IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 205/2019 [B]

In the matter between:

PHESHEYA NKAMBULE Applicant

And

NEDBANK (SWAZILAND) LTD Respondent

Neutral citation: Phesheya Nkambule v Nedbank (Swaziland) Ltd (205/2019 (B)) [2020] SZIC 28 (06 March 2020)

Coram: **S. NSIBANDE J.P.**

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

Date Heard: 08 November 2019

Date Delivered: 06 March 2020

JUDGMENT

[1] The Applicant, Phesheya Nkambule was suspended on full pay by the Respondent, Nedbank (Swaziland) Limited on 24th December 2019, pending certain investigations. On 14th February 2019 he was served with charges and invited to appear at a disciplinary hearing on 25th February 2019. It is not clear from the pleadings what happened on the 25th February but the Applicant was served with revised charges on the 20th March 2019 and then invited to a disciplinary hearing scheduled for the 15th April 2019.

[2] The Applicant attended the hearing from the 15th to the 18th April and two witnesses were led. The hearing then adjourned to continue sometime in May 2019. While the matter was adjourned the Applicant launched an application before the High Court, challenging a number of aspects of the hearing. From Annexure 'A' of Applicant's Founding Affidavit, it appears that the Applicant's hearing was scheduled to resume on 22nd May but it did not, following that he was sick and presented a doctor's note. It also appears from Annexure 'A' that the High Court application was argued in that Court on 5th June 2019.

[3] Meanwhile on 20th May 2019, the Applicant was called upon to furnish reasons why the terms of his suspension should not be varied from suspension with pay to suspension without pay until the finalisation of the disciplinary hearing. Having responded accordingly on 23rd May, the Respondent, on 28th May 2019, advised

Applicant that the terms of his suspension had been varied to suspension without pay effective 1st June 2019. Over and above that, the benefits granted to the Applicant through his employment contract were terminated. These included his contract mobile phone and his medical aid. It is common cause that the Applicant's salary has not been paid since 1st June 2019 in line with the Respondent's letter dated 28th May 2019 varying his suspension from being on full pay to suspension without pay pending finalisation of the disciplinary enquiry.

[4] The Applicant has now brought an urgent application primarily seeking the reinstatement of his salary forthwith, the reinstatement of all his benefits (cell phone and medical aid); payment of arear salary - at the time being 3 months' salary in the sum being E293 647.74 (Two Hundred and Ninety Three Thousand Six Hundred and Forty Seven Emalangeni Seventy Four Cents).

[5] Applicant's case is premised on the allegation that the Respondent's conduct now constitutes a breach of the employment contract between the parties as well as a breach of **Section 39(2)** of **The Employment Act 1980**. The Applicants submitted that he is entitled to his salary together with the benefits bestowed on him by his employment contract for as long as his contract of employment subsisted. He conceded that **Section 39(2)** of **The Employment Act** allowed an employer to suspend an employee without pay provided that the suspension without pay would not exceed a period of one month. He therefore conceded further that the Respondent was entitled to vary the terms of his suspension to suspension without

pay but only for one month - the month of June 2019 - and that any continued withholding of his salary and benefits beyond the last day of June 2019 was unlawful and contrary the provisions of **Section 39** of **The Employment Act.**

[6] The Respondent opposes the application and, in its submission, set out that the Applicant had interfered with the Respondent's exercise of its disciplinary authority by filing numerous spurious applications before this Court and the High Court, the effect of which was to delay the finalisation of the disciplinary process against him. It states that in such circumstances where the employee is involved in a systematics and blatant trajectory to delay and frustrate the finalisation of the disciplinary hearing by involving various judicial interventions, then the duty of fairness which underpins employment relationships compels the Court not to countenance the employee's behaviour. It was the Respondent's submission that on a purposive interpretation of **Section 39** of **The Employment Act No.5 of 1980**, an employee without pay for a period in excess of one month where exceptional and compelling circumstances exist, in particular where the conduct of the employee is such that he has interfered with the prerogative of the employer to discipline.

[7] In support of its submission the Respondent referred the Court to **Sections 4** and **8(4)** of **The Industrial Relations Act 2000** (as amended). The South African cases of **Msipho and Plasma Cut (2005) 26 ILJ 2276 (BCA)**, **SAPPI FORESTS V CCMA & Others Case No. DA 12/08** and **SAEWA obo Members v Abedare**

Cables [2007] 2 BALR 106 were cited to support the notion that an employee on suspension with full pay is not entitled to his remuneration for the period in which a disciplinary hearing is postponed at his instance; that it would be unfair in such circumstances to hold the employer responsible for an employee's action.

