IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 205/2019

In the matter between:

NEDBANK SWAZILAND LIMITED Applicant

And

PHESHEYA NKAMBULE Respondent

In re:

PHESHEYA NKAMBULE Applicant

And

NEDBANK SWAZILAND LIMTED Respondent

Neutral citation: Nedbank Swaziland Limited v Phesheya Nkambule (205/2019) [2020] SZIC 58 (13 May 2020)

Coram: Nsibande JP
(Sitting with N.R. Manana and M.P. Dlamini
Nominated Members of the Court)

Date Heard: 20 March 2020

Date Delivered: 13 May 2020

RULING

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[1] The Applicant, Nedbank Swaziland Limited was the Respondent in the main application. It has instituted the present application under a Certificate of Urgency for an order in the following terms:

(1) "Dispensing with the requirements of the rules pertaining to urgency and permitting this matter to be enrolled and heard as one of urgency;

(2) That the Applicant's non-compliance with the rules relating to the above said forms and service be condoned;

(3) That a rule nisi do hereby issue calling the said respondents (sic) to show cause on a date to be appointed by the above Honourable Court why the following orders should not be made final:

3.1 Staying the operation of the judgement of the Industrial Court handed down on Friday 6th March 2020 pending the finalisation of the review that has been noted by the Applicant with the High Court;

3.2 Suspending the implementation of the judgement of the Industrial Court handed down on Friday 6th March 2020 pending finalisation of the present application;

(4) That orders 3.1 and 3.2 above are to operate with immediate and interim effect pending the finalisation of the matter;

(5) Costs of suit in the event of unsuccessful opposition."

[2] The application is opposed by the Respondent who duly filed his answering affidavit. The Applicant then filed its replying affidavit to the answering affidavit and the matter was argued on 20th March 2020.

[3] The Applicant employs the Respondent as a Chief Financial Officer in terms of an employment agreement entered into, by the parties, on 3rd March 2011.

[4] On 6th March 2020, the Industrial Court delivered a judgement and granted the following orders;

4.1 We direct that the Respondent reinstate the Applicant's salary forthwith with effect from his July 2019 salary. This includes all benefits due in terms of his contract of employment.

[5] In opposing the application, the Respondent raised two preliminary points. He contended that the Applicant had approached the Court with dirty hands because of its failure to comply with the judgement of the Court handed down on the 6th March 2020. Secondly he contended that the application for a stay is in fact an application for the Applicant to perpetrate its unlawful conduct of withholding his salary.

[6] The points raised are ill conceived, in our view. A litigant dissatisfied with the judgement of Court is entitled to either have that judgement reviewed or to appeal same. A party seeking to overturn

an adverse judgement is entitled to approach the Court for a stay in execution of the judgement. Where such party has demonstrated a bona fide intention to challenge the judgement, it cannot be said to be approaching the Court with dirty hands. The Applicant having advised Respondent on the 6th March 2020, after the Court's judgement was handed down of its intention to review the judgement.

[7] On receipt of the written judgement Applicant confirmed its intention and followed up with the application for a stay of execution within days. It cannot therefore be said to be approaching the Court with dirty hands. With regard to the 2nd point, it is again also ill conceived. The Court has made its judgement on the issue of the suspension without pay.

[8] The Applicant wishes to challenge that judgement and seeks an order staying the judgement pending the ruling of a higher Court. A litigant is entitled to do that and the Court's duty is to determine whether it is proper in the circumstances of the case to grant the stay of execution. In the circumstances the points *in limine* are dismissed.

[9] It is settled that the Industrial Court has the discretion to stay the execution of its order on application and that such discretion must be exercised fairly and equitably on the merits of each case. (See **Atlas Motors vs John Kunene Industrial Court of Appeal Case No. 2/2016).**

[10] In exercising this discretion the Court has to have regard to the following factors:

(1) The potentiality of irreparable harm or prejudice being sustained by the Applicant on review if execution was allowed.

