# IN THE INDUSTRIAL COURT OF ESWATINI

## JUDGMENT

Case No. 388/19

In the matter between:

**THEMBI MABUZA** Applicant

**And**

**ESWATINI ROYAL INSURANCE CORPORATION** Respondent

**Neutral citation:** Thembi Mabuza v Eswatini Royal Insurance Corporation *(388/2019)* [2020] *SZIC 25* (06 March 2020)

**Coram:** **S. NSIBANDE JP**

(Sitting with Nominated Members of the Court Mr. N. Manana and Mr. M. Dlamini)

**Heard:** 20 December 2019

**Delivered:** 06 March 2020

## JUDGMENT

[1] The Applicant, Thembi Mabuza, is an employee of the Respondent, the Eswatini Royal Insurance Corporation. She works as a Switch Board Operator at the Respondent's head office in Mbabane.

[2] On 22nd October 2019, the Respondent suspended the Applicant on full pay pending the finalisation of a disciplinary process instituted against her. The suspension came after the Respondent had investigated allegations of misconduct involving anomalies on funeral claims payments handled/made by the Applicant.

[3] On 5th November 2019 the Applicant was invited to appear for a disciplinary hearing scheduled for 11th November 2019. Upon receipt of the invite, the Applicant, almost immediately, requested the Respondent to provide her with certain documentation for purposes of preparing for the hearing. In particular she sought all emails, memoranda and written statements of all witnesses that the Respondent intended to use at the hearing. The Respondent's response was that it had no statements from witnesses nor did it have any mail, email or memoranda that the Applicant was not aware of. In short the Respondent had no

documentation that it could give to the Applicant that she did not already have or was aware of.

[3] The Applicant then moved an urgent application before this Court seeking to compel the Respondent to provide her with the investigation report compiled and relied upon by the Respondent in charging her. The application was launched on 13th November and heard on 19th November under **case No. 356/2019**. When this matter was heard on 20th December judgment under **case No. 356/2019** had yet to be delivered.

[4] On 26th November 2019, the Respondent called upon the Applicant to show cause why it should not vary the terms of her suspension from suspension with pay to suspension without pay. The Respondent sought to vary the terms and conditions of the suspension because it was of the view that by exercising her constitutional right to seek redress in the courts of law, the Applicant had intervened in the disciplinary process and had introduced a variable that was outside its control as employer. Therefore, the Respondent had ***"reflected upon the current situation and (had) determined that it is not sustainable for the Corporation to maintain the terms of suspension with pay whilst awaiting the determination by the Courts"*** (Respondents letter dated 26th November 2019 paragraph 4).

[6] Despite the representations made by Applicant regarding the proposed charge in terms and conditions of her suspension, the Respondent varied same by letter dated 10th December 2019. The decision to vary the terms and conditions of suspension was justified thus:

***"5. The enquiry into the conditions of your suspension has been activated by the fact that the Corporation as an employer is no longer in control of the process and cannot therefore expedite the finalisation of the disciplinary hearing within the period contemplated by Section 39 of the Employment Act.***

***6. Having reflected on your response as well as the circumstances of this matter, we are of the view that it is pendant and in the interests of fairness, that the terms of the suspension be varied from suspension with pay to suspension without pay with effect from 1st December 2019."*** (Respondent letter dated 10th December 2019).

[7] Applicant received the said letter on 12th December 2019, apparently being the day on which she expected payment of her salary following that the Respondent's employees were being paid on that day. She did not receive her salary. The Applicant being dissatisfied with the Respondents actions and its subsequent refusal to withdrawal the decision to vary the terms of her suspension then approached this Court for an order;

1. *Dispensing with requirements of the Rules of Court with relation to service of process and timelines, and permitting this matter to be heard as one of urgency;*
2. *Condoning the Applicant's non-compliance with the Rules of the Honourable Court;*
3. *Directing that a rule nisi hereby issue calling upon the Respondent to show cause on a date to be determined by the Court why the rule as follows should not be made final and returnable on a date to be fixed by the Honourable Court;*

