



**IN THE INDUSTRIAL COURT OF ESWATINI**

Case No. 122/18

In the matter between:

**MBONGENI NKAMBULE**

Applicant

**And**

**MAJOZI SITHOLE N.O**

1<sup>st</sup> Respondent

**THE CENTRAL BANK OF SWAZILAND**

2<sup>nd</sup> Respondent

**In re:**

**MBONGISENI NKAMBULE**

Appellant

**And**

**MAJOZI SITHOLE**

1<sup>st</sup> Respondent

**THE CENTRAL BANK OF SWAZILAND**

2<sup>nd</sup> Respondent

**Neutral citation:** Mbongiseni Nkambule v Majozi Sithole and Another (122/2018)  
[2018] SZIC 63 (03 July 2018)

**Coram:** NSIBANDE S. JP

(Sitting with Nominated Members of the Court Mr N. Manana  
and Mr M. Dlamini)

**Heard:** 25 May 2018

**Delivered:** 3 July 2018

### **RULING**

[1] The applicant approached the Court on a certificate of urgency primarily seeking an order staying the execution of this court's order of 27<sup>th</sup> April 2018 pending the prosecution of an appeal he has noted in the Industrial Court of Appeal against that order. The applicant being dissatisfied with this Court's order dismissing his application to interdict a disciplinary hearing to which he had been called, exercised his right to appeal against the ruling by noting his appeal on 30<sup>th</sup> April 2018.

[2] It is trite that the noting of an appeal in terms of **section 19(1)** of the **Industrial Relations Act 2000** as amended does not stay execution of the Court's orders unless the Court, on application directs so, in deciding whether or not to grant a

stay of execution, the Court must exercise its discretion in a fair and equitable manner based on the merits of each case.

[3] In the case of **Phyllis Phumzile Ntshalintshali v Small Enterprise Development Company IC Case No. 88/2004** the Court set out the following as factors to be considered in the exercise of its discretion;

1. *The potential of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be refused;*
2. *The potential of irreparable harm or prejudice being sustained by the appellant in the appeal if leave to execute was to be granted:*
3. *the prospects of success on appeal, including more particularly whether the appeal is frivolous or vexatious or has been noted with the bona fide intention of seeking to reverse the judgement but for some indirect purpose to gain time or harass the other party; and*
4. *where there is potential of irreparable harm to both appellant and respondent, the balance of hardship or convenience, as the case may be.*

[4] In opposing the application the respondent argued that the applicant had not satisfied the peremptory requirements required to move this Court to exercise

its discretion to grant a stay in execution. First, the applicant was said to have failed to demonstrate that real and substantial justice requires that the judgement of the court be suspended. Secondly, that he had failed that there was a well-grounded apprehension that he would suffer irredeemable prejudice if the order is not granted. In particular, it was said he had not demonstrated that he does not have adequate alternative remedies. Thirdly that the prospect of success on the merits were limited as the matter was grounded on the right of the employer to discipline which right was unlikely to be taken away by any appeal.

[5] The applicant in his papers has stated that he stands to suffer irreparable harm if the stay of execution is refused because should he be successful in his appeal it may be that the respondent will have made an adverse finding against him at the disciplinary hearing thus making his appeal victory hallow. Essentially, he says should the stay be refused he will be forced to attend the disciplinary hearing where there is a chance that the respondent may deem it fit to dismiss him from its employ thus losing his job to his and his dependent's detriment and while awaiting the prosecution of his appeal. Victory at the appeal court would, in such circumstances be academic.

Applicant further states that his prospects of success at appeal are good but adds that this court should be reluctant to venture into matters that are for the Court of Appeal to decide, in other words, that it is now for the Industrial Court of Appeal to decide whether the appeal noted has any merit or not.

[6] The applicant's appeal while primarily seeking to overturn a decision directing him to place before the disciplinary chairperson whatever preliminary issues he has regarding the legality of the disciplinary process also challenges the Court's striking out of minutes of respondent's executive committee meeting. While we are of the view that the prospects of the appeal are not good we cannot agree with the respondent that the appeal is frivolous and designed solely to frustrate the disciplinary process. As the court said in **Phyllis Ntshalintshali supra**, we must deal with the issue of prospects of success and '*particularly look at the question as to whether the appeal is frivolous and vexatious or has been noted not with bona fide intention of seeking to reverse the judgement but for some indirect purpose....*'

In our view the Industrial Court of Appeal may well come to a different view on the Court's initial decision.

[7] Regarding the issue of irreparable harm and an injustice being occasioned to the applicant if a stay of execution was to be denied, we take cognizance of the fact that the interests of both parties must be balanced. While it may seem that the applicant has an alternative remedy in pursuing an unfair dismissal case (in the event that a stay is refused and he is ultimately dismissed by the respondent prior to the hearing of the appeal) our view is that that remedy is prejudicial to the applicant in that he will have lost his job and status and will have to wait a number of years before he actually receives any justice. In the circumstances we are of the view that while both parties stand to suffer some prejudice by the granting of a stay in execution, the balance of convenience favours the applicant in this case. He stands to suffer more hardship if the application is refused but he succeeds in his appeal.

[8] In the circumstances we make the following order:

1. **The application for a stay of execution of this court's judgement of 26<sup>th</sup> April 2018 is granted.**
2. **There is no order as to costs.**

The members agree.



**S. NSIBANDE**

**PRESIDENT OF THE INDUSTRIAL COURT**

**For the Applicant:** Mr K.Q. Magagula

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