



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No 120/2023

In the matter between:

MZWANDILE KUNENE

Applicant

And

NATIONAL AGRICULTURAL MARKETING BOARD

Respondent

Neutral Citation : Mzwandile Kunene vs National Agricultural Marketing Board, Case No. (120/2023) SZIC 53 [2023]

Coram : **MSIMANGO - JUDGE**
(Sitting with Mr. S Mvubu and Ms N. Dlamini - Nominated Members of the Court)

DATE HEARD : 25th May 2023

DATE DELIVERED : 19th June 2023

Summary : The Applicant was suspended by the Respondent on or about 18th January 2023 on full pay pending finalization of a disciplinary process. On the 21st April 2023 the Respondent wrote to the Applicant, where it called upon the Applicant to show cause why the terms and conditions of suspension should not be varied from being with pay to without pay. The Applicant responded to the effect that the employment relationship is regulated by the Employment Contract as well as other policies which include the Disciplinary Code and Procedure, hence, the variation of the suspension would amount to a violation of the Disciplinary Code. However, on the 2nd May 2023, the Applicant was served

with a letter dated 27th April 2023 intending to vary the terms of suspension from being with pay to without pay. The court is now called upon to declare the variation letter as null and void, and of no force and effect.

JUDGEMENT

[1] The Applicant is Mzwandile Kunene an adult Liswati male of Mbabane in the Hhhho Region, and an employee of the Respondent.

[2] The Respondent is National Agricultural Marketing Board, a statutory body corporate established in terms of Section 3 of the National Agricultural Marketing Board Act, No.13 of 1985 and is also a category A Public Enterprise Unit administered under the Public Enterprises Control and Monitoring Act, 1989, with its principal place of business situate in Manzini, in the Manzini District.

[3] The Applicant has brought an application against the Respondent seeking an order in the following terms:-

3.1 Dispensing with the 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.

3.2 Condoning Applicant's non-compliance with the Rules of the above Honourable Court.

3.3 Directing that a rule nisi do hereby be issued 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.

3.3.1 Reviewing and setting aside the Respondent's decision and/or letter dated the 27th April 2023 intending to vary the terms and conditions of suspension to be without pay

in violation of clause 4.01 of the Disciplinary Code, read with clause 23.1 and 23.2 of Applicant's employment contract.

3.3.2 Declaring that the variation letter dated the 27th April 2023 which was served by the Respondent on the Applicant on the 2nd May 2023 as null and void, and of no force and effect.

3.3.3 Declaring that the Applicant's purported suspension without pay is null and void and of no force and effect.

3.3.4 That pending finalization of this application, the ongoing disciplinary hearing be halted.

3.3.5 Directing the Respondent to comply with clause 23.2 of Applicant's Employment Contract before varying clause 4.01 of the Disciplinary Code and Procedure.

3.4 Pending finalization of the matter the status quo must remain the same in that the Applicant must continue to be suspended with pay.

3.5 Directing that prayers 3.3.1, 3.3.2, 3.3.3, 3.3.4, 3.3.5 and 3.4 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.

3.6 Cost of suit at attorney and own client scale.

3.7 Further and/or alternative relief.

[4] The Applicant argued that on or about the 20th November 2020 he was appointed by the Respondent to the position of Chief Financial Officer based in the Manzini Head Office.

- [5] On or about the 18th January 2023 he was suspended by the Respondent on full pay pending the finalization of a disciplinary hearing process against him.
- [6] On the 21st April 2023 the Respondent wrote to the Applicant where he was called upon to show cause why the terms and conditions of suspension should not be varied from with pay to without pay. The Applicant responded to the effect that the employment relationship is regulated by the employment contract, as well as other policies which include the Disciplinary Code and Procedure, therefore, the variation would be in violation of the code.
- [7] On the 2nd May 2023, while attending the disciplinary hearing, the Applicant was served with a letter dated the 27th April 2023, intending to vary the terms of suspension from being with pay to without pay. The Applicant argued that the essence of the letter was that the Respondent intended that the suspension was now going to be without pay in total violation of article 4.01 and 4.02 of the Disciplinary Code which provides that suspension should be with pay and once it is without pay it will amount to a punishment.
- [8] The Applicant argued that the variation violates the provisions of the code which forms part of the conditions of his employment with the Respondent, including the employment contract on how variations, amendments and deletions are to be regulated, and in particular this variation contradicts clauses 23.1 and 23.2 of the employment contract.
- [9] The Applicant submitted that whilst there appears to be a view that since the Disciplinary Code was developed by the employer without a consultative process with employees, the employer has that latitude to vary its terms at will. The Applicant submitted further that in his situation

clause 19.3 categorically provides that his employment is subject to the disciplinary code, furthermore, clause 23 governs any variation of the terms of his engagement, for the reason that it specifies that his employment contract is the sole record between himself and the Respondent. However, provisions of the Public Enterprise Unit Act, and any other relevant legislation or company policies would be read as applicable to the employment relationship.

