IN THE INDUSTRIAL COURT OF APPEAL

JUDGMENT

HELD AT MBABANE **Case No. 16/2019**

In the matter between:

EMMANUEL L. MAZIYA Appellant

And

ESWATINI REVENUE AUTHORITY 1st Respondent

COMMISSIONER GENERAL 2nd Respondent

CUSTOMS MANAGER NGWENYA BORDER POST 3rd Respondent

CUSTOMS & EXCISE DIRECTOR 4th Respondent

COMMISSIONER CUSTOMS 5th Respondent

Neutral citation	:	***Emmanuel L. Maziya vs Eswatini Revenue Authority and 4 Others (16/2019) [2020] SZICA 19 (8th May, 2020)***
Coram	:	**M. Dlamini AJA, C. S. Maphanga AJA, M. Langwenya AJA**
Heard	:	**8th April, 2020**
Delivered	:	**8th May, 2020**

Jurisdiction : ***The cardinal rule is that a decision must be informe*****d.** ***By all the parties who shall be directly and substantially affected by it. Anything outside this ambit remains to be a directive, order or standpoint and certainly not a decision.[26] There are a number of factors for consideration before a matter can be declined to be adjudicated upon by the Industrial Court without going via CMAC. Section 8 of the Industrial Relations Act read with sections 17 and 65 as well canvassed by my brother T. Dlamini AJA in Nxumalo's case[1] is not conclusive. Litigants must bear in mind the provisions of Rule 14 and 15 promulgated in 2007 in terms of section 9 of the Act. [27] So paramount is the audi alteram partem as a principle of natural justice that a litigant who with good cause shown, laments such right must be given redress in a competent court of law. [29]***

Urgency : ***…the determination of urgency is related to form and not substance. The position of the law that it is undesirable that matters be decided on technicalities than their merits must find place in industrial matters [32] Where a litigant can establish exceptional circumstances, then the court ought to relax the rules of procedure and treat the matter as urgent.[35] …the interest of the respondents must be looked at, viz., that the respondent will not suffer any irreparable prejudice if the rules are relaxed.[40]***

By M. Dlamini AJA. C. Maphanga and M. Langwenya concurring

Summary: In the *court a quo*, appellant, by means of a certificate of urgency, sought for a declaratory order against respondent's conduct of stopping his salary as an unfair labour practice on ground that there was no disciplinary hearing prior. He also prayed for an order staying his transfer pending internal process. The respondents successfully raised *inter alia*, lack of both urgency and jurisdiction of the *court a quo*.

The Parties

[1] The appellant is a liSwati adult. He is a resident of Ngwenya, region of Hhohho.

[1] The Attorney General v Sayinile Nxumalo (14/2018) SZICA 06 (24 October, 2018)

[2] The 1st respondent is a parastatal body so established by an Act of Parliament and is tasked among other duties to collect customs duty on behalf of the government. Its principal place of business is situate at Ezulwini Valley, region of Hhohho.

[3] The 2nd respondent is the Chief Executive Officer of 1st respondent. He holds fort of 1st respondent therefore.

[4] The 3rd respondent is appellant's immediate supervisor at his work station. He is stationed at Ngwenya Border Gate, Hhohho region.

[5] 4th respondent is second in charge of all customs and excise activities at the border posts and gates in the Kingdom. He is based at 1st respondent's principal place of business.

[6] The 5th respondent is at the apex of customs and excise department. He is stationed at 1st respondent's head office as well.

The Parties' averments *a quo*

The appellant's case

[7] In his lengthy founding affidavit, the appellant deposed that he was employed by the 1st respondent in February 2014 as an assistant custom's officer and stationed at the Ngwenya border gate. In

September, 2018 his woes began when one of his supervisors advised him that he had been transferred to Mhlumeni Border Gate with effect from January 2019. He reacted by immediately registering his objection to the transfer raising a number of grounds. One main ground was that he ought to have been consulted. He requested his supervisor to suspend the transfer for a year in order to put his house in order following that he had incurred financial debts following his recent wedding expenses.

