IN THE INDUSTRIAL COURT OF SWAZILAND

RULING

Held at Mbabane Case No.468/15

In the matter between:

DERRICK DUBE **Applicant**

And

EZULWINI MUNICIPAITY **1st Respondent**

COUNCILLOR GEORGE FALCOMER **2nd Respondent**

COUNCILLOR SIBISISO MABUZA **3rd Respondent**

ZONKE MAGAGULA N.O. **4th Respondent**

Neutral citation: *Derrick Dube* v *Ezulwini Municipality & 3 Other (468/15) SZIC 59 (October 30 2015)*

Coram: NKONYANE J
(Sitting with S. Mvubu and G. Ndzinisa Nominated Members of the Court)

Heard submissions: **20.10.15**

Delivered ruling: **30.10.15**

SUMMARY :

Stay of execution in the Industrial Court---Noting of Appeal in the Industrial of Appeal does not automatically stay the execution of an Industrial Court's

judgement or order---Order for stay of execution will be granted by the Court where real and substantial justice requires.

RULING

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1. The Applicant is an employee of the 1st Respondent.

2. The 1st Respondent is a Municipality established in terms of the Urban Government Act No.8 of 1969 situated at Ezulwini, Hhohho Region and carrying out its operations as such.

3. The 2nd and 3rd Respondents are Councillors who sit in the Board of the 1st Respondent. The history of this case reveals that they constitute a committee that was assigned the responsibility to oversee the disciplinary hearing of the Applicant.

4. The 4th Respondent is the current chairperson of the disciplinary hearing tribunal that was set up to deal with the disciplinary charges preferred against the Applicant by the employer, the 1st Respondent.

5. The Applicant is facing disciplinary charges that were preferred against him by the 1st Respondent. On the 20th March 2015 the Applicant filed an urgent application before this Court seeking an order interdicting the disciplinary proceedings; setting aside the charges and removal of the 4th Respondent as the chairperson of the proceedings**.**

6. The Court dismissed the Applicant's application with costs in its judgement delivered on 31st July 2015. The effect of the Court's judgment was that the employer (1st Respondent) was at liberty to thereafter continue with the disciplinary hearing against the Applicant. The Applicant did not challenge the Court's decision, either by review or appeal. The employer (1st Respondent) therefore has now decided to resume the disciplinary hearing process. The 1st Respondent served the Applicant with an invitation to attend the disciplinary hearing on the 06th October 2015. The disciplinary hearing however did not proceed because the Applicants attorneys were not in attendance. The matter was postponed until the 08th October 2015.

7. The Applicant after having been served with the invitation to appear before the disciplinary hearing set for the 06th October 2015, he filed a notice of appeal with the Industrial Court of Appeal on the 05th October 2015. The

Applicant filed an appeal against the judgement of this Court that was handed down on the 31st July 2015.

8. From the evidence before the Court, it seems that the service of the invitation on the Applicant on the 02nd October 2015, to appear before the disciplinary hearing panel finally woke him up from slumber taking into account that it was only then that he decided to appeal against the Court's judgement that was delivered on the 31st July 2015.

9. The Applicant thereafter filed an urgent application for stay of execution of the Court's judgment which was registered in Court on the 08th October 2015. In the certificate of urgency it was not stated why the application was being filed on an urgent basis. The Applicant's attorney only stated rather noncommittally that the grounds thereof were set out in the founding affidavit.

10. This urgent application was registered in Court on the 08th October 2015 to be heard on the following week on Thursday 15th October 2015. In this application the Applicant is seeking an order for the stay of execution of the Court's Order contained in the judgement of the Court that was delivered on the 31st July 2015. Since this application was not heard by the Court on the 08th October 2015, no interim or final Court Order was made on the 08th

October 2015 staying the disciplinary hearing which was scheduled to proceed on that same day. The evidence reveals that indeed the disciplinary hearing proceeded on the 08th October 2015.