[10] It was again Applicant's argument that the purported variation does not fit or fall under any of the above instruments, as the Respondent has not specified the legislation or company policy that empowers it to act in the manner it has. Further, the Respondent has not invoked clause 23.2 of the contract, whereas, it is the empowering provision should there be a need to vary the terms of engagement, without following that process the purported variation is null and void.

[11] The court is now called upon to determine whether the purported variation of the terms and conditions of suspension is lawful or not.

[12] The Respondent in turn raised two (2) preliminary points, the first being **whether the Industrial court has jurisdiction to grant the relief of review**. In this regard the Respondent argued that it is trite that the Industrial Court does not have inherent jurisdiction as its jurisdiction is circumscribed by the **Industrial Relations Act 2000**. The Respondent argued further that, the Industrial Court of Appeal in the matter of **STANDARD BANK OF ESWATINI V FREEMAN LUHLANGA** concluded that the Industrial Court does not have powers of review and can only grant injunctive relief. The Respondent went on to cite **paragraph 68.1** of the judgement which reads as follows:-

“68.1 The Industrial Court enjoys no inherent, supervisory, review or like powers to restrain illegality or prevent miscarriage of justice, its jurisdiction is strictly prescribed in Section 8 (1) of the IR Act.”

[13] The Respondent submitted that in this regard the Industrial Court of Appeal concluded that Section 8 (3) of IRA is not intended as an automatic superimposition of the sum total of the powers of the High Court, which would include the High Court’s statutory powers of appeal and supervisory powers including review and powers to determine constitutional matters. In support of this argument the Respondent went on to cite paragraph 44 of the ICA judgement which reads as follows:-

“44 the jurisdiction provision articulated in Section 8 (1) is generally referred to as conferring ‘exclusive jurisdiction’ by the Industrial Court over labour matters. This however, strictu sensu only hold true in respect of matters expressly provided for in the IRA”

[14] It must be pointed out that the jurisdiction of the Industrial Court is elaborate and covers all labour disputes arising between an employer and an employee during the course of employment. Section 8 of the Industrial Relations Act No. 1 of 2000 as amended provides as follows in this regard:-

8 (1) The Court shall, subject to Section 17 and 65 have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen’s Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an

employer or employers association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof:

(2)(a) An application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, staff association, an employer's association, an employee's association, a federation, and the commissioner of Labour or the Minister.

(3) In the discharge of its functions under this Act, the Court shall have all the powers of the High Court, including the power to grant injunctive relief.

(4) In deciding a matter, the Court may make any other order it deems reasonable which will promote the purpose and objects of this Act.

[15] In light of Section 8 above, the present application arises from a labour dispute between an employer and employee, and the basis of the dispute is that the employer is unilaterally deviating from the code by varying the terms of the employee's suspension from being with pay to without pay. In the circumstances when the employee challenges the decision of the employer he is not reviewing that decision but seeking to enforce his rights arising from the contract of employment.

[16] Dealing with a similar point, the court in the case of **MINISTRY OF TOURISM AND ENVIRONMENTAL AFFAIRS AND ANOTHER VS STEPHEN ZUKE AND ANOTHER, SUPREME COURT CASE NO. 96/2017**, held that:-

“When the Industrial Court determines a labour dispute between an employer and employee it does so within the ambit of its jurisdiction in

terms of Section 8 of the Industrial Relations Act. This does not constitute review proceedings. In determining whether the dispute falls under Section 8 of the Industrial Relations Act, the test is whether the dispute between the parties arises solely from a contract of employment between an employer and employee during the course of employment”.

[17] In *casu* the matter under consideration is a labour dispute arising out of the contract of employment between the parties during the course of employment, of which it is justiciable in the Industrial Court, as the court has exclusive jurisdiction in such matters.

[18] The Industrial Relations Act defines a labour dispute as follows:-

“dispute includes a grievance, a grievance over a practice, and means any dispute over the:

(a) entitlement of any person or group of persons to any benefit under an existing collective agreement, Joint Negotiation Council Agreements or Works Council agreements.