[8] **Section 39** of **The Employment Act** reads thus:

"39. (1) An employer may suspend an employee from his or her employment without pay where the employer 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 <u>shall not exceed</u> a period of one month.

As indicated above, the Applicant accepted the suspension without pay but argues that the Respondent has imposed same beyond the month of June 2019 and that such action is contrary to the provisions of **Section 39(2)**. It appears to us that the matter turns on the interpretation of **Section 39** of **The Act**.

[9] We have considered the South African cases cited by the Respondent. We have however, not been able to find any legislation similar to **Section 39** of our **Employment Act**. Instead, it appears that in terms of South African law an employer may suspend an employer without pay if the employee so agrees or

legislation or a collective agreement authorises the suspension. Apart from the **Sappi Forest** (supra) decision, the other two matters were decisions of arbitrators who held that an employer is entitled to withhold payment of salary of a suspended employee where that employee delays a disciplinary and for the period of the delay. The employee would not be entitled to salary during the period of the suspension. The period is not necessary an indefinite one. Again, as previously stated these decisions are not guided by legislation. The **Sappi Forest** decision seems to have been based on the provisions of a Collective Agreement that allowed suspension without pay that the contents and operation of which the employee had not disputed. Further it seemed the employee had been given an option to either attend a disciplinary hearing forthwith (while on full pay) or wait for his criminal case to be finalised (without being paid). He had chosen to await the outcome of his criminal case but then challenged the employer's decision not to pay him while awaiting same on the basis of a clause in the collective agreement.

[10] The Respondents attorney made an impassioned submission for the court to adopt a purposive interpretation of **Section 39** of **The Employment Act** in terms of which, it was submitted, the purpose of the section was to ensure that an employer held and completed a disciplinary hearing within a reasonable time. It was submitted that the period given by the Act for suspension without pay ought to be read as allowing an employer to extend same where an employee is engaged in dilatory conduct that ensures that the hearing cannot be completed expeditiously.

[11] Our **Section 39(2)** is clear an employee who intends to invoke the provision of the Section does not have unfettered powers. The suspension without pay cannot exceed a period of one month. There is no reason, in our view to go beyond the normal meaning of the section so as to give it any other interpretation. The Courts jurisdiction to promote harmonious Industrial Relations and to issue appropriate orders, does not give it power to issue orders that are outside the law. To interpret **Section 39(2)** in any other way other than that it limits suspension without pay to a period not exceeding one month would be judicial overreach into the area of the legislature. We are not entitled to do so.

[12] In any event, even from the angle of fairness, as we were implored by the Respondent's attorney, the continued suspension of an employee does not have detrimental effect for an employer only. An employee suspended on suspicion of having committed a fraud, suffers from reputational damage from which he cannot recover easily. This is particularly so where the employee is at Senior Managerial level. He can not be equated to a man sitting at home on holiday. His professional growth is threatened and he suffers mental anguish brought about by the employer's accusation. It is in his interests also, that the disciplinary hearing be finalised timeously. As he fights for his career, he is entitled to protect his right to a fair hearing by challenging whatever actions by the employer he feels are denying him a fair hearing.

It seems to us that to withdraw the Applicant's salary by changing his terms of suspension to suspension without pay and indefinitely, is contrary to **Section 39** of

The Employment Act and amounts to the applicant being penalised for challenging the fairness of the process the employer is taking him through.

[13] In the circumstances, we direct that the Respondent reinstate the Applicant's salary forthwith with effect from his July 2019 salary. This includes all benefits due in terms of his contract of employment.

[14] The Respondent raised an issue of a counterclaim amounting to E2.9 million. It is trite that this Court does not take cognisance of disputes that have not been reported and conciliated upon. The certificate of unresolved dispute constitutes proof of what dispute was reported and what was conciliated upon. On the basis of the certificate before Court it appears that the Nature of the dispute was the non-payment of salary and the Issues in dispute were the *"1. Reinstatement of my salary forthwith and 2. Payment of my salary arrears at present (3 months) = E293647.74."*

The issue of the counter claim arises only as part of the reasons the dispute is unresolved.

The Respondent ought to have reported the counterclaim as its counter dispute before CMAC so that the nature thereof would be conciliated upon. (**See Hub Supermarket v Andrew McCarter (ICA Case No. 18/2005**)

[15] In the circumstances we are unable to take cognisance of the counter claim in its current form.

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. MLK Ndlangamandla (MLK Ndlangamandla Attorneys)

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