    *3.1.1 Reviewing and settling aside the Respondent's decision and/or letter dated 10th December 2019 intending to vary the terms and conditions of suspension to be without pay in violation of article 4.2 of the Disciplinary Code;*

    *3.1.2 Declaring that the variation letter dated 10th December 2019 which was served by the Respondent on the Applicant on the 12th December 2019 to the Applicant as null and void and of no force and effect.*

    *3.1.3 Declaring that the Applicant's purported suspension without pay is null and void and of no force and effect.*
4. *Pending finalization of the matter the status quo must remain the same in that the Applicant must continue to be suspended with pay.*

5. *Directing that prayers 3.1.1, 3.1.2 and 3.1.3 and 4 above operate with immediate and interim effect returnable on a date to be determined by this Honourable Court or pending the finalization of this matter.*

6. *Cost of suit.*

7. *Further and/or alternative relief."*

[8] In her founding affidavit, the Applicant's challenge of the variation of the terms of her suspension is based on her assertion that the variation is in total violation of **Article 4.2** of the Disciplinary Code of the Respondent. **Article 4.2** (which follows under a header written 4. **Suspension from Employment**) reads as follows:

***"4.2 Where an employee has been suspended in terms of article 4.1, he shall be on full remuneration until the disciplinary case put to him by the Employer has been finalized."***

It is common cause that the Applicant was suspended in terms of article 4.1 of the Disciplinary Code. It is also common cause that the Applicant is within the bargaining unit covered by the collective Agreement from where the Disciplinary Code arises.

[9] The Applicant's argument is that the variation of the terms of suspension is in breach of the Disciplinary Code and that it is therefore null and void and of no

force and effect; that in the absence of a provision for suspension without pay in the collective agreement/Disciplinary Code, then the Respondent is not entitled to impose same unilaterally. It was further argued that the Respondent negotiated and agreed to the provisions of **Article 4.2** in full knowledge of **Section 39** of **The Employment Act 1980**, which provides for the suspension of employees without pay for a period of one month where the employee faces a disciplinary hearing. It was argued that the Respondent agreed to grant its employees more favourable terms and that since the Applicant had now acquired certain rights set out on the Collective Agreement and specifically in terms of **Article 4.2** of the Disciplinary Code, then it was unlawful for her to be subjected to the provisions of **Section 39** of **The Employment Act**.

[10] The Applicant further protests that the suspension was not said to be in terms of **Section 39 of the Employment Act**; that the letter of suspension makes no mention of **Section 39**. It was Applicant's submission that the suspension would in any event be contrary to **Section 39** in that it was for an indefinite period and most likely to extend beyond the one-month period allowed by the Section.

Section 39 of **The Employment Act** reads:

*"39 (1) An employee 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 (1) (b) the suspension without pay shall not exceed a period of one month."***

[11] The Respondent, in opposing the application raised two points of law and pleaded over on the merits. The points raised challenged the urgency of the application having regard to the time frames accorded to the Respondent in relation to the application; and whether the Applicant had set out adequately facts to motivate the Court to enrol the matter in the absence of compliance with P**art VIII** of **The Industrial Relations Act 2000** (as amended).

[12] The Respondent's complaint with regard to the urgency of the matter was largely bases on the abridgement of the time frames by the Applicant. It considered that the time lines set oppressive and designed to prejudice the Respondent ventilating its case before the Court. The Respondent was served with the application in the afternoon of on 18th December 2019 with the application set down for 9.30 am on 19th December 2019. There was no provision for the filing of answering affidavits yet the Applicant sought to secure an interim order. Rather than enrol the matter as one of urgency, the Court was

urged to find that the Applicant's oppressive and unreasonable time frames constitute an abuse of Court process.

[13] The second point raised is that the Court lacks the jurisdiction to hear this matter because the Applicant failed to adhere to **Part VIII** of **The Industrial Relations Act** and has not set out primary facts as to why the matter could not be dealt with in terms thereof. In argument the Respondent, in keeping with its answering affidavit submitted that the Court had no jurisdiction to review decisions of employers unless the requirements of **Part VIII** of **The Industrial Relations Act** had been complied with.

