

IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 14/2020

In the matter between:

VACLAV VANEK

Appellant

and

LOMATI MINE (PTY) LTD

Respondent

Neutral citation: *Vaclav Vanek v Lomati Mine (Pty) Ltd (14/2020) [2021]*
SZICA 05 (17 August, 2021)

Coram: **S. NSIBANDE J.P., N. NKONYANE AND D. MAZIBUKO JJA**

Date Heard: **17th MAY 2021**

Date Delivered: **17th August 2021**

Summary - labour law - application for security for costs - whether Court can absolve a party from furnishing security for costs without a request to absolved - whether the Court can take cognisance of a counter-claim pending in other Court for purposes of ordering a party before it to furnish security for costs.

Held: that the Court is entitled to protect an incola to the fullest extent, only after it has come to the conclusion that the peregrinus should not be absolved from furnishing security for costs.

Held & further: that Court can only take cognisance of counter-claim before it, the purpose of security for costs being to secure cost of an incola in a matter before the Court.

JUDGMENT

S. NSIBANDE JP

[1] This is an appeal against the ruling of the Industrial Court, regarding a demand for security for costs, handed down on 10th September 2020.

BACKGROUND

[2] On the 10th June 2020, the respondent (applicant in the *court a quo*) launched an application in the Industrial Court seeking orders as follows:

- "1. Dispensing with the forms, time limits and manner of service provided for in the rules of Court and granting leave for this application to be heard as one of urgency. Condoning applicant's non-compliance with the usual forms, notices and procedures on the ground that this matter is urgent;*
- 2. Directing the Respondent to forthwith pay to the Applicant the sum of US\$ 377.335.00 being sums in respect of salary arrears which were not paid for the months May 2019 to May 2020, and all tax payments that are due in that respect to SRA, including any further sums that may fall due until the matter has been determined;*
- 3. Directing further that the Respondent pays all the full benefits due to the Applicant as per the Applicant's contract of employment marked "W1" attached to this application, including all the repatriation costs for the applicant from Australia to the kingdom of Swaziland and back to Australia as the case may be;*
- 4. Costs of this application ... "*

The application was supported by a founding affidavit of the respondent in which the basis of his claim was set out.

[3] The appellant filed a Notice of Intention to Oppose followed by a demand for Security for Costs in terms of **Rule 47(1)** of the **High Court Rules** as read with **Rule 28 (A)** of the **Industrial Court Rules**. In terms of the said Notice, the appellant demanded security for costs in the amount of E200 000 (two hundred thousand Emalangeni). The security for costs was demanded on the following grounds:-

" (i) *that the applicant is a peregrinus of this jurisdiction and in the event that the Respondent successfully opposed the Applicant's application and obtains an order for costs, such order will be academic and unenforceable in that the Applicant is located, to the best of the knowledge of the defendant (sic), in Australia.*

(ii) *The Applicant is no longer employed by the Respondent nor does he have any reason to be in Eswatini and Respondent verily believes and submits that the Respondent (sic) will not return to Eswatini.*

(iii) *The Respondent (sic) does not have any movable or immovable property in Eswatini to the value of the security for costs sought, which could be attached as security.*

(iv) *The Respondent has a good defence to the Applicant's claim in that it has a counter-claim it intends to file for damages against the Applicant arising out of the Respondents (sic) mismanagement of the Mine in the amount of US\$1 800 000 (One Million Eight Hundred Thousand United States Dollars) which the Applicant is aware of."*

[4] The respondent's response to the demand for security for costs was to deny that he was a *peregrinus* and therefore legally obligated to pay security for costs.

[5] The appellant then filed what it termed a preliminary answering affidavit in which it made an application to the Industrial Court for an order for the furnishing of security in the sum of E200 000 (Two Hundred Thousand Emalangi) as previously demanded. It also sought an order staying the proceedings before the Industrial Court, *pendente*

lite, on the basis that it had instituted legal proceedings in the High Court of Eswatini against the respondent (applicant in the court *a quo*) for damages in the sum of US\$1.8 million.