(b) existence or non-existence of a collective agreement or Works Council agreements.

(c) disciplinary action, dismissal, empowerment, suspension from employment or re-engagement or reinstatement of any person or group of persons;

(d) recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment

(e) application or the interpretation of any law relating to employment; or

(f) terms and conditions of employment of any employee or the physical conditions under which such employees may be required to work”.

[19] The definition of a labour dispute in the preceding paragraph lends credence to the fact that the matter under consideration is a labour dispute justiciable in this Honourable Court.

[20] The judgement of **STANDARD BANK OF ESWATINI V FREEMAN LUHLANGA SZICA 11/2021**, cited by the Respondent in support of the argument that the Industrial Court does not have review powers is inappropriate in this matter, the Industrial Court of Appeal concluded that the jurisdiction of the Industrial Court is strictly as prescribed in Section 8 (1) of the Industrial Relations Act 2000. It is the Court’s considered view that the dispute between the parties is within the ambit of Section 8 (1) of the Act.

[21] Furthermore, in **MINISTRY OF TOURISM AND ENVIRONMENTAL AFFAIRS AND ANOTHER VS STEPHEN ZUKE AND ANOTHER, SUPRA**, the court held that:-

“When the Industrial Court executes its mandate in accordance with its jurisdiction as reflected in the Industrial Relations Act, it does not sit in a review capacity but as a court of first instance determining a labour dispute between an employer and employee”.

[22] The court aligns itself with the decision of the court in the above cited case. The point of law on jurisdiction is hereby dismissed.

[23] The Respondent further raised a point of law to the effect that the **Industrial Court does not have the power to grant declaratory relief.**

The Respondent argued that on a reading of the standard bank judgement, the Industrial Court does not have power to grant declaratory orders, further that, the Court's jurisdiction must be determined from an enabling legislation and in the absence of a statutory provision, the Industrial Court does not have jurisdiction to grant declaratory orders.

[24] It must be pointed out that the relief sought by the Applicant is not declaratory but interdictory. The law on temporary interdicts is well settled and the principles therein are well set out in the case of **MAHLOBO EDMUND DLAMINI AND ANOTHER V CHIEF HAYINDI DLAMINI – HIGH COURT CASE NO. 4633/10**, where the court set out the principles as follows:-

“It is settled law that in order to establish an interim interdict the Applicant must establish that it has a prima facie right even though open to some doubt, that there is a well grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted, that the balance of convenience favours the granting of interim relief and that the Applicant has no other satisfactory remedy The court weighs up the likely prejudice to the Applicant if the interim interdict is refused and also the likely prejudice to the Respondent if the interim interdict is granted. Similarly the court must also have regard to Applicant's prospects of success”.

[25] In addition to the principles as set out above, the Standard Bank judgement provides that the Industrial Court has the power to grant injunctive relief, and reads as follows:-

“The power to grant injunctive relief is a simple and straight forward reference to interdicts per se. it is trite that interdicts are either mandatory or prohibitory in nature i.e ordering a party to do something or to refrain from doing something and can be interim or final The only

general limitation would be that the granting of interdicts is confined to disputes recognized by the IRA over which the Industrial Court has jurisdiction, and which would entitle an aggrieved party to pursue appropriate remedial relief within the confines of the IRA”.

[26] The Applicant’s cause of action is that the Respondent is intending to vary the terms and conditions of suspension from being with pay to without pay in violation of clause 4.01 of the Disciplinary Code, read with clause 23.1 and 23.2 of the Applicant’s contract of employment. All the Applicant is seeking is that the variation by the Respondent be set aside as it is unlawful, of which this matter is provided for in Section 8 (1) of the IRA. Hence, the court has jurisdiction to grant interim relief.

[27] In terms of Section 8 of the Industrial Relations Act, the court may make any order it deems reasonable which will promote the purpose and objects of the Industrial Relations Act when deciding any matter, in particular promoting harmonious industrial relations. In the result, the point of law on lack of jurisdiction to grant declaratory orders is hereby dismissed.

[28] On the merits the Respondent argued that an employer retains the prerogative to vary the terms of a suspension provided exceptional circumstances exist and there is compliance with the procedural requirements of granting the employee a hearing before the variation. Where an employee is engaged in a systematic ploy to delay the early finalization of a disciplinary hearing, the employer retains the right to vary the terms of the suspension, particularly if the employer is being prejudiced by the continued delays which are orchestrated by the employee.

