



**INDUSTRIAL COURT OF APPEAL OF ESWATINI**  
**WRITTEN REASONS FOR EX TEMPORE RULING**

Case No. 10/2022

In the matter between

**SUFIAW (SWAZILAND UNION OF FINANCIAL  
INSTITUTION AND ALLIED WORKERS)**

1<sup>st</sup> Appellant

**CHARLES MTHETHWA**

2<sup>nd</sup> Appellant

**And**

**STANDARD BANK ESWATINI LIMITED**

1<sup>st</sup> Respondent

**NOMFUNDO MYENI N.O.**

2<sup>nd</sup> Respondent

**Neutral citation**     **SUFIAW and Another vs Standard Bank Eswatini Ltd and  
Another [2022] [10/2022] SZICA 7 (29 July 2022)**

**Coram:**           **MAZIBUKO JA, S. NSIBANDE JP AND NKONYANE JA,**

**Date of Hearing:**     27<sup>th</sup> June 2022

**Ex Tempore ruling issued:** 27<sup>th</sup> June 2022.

**Written reasons delivered:** 29<sup>th</sup> July 2022.

MAZIBUKO JA

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## WRITTEN REASONS FOR EX TEMPORE RULING

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### THE PARTIES

1. The parties before Court are as follows:
  - 1.1 The 1<sup>st</sup> Respondent is Standard Bank Eswatini Limited, a financial institution, established in accordance with the law of Eswatini, with power to sue and be sued, and shall also be referred to as the bank.
  - 1.2 The 2<sup>nd</sup> Respondent is Nomfundo Myeni, who is chairperson in a disciplinary hearing which has been instituted by the bank against one of its employees and shall also be referred to as chairperson.
  - 1.3 The 1<sup>st</sup> Appellant is Swaziland Union of Financial Institutions and Allied Workers, a trade union so registered in terms of the laws of Eswatini, with power to sue and be sued and shall also be referred to as the union.
  - 1.4 The 2<sup>nd</sup> Appellant is Charles Mthethwa an employee of the bank and a member of the union and shall also be referred to as the employee.

### FIRST URGENT APPLICATION

2. About the 26<sup>th</sup> May 2021, the Appellants (as Applicants) moved an urgent application before the Industrial Court in which they prayed for relief as follows:

*“1 That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis.*

*2 That a rule nisi be and is hereby issued calling upon the Respondents to show cause why:*

*2.1 An order should not be issued temporarily stopping the ongoing disciplinary hearing against the 2<sup>nd</sup> Applicant pending finalization of this matter in Court;*

*2.2 That the rule nisi issued in terms of prayer (2.1) above operates with immediate interim relief pending finalization of this matter.*

*3 That an order be and hereby issued declaring that the disciplinary hearing is time barred in terms of Clause 1.11 to 1.12 of the Collective Agreement entered into by and between the parties on the 21<sup>st</sup> October 2005.*

*4 That an order be and is hereby issued declaring that the 1<sup>st</sup> Respondent is precluded in terms of Clause 1.11.2 of the Collective Agreement from*

*proceeding with the hearing having reported a criminal case against the 2<sup>nd</sup> Applicant.*

*ALTERNATIVELY*

*5 That an order be and is hereby issued reviewing and setting aside as being grossly improper and/or unreasonable the decision issued by the 2<sup>nd</sup> Respondent in the matter on or around the 27<sup>th</sup> April 2021.*

*6 Costs of application against the Respondents:*

*7 Further and/or alternative relief.*

(Industrial Court Judgment dated 21<sup>st</sup> April 2022 pages 2 – 3)

2.1 This particular application shall be referred to as the first urgent application. The contents of the first urgent application are dealt with later in this judgment.

2.2 The purpose of the first urgent application, inter alia, was to obtain an order for a temporary stay of a disciplinary hearing which the

bank had instituted against the employee commencing 16<sup>th</sup> April 2022.

The application was argued and the Industrial Court issued its judgment dated 21<sup>st</sup> April 2022. The application was dismissed. There was therefore no order to stay the disciplinary hearing.

2.3 On the 28<sup>th</sup> April 2022 the Appellants noted an appeal before this Court, against the judgment of the Industrial Court. This appeal is mentioned again in paragraph 3.7 below.

2.4 The employee had again been summoned to appear before the chairperson at the disciplinary hearing on the 28<sup>th</sup> April 2022, for continuation. The disciplinary hearing was however postponed to the 6<sup>th</sup> May 2022, for continuation.