- [6] The respondent, in his answering affidavit confirmed that he was in Australia and asserted that the Covid -19 pandemic prevented him from returning to Swaziland. He denied that he was retrenched and stated that being outside Swaziland did not mean that he is not resident in Swaziland. He further asserted that the counterclaim against him had no basis in law and that, in any event, one could not set-off a liquidated claim against a claim for damages. Finally he denied that the appellant was entitled to security for costs because he was a resident of Swaziland and intended to return to Swaziland.
- [7] At the conclusion of the application the Court *a quo* found in favour of the respondent.

7.1 Although the Court *a quo* found that the respondent had become a *peregrinus* as a result of the lapsing of his work permit, it ordered that he be absolved from furnishing security for costs.

7.2 The Court *a quo* took into account the fact that, on the papers before it, the appellant had not denied that there were arrear salaries that were due to the respondent; that the delictual claim for damages pending in the High Court had no bearing to the matter before the Court; and that in making its decisions, the Court was obliged to promote equity and fairness in labour relations.

7.3 In the particular circumstances of the matter and for the foregoing reasons, the Court *a quo* absolved the respondent from furnishing security for costs and it is this order that is appealed against and is the subject of this appeal.

THE GROUNDS OF APPEAL

[8] In its notice of appeal the appellant states that:

"1. The Honourable Court erred in refusing to grant the application by the appellant for the respondent to furnish security for costs in that the court absolved the respondent from

the requirement to furnish security for costs when there was no application or request made by the respondent to be so absolved on the basis that the court granted such absolution, or on any basis whatsoever;

1.1 The Respondent had opposed the grant of the order for provision of security for costs, purely and only on the basis that he denied that he was a peregrinus;

- 2. The court erred in law in that it failed and/or refused in deciding whether to require the respondent to provide security for costs to consider the counter claim that the Appellant has against the Respondent, pending in the High Court on the mistaken basis that the Industrial Court could not legally take cognisance of a counter claim pending in another court.*
- 3. The Honourable Court erred in that it failed to exercise its discretion judiciously and exercised it in a manner that prejudiced the Appellant and rendered the Appellant's counter claim pending before the High Court of Eswatini pointless by reason of the fact that any order that the High Court may make*

regarding costs in the matter before it is incapable of enforcement and would be purely academic.

4. *The court a quo (sic) erred in that it failed to exercise its discretion judiciously in that it did not consider that if it declines to order the respondent to file security for costs, the Appellant incola is not in the circumstances of this matter safeguarded in, sufficiently or at all."*

[9] An appeal to this Court lies in respect of a question of law only, and not in respect of a question of fact or the exercise of a judicial discretion. The point of departure in determining a question of law would be to deem the Court a *quo*'s factual findings to be correct and this Court may also have regard to uncontested facts appearing from the record of the proceedings a *quo* insofar as such facts are not inconsistent with those found by the Court a *quo* (see ***Trevor Shongwe v Machawe Sithole and Another [2021] (08/2020) SZ/CA 1 (10 August 2021).***)

9.1 Ground 1 indirectly poses a legal question whether it is competent for a court to absolve a party (*in casu* the respondent) from the requirement to furnish security for costs in the absence of an

application or request by such party to be absolved from furnishing such security.

- 9.2 Ground 1.1 appears to be a mere reference to the basis of the respondent's opposition, which is factual in nature.
- 9.3 Ground 2 indirectly poses the question whether the Industrial Court could legally, take cognisance of a counter-claim pending before another court for purposes of deciding an application for security for costs.
- 9.4 Grounds 3 and 4 involve questions concerning the exercise of a judicial discretion.
- 9.5 It follows therefore, that only Grounds 1 and 2 are suited for . purposes of an appeal to this Court.

ANALYSIS

[10J] With regard to Ground 1 and security for costs, High Court **Rule 47** finds application by virtue of **Rule 28(a)** of the **Rules of the Industrial Court. Rule 47** reads as follows:

"47. (1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given.

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

- (4) *The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.*
- (5) *Security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.*
- (6) *The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient."*

10.1 This Court was not referred to any authority in support of the contention that in the absence of an application by a party to be absolved from furnishing security for costs, that such party automatically becomes liable to furnish such security. The wording of **Rule 47** of the **High Court Rules** also does not lend itself to such an interpretation or conclusion.