[29] The Respondent submitted that a disciplinary code that has been unilaterally developed by an employer forms part of the employer’s

policies and is incorporated into contracts of employment by reference, therefore the employer retains the prerogative to amend, vary or even abrogate any policy that is unilaterally developed without having to negotiate with each employee. The Respondent submitted further that there is no need for an employer to reach consensus with an employee when varying the terms of suspension. The mere fact that the contract of employment provides for a non-variation clause, does not on its own prevent the Respondent from exercising its discretion and vary the terms of suspension, further that, what has occurred in *casu* is not a variation of the terms of the contract, but a deviation from the policy on account of the existence of exigencies.

[30] The Respondent submitted that where the expeditious completion of a disciplinary is interfered with by the employee and predicated on the principle of fairness, the employer should not be required to remunerate such employee. The Industrial Court being a court of equity and persistently guided by principles of fairness and justice, is obliged to conduct an enquiry as to reasons for the delay of the finalization of the disciplinary hearing, on an overview of facts and based on the principle of fairness there existed an exceptional and appropriate circumstances warranting that the employer exercises its discretion to vary the terms of the suspension with pay to suspension without pay.

[31] The Respondent prayed that the application be dismissed as the employer has exercised his prerogative in accordance with the framework of the law and has given the Applicant reasons for the variation and accorded him due process.

[32] The disciplinary code and procedure provides as follows with regards to suspension

“4.01 Suspension with pay is used:

4.01.2 during an investigation of an incident and pending appropriate disciplinary action, the length of which should be kept to a minimum of two calendar weeks. Any extension thereof must be at the discretion of the CEO.

4.01.3 When the continued presence of the employee on site may be embarrassing to NAMBOARD or when the presence of the employee endangers NAMBOARD’s property, equipment or personnel and their property.

4.02 Suspension with pay is not a punishment but is part of the disciplinary process which is used only under the circumstances described in 4.01”

[33] The purpose of a disciplinary code amongst other things is to promote consistency, predictability and convenience in managing disciplinary matters in the work place. The code is binding on both employer and employee. It is not open to the employer to unilaterally deviate from the provisions of the code. The party wishing to deviate from the code would have to engage the other and further establish that exceptional and appropriate circumstances exist which necessitated the proposed deviation. The same principle would apply where the code has been unilaterally introduced by the employer and its contents have formed part of the terms of the employment contract between the employer and employee.

[34] Dealing with a similar matter, the court in the case of **RIEKERT VS CCMA AND OTHERS 2006, 4 BLLR**, held as follows:-

“The fact that there is clear case law to the effect that disciplinary codes are guidelines, can under any circumstance be understood by employers as meaning that they may chop and change the disciplinary procedures

they have themselves set as and when they wish. Employers and employees are entitled to comply with the prescribed rules of the game as far as disciplinary enquiries go. When an employer does not comply with aspects of its own disciplinary procedures, there must be good reason shown for its failure to comply with aspects of its own disciplinary procedures, there must be good reasons shown for its failure to comply with its own set of rules”

[35] The court went further to state that:-

“In the event the employer determines that there are circumstances which require a process that deviates from such disciplinary code and procedure, it must have compelling and good reasons to do so. The employee should be advised that whilst the disciplinary code makes provision for certain steps and procedures, the employer believes that there are compelling circumstances and reasons why in the particular instance the employer does not intend to follow the disciplinary code, and allow the employee an opportunity to comment and advance reasons why he/she does not believe that there should be a deviation from such disciplinary code and procedure”.

[36] In *casu*, the Respondent argued that it has discharged its obligation, in that it gave notice to the Applicant of its consideration to vary the terms of the suspension. The notice set out the various grounds why the Respondent was considering varying the terms of the suspension as follows:-

36.1 The obstructive and dilatory conduct at the hearing of 20th March 2023.

36.2 The dilatory preliminary objections raised on the 21st March 2023, the concern was the manner in which the preliminary

objections were being raised in a piecemeal fashion as opposed to dealing with them in one sitting.

36.3 The incessant vexatious litigation that has been pursued by the Applicant. The Applicant has instituted six different court applications raising a catalogue of objections to the continuation of his disciplinary hearing. On an overview of these applications, all the objections could have been dealt with in one application. Again the concern is the piecemeal litigation, whilst an employee has a right to seek redress from the courts, it becomes an abuse of court process when the employee embarks upon ceaseless piecemeal litigation.

