INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO.147/2017(C)

In the matter between:

WALIGO ALLEN Applicant

And

NATIONAL EMERGENCY RESPONSE

COUNCIL ON HIV AND AIDS 1st Respondent

SIKHUMBUZO SIMELANE 2nd Respondent

Neutral citation: Waligo Allen vs National Emergency Response Council on HIV and AIDS **(**147/2017) [2017] SZIC 78 (2017)

Coram: MAZIBUKO J,

(Sitting with A.Nkambule & M.Mtetwa

Nominated Members of the Court)

Last Heard: 23rd August 2017

Delivered 30th August 2017

Summary: *Suspension of employee. Employee suspended with pay pending finalization of a disciplinary hearing. Employee objects to certain procedure that was adopted by Employer before and during the hearing. Chairman dismisses Employee's objection. Employee challenges chairman's decision in Court. Employee's application also dismissed in Court. Employee appeals the Court decision. Matter pending appeal hearing.*

Employer varies a material term of the suspension while appeal is pending. Suspension varied to: suspension without pay. Employee challenges the variation.

Held: *The suspension without pay was punitive, irregular and unfair. The Respondent's decision to suspend the Applicant without pay was accordingly set aside.*

JUDGMENT

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1. The Respondent is National Emergency Response Council on HIV and Aids, a statutory body with power to sue and be sued, established in terms of Act No.8/2003 operating as such at Mbabane Swaziland. The Applicant is Ms Waligo Allen an employee of the 1st Respondent who occupies the position of Manager. This matter is a sequel to two (2) other cases involving the same parties, that have been decided by this Court under case no. 147/2017 (A) and 147/2017 (B).

2. About the 11th April 2017 the Applicant was charged with several counts of misconduct allegedly committed by the Applicant in the course of duty. The Applicant was invited to a disciplinary hearing which had been scheduled for the 3rd May 2017. At the disciplinary hearing the Applicant was represented by attorney Muzi Simelane. The initiator was attorney Mxolisi Dlamini. It is common cause that the Applicant was suspended from work on the 6th April 2017, with pay.

3. The disciplinary hearing proceeded as scheduled. The Applicant objected to a certain procedure that the Respondent had adopted before and during the hearing. The chairman adjourned the hearing in order to decide on the objection. The chairman delivered his ruling in writing on the 4th May 2017. The chairman dismissed the objection and further directed that the disciplinary hearing should proceed on the 9th May 2017.

4. On the 10th May 2017 the Applicant filed an urgent application before Court seeking relief, *inter alia*, interdicting the Respondent from proceeding with the disciplinary hearing and also challenging the manner the chairman had been appointed. The application was opposed and eventually argued. The Court dismissed the application by written judgment dated 24th July 2017.

5. On the 28th July 2017 the Applicant filed a Notice of Appeal in which she challenged the judgment of this Court of the 24th July 2017. On the 28th July 2017 the Applicant further filed an urgent application before Court under case no 147/2017(B). The application sought an order, *inter alia*, granting the Applicant a stay of execution of the

judgment which was delivered on the 24th July 2017. This application was opposed. The matter was argued on the 3rd August 2017.

6. On the 3rd August 2017 the Court delivered its *Ex Tempore* ruling as follows:

> *"An Order is granted as follows:*
>
> *1) The disciplinary hearing of the Applicant is stayed temporarily up to the 16th October 2017.*
>
> *2) The matter is postponed for finalization on the 16th October 2017."*

7. On the 16th August 2017 the Applicant filed another urgent application under case 147/2017 (C). The Applicant is seeking an order on the following terms.

> *"1 Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the above Honourable Court and directing that the matter be heard as one of urgency.*
>
> *2. That a rule nisi do hereof[hereby] issue calling upon the Respondent to appear and show cause at a date*

and time to be specified by this Honourable Court why an order in the following terms should not be made final:-

2.1 Directing the Court to have the letter of 04th August 2017 set aside and declared null and void on the basis that the purposed suspension without pay is illegal and contravenes Section 39 of The Employment Act.

2.2 Directing the Court to set aside the Applicant's suspension which is unlawfully imposed upon herself by the Respondent.

3. That the interim order operates with immediate and interim effect pending finalisation of this matter.

4. Costs of suit by the party(s) opposing this relief.

5. Such further and or alternative relief."

(Record pages 3-4)

This application was opposed. Argument proceeded on the 18th and 23rd August 2017. With leave of Court the parties supplemented their argument with written submissions.

