

**IN THE SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE APPEAL NO.57/2009**

In the matter between

**ABEL SIBANDZE APPELLANT**

**AND**

**STANLIB SWAZILAND (PTY) LIMITED 1<sup>ST</sup>RESPONDENT**

**LIBERTYLIFE SWAZILAND (PTY) LIMITED 2<sup>ND</sup>RESPONDENT**

**THE PRESIDING JUDGE OF THE**

**INDUSTRIAL COURT OF SWAZILAND 3<sup>RD</sup>RESPONDENT**

**CORAM: J.G. FOXCROFT, DR. S. TWUM et**

**I.G. FARLAM JJA**

**HEARD: 19 MAY 2010**

**DELIVERED: 28 MAY 2010**

*Summary: Review by High Court of Industrial Court - rule that Superior Courts only interfere in untermintated proceedings in inferior courts in rare cases applied - availability of appeal on point raised to Industrial Court of Appeal on termination of proceedings in Industrial Court relevant factor.*

**JUDGMENT**

**I.G. FARLAM JA**

[1] The appellant in this matter was employed by the first and second respondents Stanlib Swaziland (Pty) Ltd and Liberty Life Swaziland (Pty) Ltd, as a managing director. Relations between the appellant and Mr Bernard Katompa, a member of the executive management of the Liberty group of companies (to which the first and second respondents belonged) having deteriorated, the first and second respondents started a process to dismiss the appellant.

He challenged this process in the Industrial Court on the basis that the first and second respondents were perpetrating an unfair labour practice against him by seeking to implement certain threats they had made to look for reasons to dismiss him if he refused to resign from their employ. In his founding affidavit were certain paragraphs in which the appellant gave details of the threats of which he complained.

[2] The first and second respondents brought an application in the Industrial Court for the paragraphs containing the alleged threats to be struck out on the ground that the evidence of the alleged threats was inadmissible. They alleged that what had been stated was said in the course of without prejudice negotiations which took place with a view to settling the dispute between them and the appellant, both before and while they were represented by their attorneys.

[3] The third respondent, the presiding judge in the Industrial Court, granted the application brought by the first and second respondents and ordered that the paragraphs in question be struck from the appellant's affidavit.

[4] The appellant instituted review proceedings in the High Court, in terms of section 19 (5) of the Industrial Relations Act 1 of 2000, seeking the setting aside of the order striking out the paragraph in question.

[5] The case came before Agyemang J, who allowed the review application in part and set aside that part of the order in the Industrial Court striking out paragraphs 28, 29 and 30 of the founding affidavit. These paragraphs deal with the discussions between the appellant and representatives of the first and second respondents before the first and second respondents were represented by the attorneys. The learned judge declined, however, to set aside that part of the order made by the third respondent striking out the paragraphs dealing with the discussions between the appellant's attorney and the attorneys acting for the first and second respondents.

[6] The appellant now appeals to this court against Agyemang J's refusal to set aside that part of the third respondent's order dealing with the discussions between his attorney and the attorneys acting for the first and second respondents.

[7] The first and second respondents have brought a cross appeal against the court *quo's* decision to set aside the third respondent's order striking out the paragraphs dealing with the discussions between the parties before the first and second respondent's attorneys became involved.

[8] In her judgment in the court *quo Agyemang J*, referred to the well-established principle that as a general rule superior courts decline to interfere by way of appeal or review in uninterminated proceedings in inferior courts (as to which see, e.g., **Wahlhaus v Additional Magistrate, Johannesburg and Another** 1959 (3) SA 113 (A)) but she held that the circumstances in the present case were exceptional, justifying a departure from the general rule. In this regard she said:

*'I find that the exclusion of paragraphs 28, 29, and 30 will unnecessarily affect the prosecution of the applicant's suit before [the Industrial Court] in that it may prevent him from having his case adequately heard. That course will not be in the pursuit of justice. The intervention of this court at this stage, for the reason I have given, will not pre-empt the decision of the court a quo:, nor can the applicant be accused of merely making an academic argument or showing contempt for the court a quo - matters canvassed in the [first and second respondents'] heads of argument.'*

[9] She added: *'I fear that grave injustice may ensue or simply justice may not be served otherwise'* and she referred to the **Wahlhaus** case at 119 H - 120 E.