[8] Even though he asserted that he was occupying 1st respondent's flats, it was his averment that taking up a transfer to Mhlumeni would dig deep into his pocket as he had to pay for rentals alternatively travelling expenses from Ngwenya to Mhlumeni. It was further appellant's contention *a quo* that his supervisor then advised:

> *"…he has put all my concerns on a spread sheet excel and same shall be forth deliberated by Customs Management Team (CMT) and I shall be advised if my request has been successful or not."*[2]

[9] No response was received from respondents until January 2019, the effective date of his transfer. On the 8th January 2019 his station supervisor enquired from him if he was aware of employees' transfers. He replied in the negative. His supervisor told him that he was under the impression that his manager had advised him. He decided to approach the manager on the subject. The manager

[2] **Paragraph 17 of record of appeal at page 11**

advised him that he expected him to be at his work station as there was no letter serving before him of a request to stay the transfer for a year. He decided to take up the matter with the Human Resource Manager who referred the matter back to his department.

[10] Customs Manager, at department level, advised him to formalise his request in a form of a letter. He obliged. He was, however, told that his letter was belated. He resorted to return to Human Resource Manager who convened a meeting. The Director stated that the matter was news to him. He too referred the matter to his department. However, on 12th January 2019 the manager advised him to return on 17th January 2019.

[11] He decided to escalate the matter to the 5th respondent. The 5th respondent ruled that his request was too late. He should comply with the order of transfer. He then wrote to 2nd respondent who remitted the matter to the department to be deliberated in full before it could be entertained by him. The appellant then prayed as follows:

> *"3. Declaring the Applicant's salary stoppage by the Respondent an unfair labour practice.*
>
> *4. Directing the Applicant's salary stoppage by the Respondent an unfair labour practice.*
>
> *5. That the Applicant's transfer be stayed pending all Respondent's internal process.*

6. *That a **rule nisi** do issued to operate with interim and immediate effect in terms of prayer 3, 4 and 5, returnable at date to be issued by the above Honourable Court.*

7. *Costs of suite."*[3]

Respondents' answer

[12] The respondents raised three points of law, *viz.*, lack of jurisdiction and urgency and the doctrine of the unclean hands. On the merits, the respondent averred that in 2018 it engaged on extensive briefing of its employees on a transfer and relocation allowance policy. Respondent then asserted:

> *"27. This category of employees was made aware of the fact that the employer can transfer them and before transferring them, a three **[3]** months' notice will be given to enable the affected employee to arrange his or her affairs that will include raising any grievance relating to the transfer.*
>
> *28. In essence, the manager, **Mr. Ntshakala** was informing the Applicant that it was now his turn to be transferred, and such transfers are merely relations of our staff members, this is meant, primarily, to promote the employer's interests, and curb personal relationships between our staff members and the members of the business sector, which might in turn compromise our employees' performance of duties."*[4]

[3] Page 3 paragraph 3,4,5,6 & 7 of the record of proceedings
[4] Para graph 27 of page 30 and paragraph 28 of page 30 of the record of proceedings

[13] Respondents also disputed that the appellant was never consulted. It deposed in this regard:

> ***<u>"AD PARAGRAPH 15</u>***
>
> *29. Before the final decision given in January 2019, there had been engagements between the parties relating to the matter."*[5]

[14] The respondents disputed most of the advices stated by applicant as forthcoming from any of them. They also pointed out that the appellant's concerns were addressed in full. On the question of withholding appellant's salary the respondent stated:

> *"42. The issue of the salary had to be remitted back to the relevant structures and I am advised that the decision to withhold the salary came after the Applicant refused to render services. I am advised that once an employee withholds his services, the employer is not obliged to pay any salaries. The employee is therefore not entitled to be paid any salaries. This I say based on the fact that he has been given a workstation and accommodation at Mhlumeni, therefore, there is no valid reason for him to render services."*[6]

[5] Page 31 paragraph 29 of the record of proceedings
[6] Page 35 paragraph 42 of the record of proceedings

[15] The appellant replied to the answering affidavit. For the reasons that the matter was decided on the points of law raised, it is unnecessary for me to highlight the appellant's reply.

Judgement of the *court a quo*

[16] The *court a quo* identified the issue as follows:

> "*19. In determining whether indeed the Applicant's present proceeding is a review application but couched as if it is not, one would have to carefully scrutinize the pleadings as a whole and of course juxtapose them with the submissions and arguments of the respective Counsels in this matter."*[7]

[17] On this question, the honourable Justice found authority in **Phesheya Nkambule's** [8] case and quoted as follows:

> "*21. It is the view of the Court therefore that in the light of the decision in the case of* ***The Attorney-General v Sayinile Nxumalo****, once the Court finds that the employer has made a decision on the issue of the salary, the enquiry should end there as this Court has no power to review the decision of the employer* ***unless the dispute has first gone via the dispute resolution procedures provided for under Part VIII of the Industrial Relations Act…"*** *(*Own emphasis).[9]