## SECOND URGENT APPLICATION

3. While the disciplinary hearing was pending, the Applicants instituted another urgent application before the Industrial Court for relief as follows:

*“1. Dispensing with the usual forms and procedures as relates to the time limits and service.*

2. *Condoning the Applicant's non-compliance with Rules of Court.*
3. *Staying the disciplinary hearing pending determination of the Appeal pending before the Industrial Court of Appeal Case No.10/2022.*
4. *Further and/or alternative appropriate remedy.*

(Industrial Court Judgment dated 8<sup>th</sup> June 2022 pages 3 – 4).

- 3.1 The latter application was the second urgent application which the Appellant (Applicants) had instituted against the Respondents at the Industrial Court. The second urgent application was argued and judgment was delivered on the 8<sup>th</sup> June 2022.

#### INDUSTRIAL COURT ORDER DATED 8<sup>TH</sup> JUNE 2022

- 3.2 As part of its judgment, the Industrial Court issued the following order in the second urgent application:

*“a) The application for stay of the disciplinary enquiry is granted subject to the Applicant filing the Record, Heads of Argument and*

*application for urgent enrolment [of the appeal] within fourteen (14) Court days of the delivery of this Judgment.*

*b) Should the Applicants fail to comply with the conditions set by the Court in paragraph [a] above; the 1<sup>st</sup> Respondent will have the right to proceed with the disciplinary enquiry.*

*c) Each party to pay its own costs.”*

(Judgment dated 8<sup>th</sup> June 2022 pages 14-15)

3.3 Inter alia, the Industrial Court ordered the Appellants to apply for an ‘urgent enrolment’ of the appeal, to the present Court. The Appellants were given 14 (fourteen) Court days from the 8<sup>th</sup> June 2022 to comply with the order of the Industrial Court.

3.4 It was contended on behalf of the Appellants that, if the Appellants failed to apply for urgent enrolment of the appeal within the 14 (fourteen) Court days (as ordered), there was risk of the employee (2<sup>nd</sup> Applicant) being subjected to irreparable harm. It is apposite at this stage to summarise the grievance that the Appellants brought before the

Industrial Court for determination as well as the nature of the prejudice the employee had been subjected to.

3.5 The employee (duly assisted by the union), had raised a grievance before the chairperson at the disciplinary hearing. The grievance was presented as a point *in limine*. The Appellants had challenged the validity and/or fairness of the disciplinary charges. In particular the Appellants' argument was that the disciplinary charges had prescribed by the time the bank had charged the employee. The Appellants were therefore opposed to the bank proceeding with the disciplinary charges, since they considered the process tainted with irregularity.

3.6 The chairperson dismissed the Appellants' point *in limine*. The Appellants filed an internal appeal, but the bank failed to arrange an internal appeal hearing. Instead, the chairperson directed that the disciplinary hearing should proceed.

3.7 The Appellants challenged the decision of the chairman – before the Industrial Court, by way of an urgent application, viz; (the first urgent application). The Industrial Court dismissed the Appellants' first



urgent application. The Appellants appealed the decision of the Industrial Court to the present Court as mentioned in paragraph 2.3 above.

3.8 Justice and fairness require that the Appellants' grievance be judicially determined before the disciplinary hearing proceeds. Clearly, the employee stands to suffer irreparable harm if the disciplinary hearing were to proceed before the grievance is determined in finality. This Court has to determine whether the disciplinary charges (that the bank has preferred against the employee), are valid or not before the employee is called upon to defend himself.

4. On the 23<sup>rd</sup> June 2022 the Appellants (Applicants) moved an urgent application before this Court in which, inter alia, they prayed for relief as follows:

*“Enrolling urgently the Appeal under Industrial Court of Appeal case no 10/22, for urgent determination.”*

(At page 4)

- 4.1 Upon reading the Appellants' (Applicants') papers, the Court was not persuaded that urgency had been established. Consequently the Court declined to enroll the application as urgent. However, since the application had not been dismissed, the door was open for the Appellants (Applicants) to relaunch their application.
- 4.2 On the 27<sup>th</sup> June 2022 the Appellants (Applicants) relaunched the urgent application. The prayers were similar to those in the previous urgent application. However, the new founding affidavit contained detail that was missing from the previous founding affidavit. A notable example is a judgment of the Industrial Court dated 8<sup>th</sup> June 2022 which was issued in SZIC case no. 170/2022 B. An excerpt of that judgment is reproduced in paragraph 3.2 above.
- 4.3 The Respondents confirmed (both in writing and through their attorney), that they do not oppose the latter application. Upon reading the papers filed, the present Court was persuaded that the matter was urgent and proceeded to enroll the matter as such.
- 4.4 The manner by which the Appellants filed an urgent application before the present Court was not by choice. The Appellants were

ordered by the Industrial Court to apply for urgent enrolment of the appeal. Had the Appellants failed to file the urgent application – as directed by the Industrial Court, adverse consequences would have followed, as stated in the order of the Industrial Court.