11. It was important that the Applicant should have had the matter called in Court in order for him to get, at least a temporary order interdicting the proceedings. The Court says this because noting of an appeal to the Industrial Court of Appeal does not stay the execution of the Court's judgement or order. This is in terms of **Section 19(4) of the Industrial Relations Act No.1 of 2000 as amended**. That section clearly provides that;

"The noting of an appeal under subsection (1) shall not stay the execution of the Court's order unless the Court on application, directs otherwise."

All that this section means is that, there is no automatic stay of execution of the Industrial Court's judgements or orders unless the Industrial Court makes such an order on application by the affected party. In the circumstances of this case, after the Court delivered its judgement on the 31st July 2015 dismissing the Applicants bid to interdict the disciplinary hearing and setting aside of the charges, the 1st Respondent was entitled to proceed with the enquiry at any time.

12. The Applicant did not explain in his founding affidavit as to why he did not act for the past two months. The Applicant argued that he has three months within which to lodge the appeal and that he has acted within the time frame stated by the law.

13. On the following day, the 09th October 2015 the Applicant filed another urgent application. The Applicant was seeking an order in the following terms;

> "1. *Interdicting and restraining the Respondents from convening or proceedings with the disciplinary hearing of the Applicant pending the outcome of the Application for Stay of Execution scheduled for the 15th October 2015.*
>
> *2. Setting aside any decision or ay step which the 4th Respondent or any of the Respondents may have taken in relation to the disciplinary hearing which was set to proceed on the 08th day of October 2015 at 2:30 p.m.*
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> *3. The Respondents be and are hereby Ordered to pay the costs of this Application on the scale between attorney and own client.*

4. Granting such further and/or alternative relief."

This application by the Applicant was a sequel to the application that he had filed on the previous day on the 08th October 2015. On the 08th October 2015 however, the matter was merely registered with the Registry Office.

14. The Applicant's applications are opposed by the 1st Respondent. In its answering affidavit the 1st Respondent raised certain points of law namely;

14.1 That the Applicant is barred from approaching the Court without first seeking special leave from the High Court in terms of Section 116 of the Urban Government Act, 1969.

14.2 That the prayers are incompetent as the Applicant is seeking an order for stay of execution, whereas there is no order to execute. The Court in its judgment on the 31st July 2015 simply dismissed the Applicant's application that the Court should make an order interdicting the disciplinary enquiry.

14.3 That there is no urgency. The urgency is self-created and this should not be condoned by the Court.

15. The Applicant in his replying affidavit also raised a point in limine, namely; that the answering affidavit of the 1st Respondent in so far as it relates to events of the 08th October 2015 contained hearsay evidence as the deponent Vusumutiwendvodza Matsebula, was not present during the disciplinary hearing.

16. The point of law raised by the Applicant will be dismissed by the Court. The deponent to the answering affidavit did not say that the facts were within his personal knowledge. The deponent stated that the facts were to *"the best of my knowledge and belief."* The deponent also to stated in the subsequent paragraphs that he is *"advised and verily believes"* the facts to which he was deposing.

17. The points of law raised by the 1st Respondent will be considered by the Court together with the merits of the case.

18. An application for stay of execution is simply an application that seeks to preserve the *status quo* pending the determination of an appeal or review application before a higher tribunal. In the present case, this Court delivered a judgement on 31st July 2015 dismissing the Applicant's bid to stop the disciplinary hearing process that had been initiated against him by the 1st Respondent. The effect of the dismissal of the Applicant's application was that the 1st Respondent was as on that date, entitled to proceed with the disciplinary hearing against the Applicant. The present application therefore is for the stay of the disciplinary hearing pending the determination of the appeal filed by the Applicant on the 05th October 2015.