[14] On the merits, the Respondents case was that it was entitled to deviate from the disciplinary code in appropriate and exceptional circumstances, that it had established the necessary exceptional circumstances warranting such deviate and that it had adopted a fair process (in which the Applicant was given an opportunity to comment and advance reasons why she believed there should not be a deviation from the Code), in reaching the decision to deviate from the Code.

[15] It was the Respondent's submission that where the expeditious completion of the disciplinary hearing is disturbed by the employee, the employer ought not be obliged to pay remunerate the employee; that based on the principle of fairness, it

is unfair for the employer to pay an employee's remuneration whilst the employee is exhausting his Constitutional right to pursuing relief in the Courts or is engaged in various activities designed to delay and/or frustrate the expeditious completion of the disciplinary hearing. In support of this submission the Respondent cited the case of **Msipho and Plasma Cut (2005) 26 ILJ22 76 BC**.

[16] With regard to this matter the submission was that the applicant had sought and obtained a stay of the disciplinary hearing under **Industrial Court Case No. 356/19** thus interfering with the progression of the hearing and that the stay of the disciplinary hearing necessitated that the terms of the suspension be reviewed and that suspension without pay be considered. It was submitted that the following factors warranted the deviation from the disciplinary code.

16.1 That the matter under case 356/19 was argued before an acting judge whose acting term had come to an end;

16.2 That the Court was now in recess and would only resume late January or early February in 2020; and

16.3 There was no indication when judgment would be issued.

[17] The Respondent further submitted that **Section 39** of **The Employment Act** allowed it to suspend the Applicant without pay and that it only needed to

follow the rules of natural justice in order to vary a suspension from one with pay to one without pay. It was the Respondent's case that it had made a case for the suspension from one with pay to one without and that it was entitled to save for the reason that the employee had herself introduced the Court as a third party which was now in control of the disciplinary hearing.

[18] With regard to the preliminary issues, we are in agreement with the Respondent that the time limits were abridged by the Applicant in a manner that was unreasonable and oppressive. We align ourselves with the sentiment of the Court and in **Plastic International Limited v Markus Zbinden High Court Case No. 4364/2010** that *"the need to abridge time limits in a manner that does not prejudicially affect a Respondent's right to approach the Court cannot be over emphasised*."

As a consequence of our agreement with the Respondent with regard to the unreasonable time frame set by the Applicant, we refused to grant the Applicant interim relief to mark our disapproval of the unreasonable manner in which the time limits were abridged. We, however, find that the matter was sufficiently urgent to enrol as an urgent matter. The Applicant in her papers bases the urgency of the matter on the fact that there is a breach of provisions of a collective agreement the result of which will be to visit the injustice of having her salary not paid to her. This Court has previously held that an imminent

threat of manifest injustice constitutes a good ground for urgency **(see Zodwa Mkhonta v SEB IC Case No. 343/2000)** and while it may seem that the urgency is based on the Applicant suffering financial hardship if the matter is not enrolled on an urgent basis, the case of **Kenneth Manyathi v Usuthu Pulp Company and Another IC Case No. 245/2002** is distinguishable from this matter. In case **245/2002** (supra) the Court was dealing with an application that would affect other employees by effectively annulling a Collective Agreement relating to a benefit that was being removed by the employer and the Applicant claimed urgency on the basis of financial hardship. In this matter the Applicant claims urgency on the basis of the non-payment of her salary. This Court in **Bonkhe Lukhele v SDFC IC Case No. 39/2008 and Graham Rudolph v Mananga College IC Case No. 94/2007 [Interlocutory ruling]**, held that the non-payment of an Applicant's salary was a good ground for urgency where the employment contract still subsists. It is common cause that the employment contract herein still subsists.

[19] With regard to the alleged non-compliance with **Part VIII** of **The Industrial Relations Act** the Applicant states, at paragraph 30 of her Founding Affidavit that if she were required to adhere with the rules of this court, including reporting a dispute with the Conciliation Mediation and Arbitration Commission she would find herself without a remedy as the suspension without

pay would be unlawfully effected. It is our view that by so saying the Applicant sets out a reason why the processes of **Part VIII** should be waived. **The Industrial Court Rules 2007** make provision for matters to brought to court notwithstanding the procedure provided in **Part VIII** of the **Act**. We are satisfied that the Applicant has made a case for the waiver of Part VIII.