[10] I am afraid that I cannot agree that the circumstances of the case are so exceptional as to take them out of the general rule stated in the **Wahlhaus** case, in which Ogilvie Thompson JA (with whom the other members of the court agreed) said (at 119 H - 120 E):

*'It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict, or mandamus- against the decision of a magistrate's court given before conviction. (See **Ellis v. Visser and Another**, 1956 (2) SA 17 (W), and **R. v Marais**, 1959 (1) SA 98(T), where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner and Lansdown (6<sup>th</sup> ed., vol. 1 p. 750) state:*

*"While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the uninterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained... In general, however, it will hesitate to*

*intervene; especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress by means of review or appeal will ordinarily be available."*

*In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from the necessity of deciding whether or not the particular case is an appropriate one for intervention. Secondly, the prejudice inherent in an accused's being obliged to proceed to trial, and possibly conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se necessarily justify the Supreme Court in granting relief before conviction (see too the observation of MURRAY, J., at pp. 123 - 4 of Ellis' case, supra).*

*As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal.'*

[11] Apart from the fact that the circumstances set out by the judge in her judgment are not so exceptional as to warrant a departure from the general rule (which, as appears from the passage I have quoted from the **Wahlhaus** case, happens in rare cases, the power to depart from the rule being 'sparingly exercised') there is another factor which the court *a quo* appears to have overlooked but which affords a strong reason against intervention on review by the High Court in this case. If proceedings in the Industrial Court do not terminate in the appellant's favour he will have the right to appeal on a question of law to the Industrial Court of Appeal. The question as to whether the evidence struck out by the Industrial Court was inadmissible, being a question of law, will be able to be argued in the Industrial Court of Appeal in terms of section 9 (1) of the Industrial Relations Act 1 of 2000. It will not be necessary for the point to be taken by way of review as the evidence excluded is fully set out in the record. As appears from the heads of argument filed in the appeal one of the contentions raised by the first and second

respondents in support of the argument that the evidence struck out by the Industrial Court was inadmissible related to the ambit of the concept of a dispute between parties in an industrial context. The Industrial Court of Appeal, if the matter should come before it in due course, will be well equipped to consider this aspect of the case, in view of the fact that it is a specialist tribunal established to hear appeals in industrial matters, from which no further appeal lies to this Court: see **Swazi Observer (Pty) Ltd v Hanson Ngwenya and Others**, an unreported decision of this Court given in Civil Appeal 19 of 2006.

[12] In the circumstances I am satisfied that the court *a quo* erred in entertaining the application brought by the appellant to review the ruling made by the Industrial Court.

[13] It follows that the appellant's appeal directed at obtaining an order intervening even further than the court *a quo* did with the ruling made in the Industrial Court must fail. It also follows that the first and second respondents' cross-appeal seeking the reversal of the court *a quo*'s order setting aside the striking out of paragraphs 28, 29 and 30 must succeed, albeit on a basis not raised by the first and second respondents in their notice of appeal. In the circumstances I am of the view that it would be appropriate to make no order as to costs in this court or in the court below.

[12] The following order is made:

1. The appeal brought by the appellant is dismissed.
2. The cross-appeal brought by the first and

second respondents is allowed.

1. The order made in the court *a quo* is set aside and replaced with the following order.

'The application is refused.'

---

**I.G. FARLAM**

**JUSTICE OF APPEAL**

**I agree** \_\_\_\_\_

**J.G. FOXCROFT**

**JUSTICE OF APPEAL**

**I agree \_\_\_\_\_ DR. S. TWUM**

**JUSTICE OF APPEAL**

For: Appellant: B. Mndzebele

For: 1<sup>st</sup> and 2<sup>nd</sup> Respondents: K. Motsa