19. The most recent Court judgement dealing with an application for stay of execution was delivered by the Supreme Court in the case of **NUR & SAME (PTY LTD & NUISA INVESTMENT (PTY) LTD t/a Sakhula Filling Station v. GALP SWAZILAND,** Case No. 13/2015 (SC) by Maphalala ACJ. In that case after having referred to numerous authorities the Learned Acting Chief Justice stated the following in paragraph 22:

"There is no evidence that the Applicants have unequivocally abandoned their right to challenge the judgement. It is common cause that the judgement was

delivered on the 29th July 2015, and, the Applicants were ordered to vacate the business premises by no later than 31st August 2015. Accordingly, the Applicants were entitled to challenge the judgement any time before the lapse of that period."

20. In the present application there was no time frame set by the Court within which the disciplinary hearing was to resume. In the Supreme Court judgement (supra) there was an order that the Applicants should vacate the premises by the 31st August 2015. The Applicants filed their application for stay of execution before the lapse of that period, being 31st August 2015. In the present case the Applicant filed his appeal after he had been served with the notice of resumption of the disciplinary hearing. This was well within the three months' period allowed by the law within which to file an appeal.

21. It was argued on behalf of the Applicant that the employer was not supposed to continue with the disciplinary hearing as the Applicant had already filed the application in Court. The case of **Phumzile Magagula & Two Others V.**

Standard Bank of Swaziland was referred to as authority for this argument. The application enrolled in Court was for an order staying the disciplinary hearing pending the determination of the appeal filed by the Applicant before the Industrial Court of Appeal. The chairman of the hearing having been served with the application for stay clearly had no right to ignore the Court papers as the application had been enrolled in Court. The decision of the Chairman to proceed with the hearing was also unjustified for the following reasons;

21.1 When the matter was postponed on the 06th October 2015, the Applicant told the Chairman that his lawyer could be available on the following week. The Chairman however did not postpone the matter until the following week, but postponed the matter for only two days until the 08th October 2015 when it was clear that the Applicant's lawyer was not going to be available.

21.2 The judgment of the Court dismissing the Applicant's application was delivered on the 31st July 2015. The 1st Respondent waited for over two months to restart the hearing. For the Chairman therefore to refuse the Applicant's application for postponement for just one week on the basis that the postponement would drag or delay the hearing was clearly unjustified taking into account that the 1st Respondent itself delayed by

over two months to restart the hearing. There was clearly no grave prejudice to be suffered by the 1st Respondent by granting the postponement by a period of one week.

21.3 In the circumstances of this case, there was clearly no justifiable reason for the Chairman to refuse the postponement and to continue with the hearing in the absence of the Applicant or his lawyer. The decision of the Chairman to refuse the postponement is therefore set aside with the result that any decision taken thereafter is also set aside by the Court.

22. However, the Court agrees with the Respondent's attorney that the approach of the Applicant in this application was rather lackadaisical. The Court says this because of the following:

22.1 The Applicant was aware as early as 31st July, 2015 that the disciplinary hearing might resume at any time, his bid to interdict it having been dismissed by the Court.

22.2 He waited until he was served with the invitation on 02nd October 2015 attend the disciplinary hearing on 06th October 2015, before he decided to file the appeal on 05th October 2015.

22.3 The Applicant well knowing that the hearing will proceed on the 06th October, 2015 did not file an application to stay the proceedings pending the determination of the Appeal.

22.4 The Applicant attended the hearing on the 06th October, 2015 and applied for a postponement because his attorney was not in attendance. The matter was postponed until 08th October, 2015. He finally filed the urgent application on the 08th October 2015.

22.5 The matter having been enrolled in Court on the 08th October 2015, the Applicant did not set the matter down for hearing on the 08th October 2015, but he set it down for hearing on the 15th October 2015, the following week.