[7] Page 112 paragraph 19 of the record of proceedings
[8] **Phesheya Nkambule v Nedbank (Swaziland) Ltd unreported IC Case No 205/2019**
[9] Page 113 paragraph 21 of the record of proceedings

[18] In other words, the court found that appellant's application was a review and therefore his first port of call had to be at CMAC. The *court a quo* then embarked on the determination of urgency as respondents challenged the applicant's application as lacking urgency. The court first held:

> "*23. As I stated earlier in this judgement, the Applicant did not bother himself to inform the Court as to when exactly his salary was stopped and how it came to be that it was so stopped."*[10]

[19] It proceeded:

> "*24. To the extent that the Applicant relies on financial hardship as a basis for urgency, it has been held that as a general principle, financial hardship does not establish a basis of urgency.* ***(See Jonker v Wireless Payment Systems CC (2010) 31 ILJ 381 (LC) at para 16)****."*[11]

[20] It concluded:

> "*25. In view of the fore going, and in this matter of the present Applicant,* ***Mr. Emmanuel Maziya****, it is my considered view that because he did not first report his dispute with the Conciliation Mediation and Arbitration Commission (CMAC), as provided for under Part VIII of our Industrial Relations Act, this Court cannot come to his*

[10] Page 14 paragraph 23 of judgement
[11] Page 14 of judgment paragraph 24

aid. Consequently, the Court will make the following order;

a) The application be and is hereby dismissed.

b) No order as to costs[12].

Grounds of appeal

[21] On the hearing date of the appeal, the court was informed that the issue of the transfer was moot on the basis that the parties had reached an agreement that appellant had accepted the transfer. What made the grounds of appeal to remain alive therefore was the issue of the withheld salary. The appellant submitted on all three grounds of appeal which were drafted as follows:

> *"1. The court a quo erred in law to rule that it does not have jurisdiction to hear and determine the Appellant's application because the Industrial Court does not have review powers, unless the matter has undergone part Viii of the Industrial Relations Act 2000 as amended.*
>
> *2. The court a quo erred in law to find that the Appellant's Application was a review, yet the primary prayers sought therein by the Applicant were declaratory in nature and injunctive as envisage by Section 8 of the Industrial Relations Act 2000 as amended. The application before the Court a quo fell squarely under, the purview of law and the Industrial Court has exclusive jurisdiction therein.*

[12] Page 14 paragraph 25 of judgement

3. *The Court a quo erred to make a determination on urgency, if its findings was that it does not have jurisdiction over the matter."*[13]

Issue

[22] The first question for determination is whether the *court a quo* correctly held that the appellant's application was one of review? The second one is whether it correctly held that the matter was not urgent in the circumstances.

Determination

Transfer

[23] It appears to me that the *court a quo* accepted annexure "EM2" as evidence that the appellant was granted a hearing. I cannot find fault in this finding. Annexure "EM2" reflects that appellant's concerns were considered on 11th January, 2019. I must point out that there is nothing wrong in law for a functionary or administrator to take a certain position and then invite the affected party later to make representation with a view to changing its mind. In this regard, it can safely be said that a decision was taken on the 11th of January, 2019 to transfer the appellant. The *court a quo* therefore cannot be impugned for holding that the appellant's first port of call was CMAC.

Withholding of salary

[13] Paragraph 1, 2, and 3 of the appellant's grounds of appeal

[24] I have taken time to scan through both the pleadings and the judgment of the *court a quo*. What transpires from both is that the respondents took the view that since the appellant did not comply with the decision of 11th January, 2019 i.e. report at his new work-station, the 'no work, no pay' rule had to be enforced against him. There is no evidence to the effect that the appellant was invited for a hearing before the 'no work, no pay' rule was invoked. It was erroneous of the respondents to adopt such a procedure, I must highlight.

Was withholding of appellant's salary a decision?

[25] From the pleadings serving before this court, it is clear that the appellant was not invited to make representation before his salary was withheld at the instance of the respondents. Put differently, the respondents relied on information provided by themselves at the exclusion of that of the appellant to reach the position that appellant's salary must be withheld. They relied on information whose source was unilateral, in short. In law, by reason that the other party did not make any submission to influence their position, they could not have made a decision.