8. By letter dated 28th July 2017 the Respondent invited the Applicant to a consultative meeting. The purpose of that meeting was to give the Applicant an opportunity; to show cause, why the terms of her suspension should not be altered from : suspension with pay, to suspension without pay. The letter is attached to the founding affidavit marked AW1. The meeting was scheduled for the 1st August 2017.

9. The Applicant attended that meeting. The Respondent was represented by both its director of Corporate Services and a certain Mr Gabriel Manana who (according to the Applicant), was a consultant. The hearing proceeded as scheduled. The Respondent's decision was conveyed to the Applicant by letter dated 4th August 2017. The letter reads as follows:

"4th August 2017

Ms. Allen Waligo

P.O.Box 4339

MBABANE

Dear Allen,

RE: YOUR SUSPENSION FROM DUTY

1. *The hearing held on the 1st August 2017, to consider the conditions of your suspension and converting same from with pay to without pay bears reference. The minutes of same are attached hereto.*

2. *Having considered your representations, NERCHA has concluded that you have not made a compelling case to warrant the employer to sustain your suspension with full pay. You are hereby advised that your suspension will from Friday the 4th August 2017 be converted to without pay.*

Yours Faithfully

MR. KHANYAKWEZWE MABUZA
NATIONAL EXECUTIVE DIRECTOR"…

(Record B page 3)

The suspension was varied from: suspension with pay, to suspension without pay.

10. The Applicant has challenged the Respondent's decision to vary a material term of the suspension. According to the Applicant the variation of the suspension is in breach of Section 39 (2) of the Employment Act No.5/1980 (as amended by Act No. 5/1997). The Section reads thus.

> *"39.2 (1) An employer may suspend an employee from his or her employment without pay where the employee is*
>
> *(a)remanded in custody: or*
>
> *(b)has or is suspected of having committed an act which if proven, would justify dismissal or disciplinary action.*
>
> *(2) If the employee is suspended under subsection (2) (b)[(1) (b)], the suspension without pay shall not exceed a period of one month."*

The argument is that the period of suspension without pay, which the Respondent has imposed, is indefinite and is therefore contrary to the provision of Section 39 (2).

11. It is common cause that the Applicant charged with the following offences:

    11.1 Gross dishonesty.

    11.2 Untrustworthy conduct.

    11.3 Bringing the name of NERCHA [Respondent] into disrepute.

    11.4 Gross insubordination.

    11.5 Gross insolence.

    11.6 Gross dereliction of duty of duty.

    11.7 Intimidating and disrespectful behavior.

    It is not in dispute that some of the alleged offences, if proven, would justify dismissal or disciplinary action. In other words the Applicant was facing serious charges which met the requirements of Section 39(1) (b) aforementioned. The Respondent was therefore entitled to invoke the provision of Section 39(2) of the Employment Act on the 6th April 2017, but did not do so.

12. The power of an employer who intends to invoke the provision of Section 39 (2) of the Employment Act is not unfettered. This

Section entitles the employer to impose a suspension without pay for a period not exceeding one (1) month. In the matter before Court the employer has imposed a suspension without pay for an indefinite period. The variation letter is consequently in breach of Section 39 (2) of the Act. Currently the matter awaits allocation of a date to argue the appeal. The parties will further await a decision on appeal. There is neither allegation nor assurance in the variation letter that the decision on appeal will be delivered within one (1) month from the 4th August 2017.

13. The Respondent was made aware of the defect in the variation letter. The Respondent addressed the defect as follows in the answering affidavit.

> *"15 Furthermore, I am aware that in terms of the above quoted section the suspension of the employee has to be for a period of a month. The suspension of the applicant is not for an indefinite period for this court to intervene. The respondent has been advised by its legal representatives that the terms of the suspension*

will have to be revisited after a period of a month. The respondent will do that. Again, the applicant stands to fail with costs."

(Record C page 7)

14. The contents of paragraph 15 of the answering affidavit is clearly an afterthought. The contents therein do not appear in the variation letter. The answering affidavit does not cure the defect that exists in the variation letter. An affidavit contains allegations of fact as well as evidence on events that have already occurred and which the deponent has witnessed. There is no evidence that the Respondent has withdrawn the variation letter and substituted same with a new decision. The variation letter is the only decision that the Respondent has so far communicated to the Applicant concerning the matter at hand. The variation letter has been presented before Court as an exhibit to prove the truth of its contents against its author. The contents of paragraph 15 in the answering affidavit merely express the Respondent's future plans (concerning the suspension) which may or may not be executed. However, that

paragraph does not amend the variation letter. The Court agrees with Applicant that the variation letter is defective for contravening Section 39(2) of the Employment Act. The variation letter is accordingly set aside for this defect.