5. The Industrial Court created unnecessary urgency in this matter in our view – in error. The circumstances of this case are not different from any other – where an employee has been suspended with pay pending finalization of either a disciplinary hearing or Court proceedings. If suspension of an employee with pay is a ground for urgency, then all other similar cases should be considered to be urgent. This Court does not endorse the Industrial Court’s determination that: suspension of an employee with pay, pending finalization of an appeal – is a ground for urgency.
  
6. In the present matter, the Industrial Court had the discretion to grant the employee (2<sup>nd</sup> Applicant) a stay of the disciplinary hearing – pending finalization of the matter on appeal. A litigant who considers his appeal to be urgent – such that it deserves urgent enrolment, has the duty to make an appropriate application before this Court and properly support his prayers - without being ordered by the Industrial Court to file that application. Urgency must emanate from the facts and circumstances of the case. An

order of the Industrial Court should not influence urgency in a matter that has been referred to appeal.

7. The rules of Court (Industrial Court of Appeal), and the Industrial Relations Act No.1/2000 (as amended) (hereinafter referred to as the Act), have time lines and procedure that regulate an appeal process from the time an appeal is noted until judgment is delivered. Some of the provisions in the rules and the Act which are relevant to the present enquiry and are quoted below.

- 7.1 Section 19(3) of the Act allows a litigant to appeal a decision of the Industrial Court within 3 (three) months, from the date of noting the decision.

- 7.2 Rule 21 (1) requires the Appellant to file the record (of proceedings from the Industrial Court), within 1 (one) month from the date of noting the appeal.

- 7.3 In terms of Section 21 (2) of the Act, this Court is encouraged to endeavor to determine an appeal that has been referred to it, within 3 (three) months from the date the appeal is noted.

7.4 In terms of Section 20 (1) the Act, this Court has the same powers and functions as the Court of Appeal, but shall deal only with appeals from the Industrial Court. This Court has the power to make decisions that would promote justice and fairness in a matter between employer and employee.

7.5 This Court has the mechanism, authority as well as judicial discretion to hear and determine appeals from the Industrial Court – within a relatively short space of time, for instance, within 3 (three) months from the date the appeal is heard. This Court can also hear deserving appeals on an urgent basis. It is however this Court only that has jurisdiction to determine whether a particular appeal (in a labour matter) is urgent or not. The Industrial Court has no jurisdiction to determine or suggest urgency or lack thereof in an appeal that is pending before this Court. The Industrial Court erroneously exercised jurisdiction it did not have – when it issued its order dated the 8<sup>th</sup> June 2022.

- 7.6 Once the Industrial Court issues a decision and an appeal is noted against that decision, the Industrial Court has no power to dictate how and when the appeal should be enrolled. In terms of Section 19 (4) of the Act, the Industrial Court has power to suspend the operation of its order. This is the jurisdiction that the Industrial Court should have exercised when it issued the order dated 8<sup>th</sup> June 2022.
8. This Court had to take into consideration the interest of the employee (2<sup>nd</sup> Applicant). The employee had not been granted a stay of the disciplinary hearing pending finalization of the appeal. The employee was still exposed to risk of the bank proceeding with the disciplinary hearing against him before his grievance is determined by the present Court. It is in the interest of justice that the employee be protected from the adverse consequences that are mentioned in the order of the Industrial Court (dated 8<sup>th</sup> June 2022).
9. For the reasons stated above, on the 27<sup>th</sup> June 2022, the Court issued the following Ex Tempore order:
- 9.1 An application for urgent enrolment of the appeal is granted.
- 9.2 The parties should liase with the Registrar for allocation of a hearing date.

9.3 The parties should comply with the rules of Court regarding the filing of Heads of Argument, authorities and such further documents as may be considered necessary in preparation for arguing the appeal.

9.4. No order as to costs.

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D. MAZIBUKO

JUDGE - INDUSTRIAL COURT OF APPEAL

I agree

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S. NSIBANDE JP

I agree

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N. NKONYANE JA

For: Appellant

Mr M Ndlangamandla  
of MLK Ndlangamandla Attorneys

For: Respondent

Mr Z. Jele  
Of Robinson Bertram