[26] The cardinal rule is that a decision must be informed. The poser is, by who? By all the parties who shall be directly and substantially affected by it. Anything outside this ambit remains to be a directive, order or standpoint and certainly not a decision in so far as the law is concerned. Taking a good example is what the court does on a daily basis. It makes decisions after inviting both parties to make

representation. It is one thing to say the other party was invited but declined or failed to honour the invitation. In the present case, this is not the case. The evidence is that he was not consulted before his salary was stopped. For this reason alone, it could not be said that the respondents took a decision to withhold appellant's salary in the absence of any evidence to the effect that the appellant was invited to make an input to inform the decision-maker, *in casu,* the respondents. In the analysis, the appellant's matter in regard to his salary was not ripe for referral to CMAC.

Did the *court a quo* have jurisdiction therefore?

[27] I must clarify that having sought above to draw a demarcation between orders or directives at it were and decisions, by no means do I subscribe to the view that where a matter is said to be a review, it automatically follows that it must find its first port of call at CMAC. There are a number of factors for consideration before a matter can be declined to be adjudicated upon by the Industrial Court without going via CMAC. Section 8 of the Industrial Relations Act read with sections 17 and 65 as well canvassed by my brother **T. Dlamini AJA** in **Nxumalo's** case[14] is not conclusive. Litigants must bear in mind the provisions of Rule 14 and 15 promulgated in 2007 in terms of section 9 of the Act. I have discussed the circumstances on when a matter may be taken directly to the Industrial Court without going via CMAC in the case of **Adventures in Mission Swaziland vs Wisile Langwenya (19/2019) [2020] SZICA 18 (8th May, 2020)** paras 20-31. I do not wish to regurgitate the same.

[14] The Attorney General v Sayinile Nxumalo (14/2018) SZICA 06 (24 October, 2018)

[28] It suffices for me to point out that following that the appellant in the case at hand was not invited to a hearing in so far as the stoppage of his salary was concerned, this means in law he was denied his right to a hearing. **M.C.B. Maphalala AJA** as he then was, in **Rudd v Rex**[15] wisely referred to the Supreme Court of India[16] where their Lordships eloquently quoted from the English Court's decision[17] as follows:

> "*Even God did not pass sentence upon Adam before he was called upon to make his defence; 'Adam,' says God, 'Where art thou? Has thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?'"*

[29] So paramount is the *audi alteram partem* as a principle of natural justice that a litigant who with good cause shown, laments such right must be given redress in a competent court of law. In terms of section 8 of the Industrial Relations Act of 2000, the Industrial Court is clothed with exclusive jurisdiction where there is an employment contract as the underlying relationship. Their Lordships sitting as a full bench of the Supreme Court in **Zuke's** case[18] dealt at length with this position of the law. It must always be borne in mind that CMAC does not adjudicate on matters. It is tasked with conciliation, mediation and arbitration. Should CMAC fail, it must issue a

[15] (26/12)[2012] SZSC 44(30th November, 2012) at para 20
[16] Uma Nath Pandey v State of UP Air 2009 SC 237
[17] Copper v Wandworth Board of Works (1863) 143 ER 414)
[18] Ministry of Tourism & Environmental Affairs & Another vs Stephen Zuke & Another (96/2017) [2019] SZSC 37 (2019)

certificate of unresolved dispute for the matter to be determined fully by the Industrial Court.

[30] In the analysis, I must find that the *court a quo* erred in law by declining jurisdiction to hear the appellant's application with regard to the stoppage of his salary. It ought to have entertained his application.

Urgency

[31] I do appreciate that appellant's application was thrown out because of the findings that the *court a quo* lacked jurisdiction. That as it may, it is imperative to repeat the cardinal rule of procedure as laid down by their Lordships in **Nebank's**[19] case. It is captured as follows:

> *"A matter cannot be dismissed on the basis that it is not urgent but the court may decline to hear it on urgent basis and direct that it takes its normal course."*

[32] Their Lordships proceeded to outline the rationale behind this procedure. They stated that the determination of urgency is related to form and not substance. The position of the law that it is undesirable that matters be decided on technicalities than their merits must find place in industrial matters such as the present one.