15. Another ground raised by the Applicant in challenging the variation letter is that the contents therein contravene the provisions of the Disciplinary Code and Procedures that is applicable at the Respondent's workplace. The Applicant has referred the Court to articles 5.8 and 5.9 of the Code which provide that:

> *"5.8 Employees being investigated for misconducts may be suspended during the course of the investigations, for a period that is reasonable and fair. The suspension must be on full pay pending the convening of the disciplinary hearing for the misconduct. The suspension on full pay is not to be considered as a disciplinary action.*
>
> *5.9 Suspension without pay, may also be used:*

a) When the employee is remanded in custody;

b) If the employee is subsequently discharged or acquitted of the charge for which he/she was placed under custody, the suspension may be lifted. NERCHA shall nonetheless not be obliged to pay employee the wages/salary he/she would have earned had he/she not been in custody."

16. In terms of Section 5.9 of the Disciplinary Code, the employer is entitled to order a suspension without pay only where the employee is remanded in custody. This provision does not apply in this case since the employee (Applicant) is not remanded in custody.

17. In terms of Section 5.8 of the disciplinary Code, the employer is empowered to suspend its employee on full pay pending convening of a disciplinary hearing for misconduct. The Court interprets the phrase: "*pending convening of a disciplinary hearing*" to mean, pending initiation and completion of a disciplinary hearing. It is at

the completion of a disciplinary hearing that the employer would be able to decide whether to retain or dismiss the employee. In the case before Court the employer has initiated but has not completed the disciplinary hearing. At this stage, the employer's decision to suspend its employee without pay is in breach of the Disciplinary Code.

18. The Court is alive to the fact that a Disciplinary Code is subordinate to law. Where the provisions in the Disciplinary Code conflict with those in the law (be it statutory or common law), the provisions of law should prevail. This principle has legal support.

18.1 *"However, the …Court has made it clear that compliance with a disciplinary code is not an independent test for the fairness of [an employer's decision]."*

GROGAN JOHN: DISMISSAL, DISCRIMINATION AND UNFAIR LABOUR PRACTICES, 2nd edition, Juta, 2007 (ISBN 978 0 7021 7885 6) at page 333.

18.2 *"... failure to follow a disciplinary code is not per se unfair. The departure from the code must still be measured against general standards of fairness, as enshrined in the Act ..."*

GROGAN JOHN (supra) at page 334.

19. The inquiry before Court is two-fold. Firstly, the Court has to determine whether it is competent for an employer to vary its decision from: suspension with pay to suspension without pay. If the employer is entitled to implement the variation, the next inquiry is whether the employer arrived at its decision using a fair procedure.

20. The justification for the employer's decision to vary the terms of the suspension are contained in the letter dated 28th July 2017 annexure AW1. The letter reads thus:

"28th July 2017

Ms Allen Waligo
P.O. Box 4339
MBABANE

Dear Allen

RE: NOTICE TO SHOW CAUSE WHY YOUR SUSPENSION SHOULD NOT BE WITHOUT PAY

1. *Reference is made to your letter of suspension dated 6th March 2017.*
2. *NERCHA has noted serious delaying tactics being employed by you and your attorneys to frustrate the disciplinary hearing. You have done that through filing ill-conceived points of law at the disciplinary hearing which were rightly dismissed by the Chairperson, Mr Sikhumbuzo Simelane and moving a court application to stop your disciplinary hearing which was also rightly dismissed by the Industrial Court on the 24th July 2017.*
3. *As soon as you were served with the Notice to continue with disciplinary proceedings and you being aware that the disciplinary hearing is now being set to proceed you have caused to be filed a notice of appeal which basically means that the organization will have to continue paying you pending the outcome of the appeal and essentially you are not rendering any services to the organization. You are unfairly paid for doing nothing. This is unacceptable to the organization as you have been on suspension for over four*

months now and has placed a heavy economic burden on the organization.

4. *The organization is therefore contemplating converting your suspension from with pay to without pay with immediate effect.*
5. *You are therefore directed to appear personally and/or with a fellow employee before the senior management of the organization to show cause why your suspension should not be converted from with pay to without pay pending the finalization of your disciplinary hearing. You will appear as follows:*

   Day: Tuesday

   Date: 1st day of August 2017

   Time: 08:30 am hours.