10.2 It is clear from the authorities that a court has and retains a discretion to require a *peregrinus* litigant to provide security for costs.

In general terms, where a *peregrinus* institutes proceedings against an *incola*, as was the case in this matter, the Court *a quo* must exercise this discretion having had regard to all relevant facts and on considerations of equity and fairness to both parties (see **Magida v Minister of Police 1987 (1) SA 1 (A)**; **Erasmus: Superior Court Practice B1-341**). Although the underlying principle is that the court is entitled to protect the *incola* to the fullest extent, it should do so only after it has come to the conclusion that the *peregrinus* should not be absolved from being required to furnish security (**Magida supra**, quoted with approval in **Rev Jeremy Ganga v St. John's Parish LCSA - Cape Town Case No. C134/20130**). According to the case of **Lappman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd (No.1) 1997(4) SA 908 (W)**, the enquiry as to whether or not to order the furnishing of security for costs must be taken without any predisposition towards either granting or refusing to grant security.

10.3 It would appear therefore, that the court must itself make the enquiry as to whether or not to absolve the *peregrinus* having regard to the circumstances of each matter and having regard to what is fair and equitable in the circumstances. It would seem to us that the *peregrinus* need not necessarily plead for absolution from furnishing security. In *casu*, the fact that the respondent (applicant in the Court *a quo*) sought payment of his arrear salary; that, on the papers before it, the appellant had not denied liability for the arrear wages and the fact that the court was enjoined to take into account equity and fairness in deciding matters before it were considered by the Court *a quo* and it came to the decision that the *peregrinus* respondent be absolved from furnishing security. In our view, the Court *a quo* cannot be faulted on its analysis and application of the law and in the exercise of its discretion. In the premises, this ground of appeal cannot be upheld.

[11] With regard to Ground 2 i.e. whether the Industrial Court could legally take cognisance of a counter-claim pending in another court:

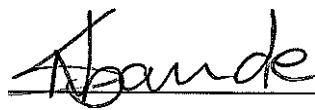
11.1 The appellant did not point to any authority for the proposition that the Court *a quo* could legally consider a counter-claim that is pending in another court, when exercising its discretion in respect of security for costs. We have not been able to find one ourselves but by its definition a counter claim is a claim made to rebut a previous claim. The appellant has not filed any claim against the respondent in the Court *a quo* nor has the respondent has made any claim against the appellant in the High Court. As a matter of fact the Court *a quo* has no jurisdiction to adjudicate on the appellant's claim for damages against the respondent in respect of the alleged negligence in carrying out his duties at the mine. Having regard for that state of affairs it cannot be said, in a real sense, that there is actually a counter claim against the respondent's claim for arrear salary.

11.2 In any event, it seems to us that it would be absurd for the Court to order a litigant to furnish security for costs for a matter that is not before it when the whole objective of furnishing security is to secure costs in respect of a matter being adjudicated before that court. The appellant, in its papers clearly seeks the security for purposes of *"protecting the integrity and effectiveness of an order that the High Court might ultimately make."* When one considers that in the Industrial Court costs do not always automatically follow the result and are granted according to law and ***fairness*** (**Section 13** of the **Industrial Relations Act 2000** as amended), it becomes clear that the proposition by the appellant has no basis. The appellant has recourse in the High Court regarding security for costs. The High Court has the jurisdiction to determine the question of provision of security for costs in a matter before it and in relation to a litigant who is a peregrinus to the Court's jurisdiction.

11.3 This ground of appeal fails as well.

[12] We therefore make the following order:

1. The Industrial Court's decision is upheld and the appeal is dismissed.
2. Each party is to pay its own costs.



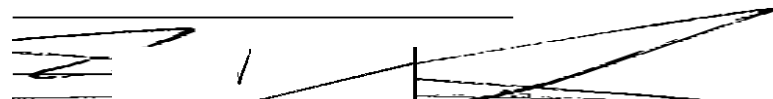
S. NSIBANDE JP

I agree



N.NKONYANE
JUSTICE OF APPEAL

I agree



D. I.
JUSTICE OF APPEAL



For Appellant - Musa Sibandze (Musa Sibandze Attorneys)

For Respondent - Mr. Lucky Howe (Howe Masuku Nsibande Attorneys)