(2) The potentiality of irreparable harm or prejudice being sustained by the Respondent on review if execution was denied;

(3) The prospects of success on review including whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgement but for some indirect purpose e.g. to gain time or harass the other party;

(4) Where there is the potentiality of irreparable harm or prejudice to both Appellant and Respondent, the balance of hardship or convenience as the case may be." per **Corbett JA** in **South Cape Corporation vs Engineering Management Services 1977 (3) SA 534 at 545** cited with approval in **Phyllis Phumzile Ntshalintshali vs Small Enterprises Development Company Industrial Court Case No. 88/2004**

[11] The Applicant submitted that it should not be required to pay Respondent's arrear salary until such time that another court (which may come to a different conclusion) determines so, because it will not be able to recover any loss occasioned by paying the salary should it be successful in the review application. It would suffer irreparable harm if the execution of the judgement was not stayed because Respondent by his own admission has no resources to pay

Applicant the amounts that would be due to it in the event it was successful in the review application.

[12] Secondly, the Applicant submitted that it has prospects of success in the review application because the Court abrogated its responsibility to make pronouncements that promote the object of the Industrial Relations Act whereas it had done so in previous matters; that it would be a grave injustice to execute the court order without allowing the Applicant to exhaust all its rights to challenge the judgement where the Respondent is suspected of having stolen in excess of E3 million and where he has been obstructionist in the disciplinary hearing resulting in a delay in the conclusion of same.

[13] The Respondent submitted that the Applicant has no prospects of success in the review application that he stood to suffer irreparable harm himself if execution is stayed. In his papers he set out that he has lost property and his children are suffering. He stands to lose all his property that was acquired through loans sourced from Applicant.

[14] Respondent pointed out that Applicant's prospects of success are low in the review application because despite the various issues the Applicant raises, the matter remains one for the interpretation of **Section 39 (2)** of the **Employment Act 1980** which interpretation is clear – suspension without pay cannot exceed a period of one month.

Further, there can be no irreparable harm suffered by the Applicant where it pays an employee his salary in terms of a contract of

employment – that the employee is not rendering a service is not his fault but the result of the Applicant's unilateral decision.

[15] It appears to us that the prospects of success on review are not high. We say so being alive to the fact that this Court has, in an effort to fulfil the objectives of the **Industrial Relations Act** and the **Employment Act,** has made pronouncements that have developed the law. The example given by the Applicant with regard to **Section 42** of the **Employment Act** sets out the difference between what the Courts can pronounce on to develop the law and what they are unable to do without encroaching into the legislative sphere. There is no law calling for a disciplinary enquiry prior to the termination of an employer's service however, the Court has interpreted **Section 42 (2)** as calling for a fair process to establish the reason for the termination and has established that such process is the disciplinary enquiry. In so doing the Courts have developed the law with regard to processes that the **Acts** make provisions for. They have not interpreted and put new meaning to the words of the legislature. In our view **Section 39 (2)** of the **Employment Act** does not lend itself to be interpreted in any other way than that set out in the Courts judgement. The Court cannot make a pronouncement that goes against the legislation but one that enhances the legislation. To extend the period of suspension without pay, in our view requires legislative intervention. Be that as it may we are alive to the prospect of a higher court coming to a different view, remote as it seems.

[16] Both applicant and respondent complain that they will suffer irreparable harm if they are not successful in the application for a stay of the Court's order. It appears to us that the balance of

convenience with regard to potentiality of irreparable harm falls towards the Respondent in this matter. The Applicant by its own admission, is aware that the Respondent runs private businesses including property owning flats at both Fairview and Ngwane Park. These properties were acquired through loans granted by the Applicant to the Respondent. It seems to us that if the Applicant is successful in the review application it may well turn to these properties to recover the monies paid in terms of the Court Order. On the other hand, the Respondent will not be in a position to recover his properties in the event that he is successful in the review application. He has indicated that the Applicant is intent on recovering the loans from him despite that it knows that his salary is not being paid. This in our view borders on the harassment of the Respondent. In any event we are of the view that the balance of equities favours the Respondent. He stands to suffer much more than the Applicant if the court order is stayed. His life and that of his children is unlikely to recover even if he is successful at the review application and his salary is reinstated.

[17] In the premises we dismiss the application for a stay. We make no order as to costs.

The Members agree.

Nsibande

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. Z.D. Jele (Robinson Bertram Attorneys)

For Respondent: Mr. M.L.K Ndlangamandla (M.L.K. Ndlangamandla Attorneys)