23. The most prudent thing for the Applicant to have done in this matter was to file an application for stay of the disciplinary hearing scheduled to proceed on the 06th October, 2015. Fortunately for him, when the hearing commenced on the 06th October 2015, the chairman acceded to his request for a postponement as his attorney was not in attendance. The Applicant therefore got a second chance. He eventually filed the application on the 08th October 2015 and set it

for hearing on 15th October, 2015. Despite this laid back attitude of the Applicant however, the Court is unable to ignore the fact that the Applicant was still within time to file the Appeal. By filing the Appeal the Applicant was exercising his right under the Constitution. The fundamental considerations guiding the Court are real and substantial justice. The Court will therefore hear the matter on basis of urgency. In the case of **Abel Sibandze v Stanlib Swaziland (Pty) Ltd, case No.440/09 (IC)**, dealing with a similar application the Court held that;

"The decision of the Industrial Court of Appeal will determine the rights and duties of the parties regarding the disciplinary hearing. It is therefore in the interest of justice that the Appeal be heard and finalized before the disciplinary hearing commences."

Similarly, in the present application it is in the interest of justice that the Appeal be heard and finalized before the disciplinary hearing resumes.

24. The 1st Respondent's attorney also raised the issue of the applicability of Section 116 of the Urban Government Act in the present application. Section 116 (2) provides that no action shall be commenced against a municipality until thirty days' notice have been served on the municipality. Section 116 (1)

provides that no **legal action of any nature** which led the 1st Respondent's attorney argue that ***"any nature"*** includes even labour matters like the present one before Court. This question arose in the case of **Churchill Fakudze v The Chairman of the Counci-in-Committee (1st Respondent) and The City Council of Manzini (2nd Respondent), case No. 42/06 (HC).** In that case, Annandale ACJ found that the Applicant had failed to first seek the special leave of the High Court in terms of sub-section (3) and dismissed the application. The High Court failed to address the question of the Constitutionality of Section 116 as a whole when the question had been raised before it. Two years later the question again arose in the Industrial Court in the case of Gideon **Mhlongo v The City Council of Mbabane, case No. 251/07 (IC),** decided on 09/12/2008. The question was raised as part of two special pleas that were raised before the Court. Unfortunately the Court did not have the opportunity to decide the question. The judgement in the Fakudze case was referred to. Dealing with the judgement of **Annandale ACJ** in the Fakudze case, Dunseith JP (as he then was) pointed out in paragraph 26 that;

> ***"We do not consider that we are bound by judgement in Fakudze's case for the following reasons;***
>
> ***26.1…***

26.2 We are unable to extend the principle laid down in the Fakudze case to the present matter because in our respectful view the approach of the learned acting Chief Justice to the constitutional challenge was incorrect…."

The Industrial Court went to state in paragraph 30 that;

"If the court had not upheld the first Special Plea, I would have referred the question of the constitutionality of section 116 (1) to the High Court and stayed the proceedings in the interim. In my view the raising of the question can by no means be regarded as frivolous or vexatious. On the contrary, the arguments of the Respondent make out a substantial case for the striking down of section 116."

25. In the present case the Court having already held that the decision of the Chairman should be set aside, it will be opportune time that the question of the applicability of Section 116 of the Urban Government Act of 1969, be referred to the High Court in terms of Section 35 (3) of the Constitution. The section is an impediment and it interferes with the Applicant's Constitutional right of access to the Courts. The Industrial Court is subordinate to the High

Court. It has no power to strike down legislation that is inconsistent with the Constitution. The question will therefore have to be referred to the High Court.

26. In the circumstances of this case the Court will make the following order taking into account the interests of justice, fairness and equity;

a) The decision of the Chairman to proceed with the hearing and to dismiss the Applicant is set aside.
b) Interim order for the stay of the disciplinary hearing pending the referral of the question and the determination of the Appeal is granted.
c) The question of the applicability of Section 116 of the Urban Government Act is hereby referred to the High Court in terms of Section 35 (3) of the Constitution.
d) The Court will make no order as to costs.

The members agree.

N. NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant: Ms. S. Matsebula & Mr. M. Ndlangamandla

(Magagula & Hlophe Attorneys).

For Respondents: Mr. S.V. Mdladla

(S V Mdladla & Associates).