Accordingly, the points raised *in limine* are dismissed.

[20] It is now established in our law that an employer can deviate from a disciplinary code provided there are appropriate and exceptional circumstances to justify the deviation and the variation is preceded by a fair process in terms of which the other party is consulted.

**Vusi Ndzingane v Swaziland Building Society IC Case No. 259/2012** and **Gugu Fakudze v The Swaziland Revenue Authority and 3 Others ICA Case No. 08/2017**.

[21] In terms of **Gugu Fakudze v The Swaziland Revenue Authority** (supra) what is an exceptional circumstance is a question of fact and each case will turn on its own circumstances. In this matter, the Respondent's justification for the decision to vary the terms of the suspension are contained in the letter of 26th November 2019 wherein the Respondent writes;

***"3. There has now been an intervention in the disciplinary process, that has been brought about by your exercising your constitutional right to seek redress in the courts of law.***

***4. We have reflected upon the current situation and have <u>determined</u> that it is not sustainable for the corporation to maintain the terms of suspension with pay whilst awaiting for the determination by the Court."***

The Respondent sought to vary the suspension terms because the Applicant had approached this Court under **Case No.356/2019**. It was not because the Court had gone to recess or that judgement had been reserved to an unknown date, likely to be at the end January/beginning February 2020. Ultimately the issue was that Applicant would continue to receive her monthly salary pending finalisation of **Case No.356/2019**, and that the Respondent was no longer in control of the disciplinary process and could not ensure that it was finalise expeditiously.

[22] The change in the terms and conditions of the Applicant's suspension is a response to the Applicant challenging the decision of the Respondent to refuse to furnish her with certain information that she felt she needed to prepare for the hearing. In terms of our labour law, the Applicant is entitled to a fair hearing. Where an employee suspected of having committed a misconduct, appears

before a disciplinary she is entitled to a fair due process. Where she feels that such process is unfair and is to her detriment, she is entitled to approach the Courts to safeguard her rights. In our view, to then visit such employee with the withdrawal of her salary during the suspension is to punish that employee for merely acting to protect her right to a fair hearing.

[23] This Court in the matter of **Waligo Allen v National Emergency Response Council on HIV and AIDS and Another IC Case No. 147/2017**, stated that ***"In principle, an employer should be legally entitled to vary the terms of the employees suspension: from suspension with pay to suspension without pay or vice versa. If there's 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."***

[24] Our view is that it cannot be a legally competent ground for an employer to penalize its employee for exercising his/her right to administrative justice as **Mazibuko J** stated in the Allen case (supra) ***"it would be improper and irregular for employers to discourage employees from exercising their right to***

***appeal or review decision of the Court for fear of being victimised either by way of withdrawal of salary or by any other unfair process."***

We are agreement with these sentiments. It cannot be said that the variation of the terms and conditions of the Applicant's suspension was based on legally competent grounds in these circumstances when it was based on denying her her right to a fair hearing. Where an applicant's application to Court is unjustified and/or is an abuse of the Court process, it is for the Respondent to convince the Court to make such a finding and to visit such an applicant with costs, even in this Court.

[25] In the circumstances, the application succeeds and the Court makes the following order;

**(a) The variation letter dated the 10th December 2019 is null and void, and of no force and effect; and**

**(b) The Applicant's purported suspension without pay is null and void and of no force and effect.**

**(c) The Respondent is directed to pay the Applicant's salary for December, January and February and all subsequent months.**

**(d) Each party is to pay its own costs.**

The Members agree.

**S. NSIBANDE**

**PRESIDENT OF THE INDUSTRIAL COURT OF ESWATINI**

**For the Applicant:** Ms. H. Mkhabela (Mkhabela Attorneys)

**For the Respondent:** Mr. Z. Jele (Robinson Bertram Attorneys)