   Venue: Emafini Conference Centre.
6. *Please note that should you fail to appear then the organization will take the appropriate decision and it will be assumed that you have waived your right to make representations.*

Yours faithfully,

THEMBISILE GAMA

DIRECTOR CORPORATE SERVICES"

21. The points of law that the Applicant raised before the chairman at the disciplinary hearing and also in the Court application (in order to challenge the chairman's ruling), are events that took place before the Respondent changed the terms of the suspension. Those events could not have influenced the Respondent's decision of the 4th August 2017. The reason that influenced the Respondent's decision was the fact that the Applicant filed a notice to appeal of this Court's judgment dated the 24th July 2017. An extract from annexure AW1 reads as follows:

> *"3 .As soon as you were served with the Notice to continue with disciplinary proceedings and you being aware that the disciplinary hearing is now being set to proceed you have caused to be filed a notice of appeal which basically means that the organization will have to continue paying you pending the outcome of the appeal and essentially you are not rendering any services to the organization. You are unfairly paid for doing nothing. This is unacceptable to the organization as you have been on suspension for over four months now and has placed a heavy economic burden on the organization.*

4 The organization is therefore contemplating converting your suspension from with pay to without pay with immediate effect."

What has frustrated the Respondent is the fact that: while the Applicant is on suspension, she will continue to receive her monthly salary pending finalisation of the appeal. That fact is unacceptable to the Respondent.

22. A litigant who is dissatisfied with a decision of the Industrial Court has a right to appeal that decision or subject it to review. The right of appeal or review a decision of the Industrial Court is guaranteed in terms of Section 19 of the Industrial Relations Act No.1/2000 as amended, and it provides as follows:

"19.(1) There shall be a right of appeal against the decision of the Court on a question of law to the Industrial Court of Appeal.

...

19(5) A decision or order of the Court ... shall, at the request of any interested party, be subject to review by

the High Court on grounds permissible at common law."

23. A withdrawal of the Applicant's salary during the suspension meant that the Applicant was being penalized for exercising her right to appeal the decision of the Industrial Court. It is not competent for the employer to penalise its employee for exercising his/her right to appeal a Court decision. The Respondent's conduct contravenes Section 19(1) of the Industrial Relations Act. The Respondent's decision to withdraw the Applicant's salary during suspension was accordingly irregular and unfair and it is hereby set aside. It would be improper and irregular for employers to discourage employees from exercising their right to appeal or review decisions of the Court for fear of being victimized either by way of withdrawal of salary or by any other unfair process.

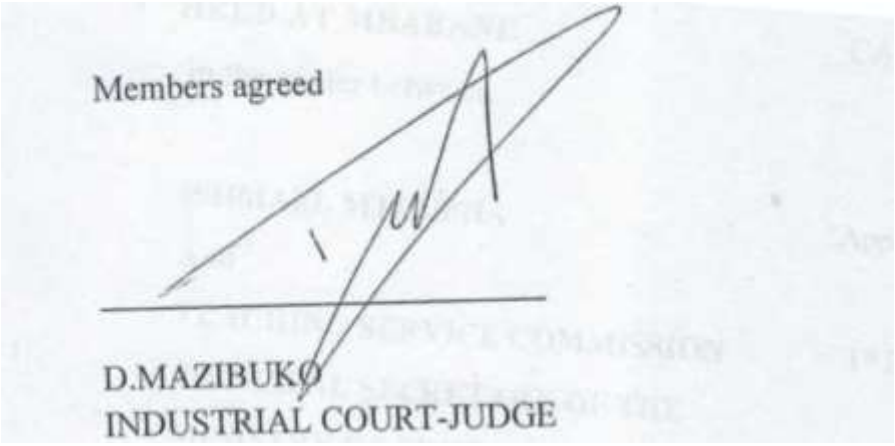
24. In principle an employer should be legally entitled to vary the terms of the employee's suspension: from suspension with pay to suspension without pay or vice versa. A decision to suspend an employee with or without pay depends on whether or not the

circumstances are justified under Section 39(1) (a) and (b) of the Employment Act. If there is a material change in the employee's circumstances, such change may justify the employer in varying its earlier decision on suspension. However, that variation must be preceded by a fair procedure and be based on legally competent grounds.

25. Wherefore the Court orders as follows:

25.1 The Respondent's decision dated 4th August 2017 in terms of which the Respondent varied the terms of the Applicant's suspension: from suspension with pay to suspension without pay, is hereby set aside.

25.2 Each party is to pay its costs.



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