Jonker's[20] Case

[19] **Nedbank (Swaziland) Ltd v Kenneth G. Ngcamphalala Civil Appeal 08/2013 para 12**
[20] **Jonker v Wireless Payment System CC (2010) 31 ILJ 381 (LC)**

[33] The *court a quo* relied on the **Jonker's** case to dismiss the appellant's application for his matter to be treated with expediency. **Snyman AJ** sitting in the Johannesburg Labour Court Division was faced with a similar submission on urgency based on stoppage of salary. **Snyman AJ** captured the arguments of the respondent as follows:

> *"In its answering affidavit the 1st respondent raised the issue that the application was not urgent because it, in essence entails a claim for the payment of money which can never be urgent or entitle the applicant's to 'jump the queue', so to speak."*

[34] The learned Judge then referred to **Jonker's**[21] case and quoted:

> *"The general rule that financial hardship and loss of income are not considered to be grounds for urgent relief was upheld in* ***Malutji v University of the North [2003] ZALC 32(LC) and Nationale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO er Andere (1990)11 ILJ 971 (T)***

[35] The honourable Justice pointed out that in as much as the court pointed out the general rule, the court proceeded in **Jonker's** case to state that there were exceptions to this general rule. Where a litigant can establish exceptional circumstances, then the court ought to relax the rules of procedure and treat the matter as urgent.

[21] supra

[36] In other words, **Snyman AJ** proposition is that the court faced with the determination for urgency should not enquire if the grounds raised refer to financial loss and hardship. The enquiry should be "has the applicant established exceptional circumstances warranting waiver of the rules of procedure?" This question must be asked regardless of whether the applicant refers to financial loss or hardship as the underlying factor to the exception circumstances.

[37] I must give an example to clarify what I mean. Scenario A; Employee A laments his employer stopping his salary even though he was at work or worse scenario, the employer hindering him from rendering his services. Scenario B: Employee B cries over his employer stopping his salary while disciplinary processes are pending. Both A and B may allege the natural consequences of withholding salary to be financial loss and hardship. I do not see why both should be treated the same by the court if they bring their applications under a certificate of urgency. I think the court should be guarded by the principle of avoiding gross travesty of justice and therefore decide each case on its merit.

[38] **Snyman** clarified on this position of the law:

> *"[T]he fact that this matter may involve issues of financial hardship and non-payment of salary as part of the basis for urgency cannot as a necessary consequence, always mean that it* ***cannot*** *be considered as one of urgency."*

[39] In the Durban division in **Mfano case** [22]the court held as guidelines to the question of urgency:

> *"The first is whether the reasons that make the matter urgent have been set out and secondly, whether the applicant seeking relief will not obtain substantial relief at a later stage."*

[40] The court proceeded to mention that the interest of the respondents must be looked at, *viz.*, that the respondent will not suffer any irreparable prejudice if the rules are relaxed. The **Minantli's** case[23] quoting from **Mfano's** case *supra* hit the nail on the head on this issue as it was propounded:

> "*In exceptional circumstances the Labour Court may intervene on an urgent basis to interdict an unfair dismissal. Thus, there is no inherent jurisdictional obstacle obtaining such relief. As the Labour appeal Court observed in the **Booyson** decision there is no closed list of factors to consider, but in my view employees should not even consider seeking this extraordinary relief if the unfairness is not glaringly obvious and of a very fundamental nature which can be easily redressed…"* (Underlined, my emphasis)

[41] Turning to the present case, it is my considered view that the court should have enquired further on this question of urgency. It was

[22] **Mfano Philemon Ntombela and 49 Others v United National Transport Union And Others Case No. D1724/2018 at paragraph 27**

[23] **Minantli and Others v Department of Infrastructure development (Gauteng Province) [2016] 36 ILJ 464 (LC) paragraph 13**

erroneous of it to take the view that because the appellant was crying financial loss and hardship, his case on urgency was a none-starter.

[42] I note that in its paragraph 23, the court noted that the appellant did not mention the period from which his salary was stopped. With due respect, the court could have easily ascertained from both Counsel on the date his salary was stopped. This is because it was not in issue that his salary had been stopped. The court, sitting as it did ought to be alive that it is a court of equity. It should not be hard and fast on upholding rules of procedure. At any rate, rules are made for the court and not the court for the rules. This adage is in line with the principles that the court must at all times strive to attain justice. That as it may, the appellant's reply does state that his salary was withheld in the month of April,[24] with the application filed on 10th May 2019.

[43] In the above, the following orders are entered:

43.1 Appellant's appeal is partly upheld.

43.2 The matter is referred back to the Industrial Court to be enrolled and heard within 10 court days from date of this judgement, to determine the question of the stoppage of salary.

43.3 No order as to costs.

[24] See paragraph 6.3 page 77 of record of proceedings

M. Dlamini AJA

I agree :

C. S. Maphanga AJA

I agree :

M. Langwenya AJA

For the Appellant : **K.Q. Magagula** of Sithole & Magagula Attorneys

For the Respondents : **B. Gamedze** of Musa M. Sibandze Attorneys