re-instate the stipend. The teachers then decided to report the matter to CMAC as a dispute in the nature of unfair labour practice.

6. The parties were invited to a conciliation meeting. The Applicant did not attend. The CMAC Commissioner therefore allowed the party in attendance to state its side of the story. After having heard the evidence of the party in attendance, the Commissioner issued a default judgement in the following terms;

“6.1 The Respondent is ordered and directed to reinstate the stipend with effect from January 2014.

6.2 The Respondent is directed to pay all accumulated stipend arrears to the Applicants on or before the 30th April 2015.

6.3 No order for costs is made.”

7. The Applicant did not comply with the Conciliation, Mediation and Arbitration Commission (CMAC) award hence the Respondents approached the Court on 08th July 2015 seeking an order to register the default judgement in order to be able to lawfully enforce it. The application was not opposed and the Court accordingly granted the application to register the default judgement. It is this Court’s order that the Applicant now seeks to have rescinded. The Applicant has launched the application under a certificate of urgency and is seeking an order in the following terms;

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 an urgent one.*

2. *Condoning the Applicant's non-compliance with the forms, time limits and manner of service.*

3.
 - 3.1 *That an order issue to stay the execution of the Court order issued by this Honourable Court granted on the 8th July, 2015 pending the determination of the rescission application made to CMAC. An application for rescission of the default award has since been filed with the Executive Director of CMAC (annexure "A1").*

 - 3.2 *That the order sought in paragraph 3.1 above operate with an interim effect;*

 - 3.3.1 *That a rule nisi be issued calling upon the Respondent on a date to be appointment by this Honourable Court*

to show cause why the following orders should not be made final;

3.3.2 cost of suit if the application is opposed.

3.3.3 further and/or alternative relief.”

8. The Applicant’s application is opposed by the Respondents. The Respondents duly filed an answering affidavit deposed thereto by Bongiwe Dube. The Applicant thereafter filed its replying affidavit.

9. In its founding affidavit the Applicant raised a point in limine; namely, non-joinder. It was argued on behalf of the Applicant that the Respondents’ application was fatally defective for failure to cite the relevant parties. It was argued that the Teaching Service Commission, The Ministry of Education and Training and the Attorney General’s Office should have been cited as they have a direct and substantial interest in the outcome of the matter.

10. Indeed, the evidence before the Court revealed that the Respondents are employed by the Teaching Service Commission which is an agency of the Ministry of Education and Training.
11. It was argued to the contrary on behalf of the Respondents that the Teaching Service Commission or the Ministry of Education and Training have no direct and substantial interest in the matter because the stipend was paid by the Applicant from monies paid by the parents of the pupils at the school. The Respondents attached Annexure “DB7” in their answering affidavit which is an agreement for the payment of the stipend entered into by the Applicant and one of the Respondent teachers by the name of Zibelezenkosi Ntsikeni.
12. This agreement however was signed by the parties on 05th March 2000, before the school was taken over by the Swaziland Government in 2006. In 2006 the Applicant and the Swaziland Government entered and signed a Memorandum of Agreement in terms of which the Primary School and the High School (the Applicant) were transferred to the Swaziland Government. In terms of Article 1 it was agreed that;

“1. THE GOVERNMENT WILL

1.1 take over from SOS Swaziland the operations and management of the Primary and High School in accordance with Government policies and regulations.

1.2 Provide, manage and remunerate the teaching staff of the schools according to Teaching Service Commission policies, procedures and regulations.....”

In terms of Article 2.5 the parties agreed that SOS Swaziland will

“2.5 Cease to provide any additional monthly allowance or remuneration to teachers and support staff.”

13. The agreement is clear that the Applicant shall, as on 11th January 2006, when the agreement was signed, cease to provide the stipend to the teachers.
14. It was argued on behalf of the Respondents that the stipend is paid directly by the parents of the pupils at the school. The parents of the pupils or the school committee were not however cited in these proceedings. Since the Applicant was taken over by the Government in 2006 the Government

clearly has a direct and substantial interest in these proceedings. The Court aligns itself with the observations by the Supreme Court in the case of **The Commissioner of Police and Another V. Maseko, Civil Appeal Case No. 3/11**, where the Supreme Court stated that;

“non-joinder is a matter that no Court, even the latest stage in the proceedings can overlook, because the Court of Appeal cannot allow orders to stand against persons who may be interested, but who had no opportunity to state their case.”

On the evidence before the Court, the Swaziland Government having taken over the Applicant school, there is no doubt to the Court that it does have a direct and substantial interest in the proceedings.

15. On the question of *lis pendens*, it was argued on behalf of the Respondents that there was no matter pending before the Executive Director of CMAC. The Respondents’ representative argued that there was no matter pending before the Executive Director of CMAC because the application by the Applicant for the rescission of the default award was filed outside the fourteen days allowed by the law. We do not agree with the Respondents’ representative. Whether the application for rescission of the default award

was timeously filed or not is a matter for the CMAC Executive Director to determine. If he finds that the application was filed out of time and he has not discretion to condone the non-compliance, he will issue his ruling accordingly and the matter will be removed from his jurisdiction. Presently the matter is pending before him because he has not yet made any ruling.

(See: Noluntu Ntiwane V. Better Plan Investment, Case No.524/07 (IC), and Jabulani Dlamini V. Score Supermarket, Case No.12/08 (IC)).

16. It may well be that the Executive Director of CMAC has delayed in handing down his ruling, that however does not detract from the fact that the matter is still pending before him.

17. Since the Applicant is now a Government school, the Government should be joined as of necessity. **Herbstein and Van Winsen “The Civil Practice of the Supreme Court of South Africa”, 4th edition** dealing with this subject stated as follows at page 170;

“If a third party has or may have a direct and substantial interest in any order the Court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party he is a necessary party and should be joined in the proceedings, unless the Court is satisfied that he has waived his right to be joined. Such a person is entitled to demand as of right he be joined as a party and cannot be required to establish in addition that it is equitable or convenient that he should be joined as a party. In fact, when he is a necessary party in this sense the Court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises.”

In the present case there is no doubt that the Swaziland Government is a necessary party as the Applicant is now a Government school.

18. The matter was thoroughly argued and all relevant issues adequately canvassed before the Court. There will therefore be no prejudice to any party in the Court issuing a final order saving the parties time and unnecessary costs.

19. Taking into account all the circumstances of this case, the interests of justice and fairness, the Court will make the following order;
- a) The point of law relating to non-joinder is upheld.
 - b) The point raised that the matter is still pending before the Executive Director of CMAC is upheld.
 - c) Order for stay of execution of this Court's Order issued on 08th July 2015 pending the determination of the rescission application is granted.
 - d) The application is accordingly dismissed but the Respondents are granted the leave to file a fresh application after the matter is finalized at CMAC.
 - e) There is no order as to costs.

The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant: Mr B. Sengwayo
(Attorney – General’s Office).

For Respondents: Mr A. Fakudze
(Labour Law Consultant)