36.4 The Applicant changed legal representatives three (3) times during the course of the disciplinary hearing, this was a dilatory tactic, and further delayed the hearing by refusing to accept correspondence pertaining to the disciplinary hearing, this also constituted obstructive conduct.

36.5 The hearing was postponed at his own instance on at least three (3) occasions.

36.6 On two occasions he turned up without representation and insisted on being represented. The postponements though granted were clearly premised on an element of ingenuity, because the Applicant had adequate opportunity to secure representation but inexplicably failed to do so.

36.7 He also furnished a dubious medical certificate.

[37] The Respondent submitted that the first obligation is that the employer must follow procedure when seeking to vary the terms of a suspension, and that, the varying of the terms of suspension is the sole prerogative of

the employer. In the exercise of this prerogative the employer is only mandated to consult the employee, and the employer is only obliged to put prima facie evidence justifying the variation, and if not persuaded by the response of the employee, the employer is at liberty to vary the terms of suspension from one with pay to without pay.

[38] In **PHE SHEYA NKAMBULE V NEDBANK (SWAZILAND) LTD 205/2019 (B) SZIC**, wherein the Applicant was called upon by the Respondent to furnish reasons why the terms of his suspension should not be varied from suspension with pay to suspension without pay until the finalization of the disciplinary hearing. The Applicant having responded accordingly, the Respondent advised the Applicant that the terms of his suspension had been varied to suspension without pay.

38.1 The Respondent 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 Honourable Court and the High Court, the effect of which was to delay the finalization of the disciplinary process against him. The Respondent submitted further that in such circumstances where the employee is involved in a systematic and blatant trajectory to delay and frustrate the finalization 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 behavior.

38.2 The court held as follows in the matter:

“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 cannot 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 finalized 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”.

38.3 The court went further to state that:

“It seems to us that to withdraw the Applicant’s salary by changing his terms of suspension to suspension without pay Amounts to the Applicant being penalized for challenging the fairness of the process the employer is taking him through. In the circumstances, we direct that the Respondent reinstate the Applicant’s salary forthwith”.

[39] The Respondent dissatisfied with the Ruling of the Honourable Court, took up the matter on review at the High Court, wherein the judgement of the Industrial Court was confirmed and the Court held that:

“I sympathize with the Applicant who is bleeding financially. I agree that there seems to be no provision that protects and cushions an employer when an employee employs delaying tactics during the determination of a disciplinary hearing. Even if this court were to conduct the inquiries referred to and come to the conclusion that fault was to be attributed to the 1st Respondent, then what?”

[40] In the circumstances the court aligns itself with both the judgements of this Honourable Court and the High Court.

[41] Furthermore, in matters of employment, the question for determination is not just on substantive but also on procedural justice. Where one party unilaterally takes a decision to change the rules of the game which have been agreed upon, this will in no doubt, if allowed result in procedural unfairness, a situation which ought to be frowned upon by those who administer justice especially in labour matters. Even where the said exceptional circumstances exist, the party wishing to deviate from the code should engage the other.

[42] **Clause 23.1** of the Applicant's employment contract provides as follows:

“This contract constitutes the sole record of the contract for the service between the employee and NAMBOARD. The parties shall not be bound by any term representation, warranty and or promise which is not recorded in this instrument save for as provided in the PEU Act and any other relevant legislation or company policies”.

[43] **Clause 23.2** states further that:-

“No agreement varying, adding to, deleting from or cancelling this agreement and no waiver of any right under this agreement shall be effective, unless reduced to writing and signed by the chairman on behalf of NAMBOARD and the employee”.

[44] In terms of the above clauses it follows therefore that the purported variation of the suspension is of no legal effect. The Respondent has given itself power to vary the employment terms without complying with the contractual obligations binding upon the parties.

[45] In **BUSAF (PTY) LTD V VUSI EMMANUAEL KHUMALO t/a ZIMELENI TRANSPORT, HIGH COURT Case no. 2839/2008**, the court had this to say regarding the proper position relating to agreements reduced to writing:

“If, however, the parties decide to embody their final agreement in written form, the execution of the document deprives all previous statements of their legal effect. The document becomes conclusive as to the terms of the transaction which it was intended to record. As the parties previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them is therefore inadmissible”.

[46] The import of the foregoing is that because the Applicant and the Respondent decided to embody the terms of their employment relationship into a signed agreement, the Respondent may not then vary the terms thereof, to the extent that he seeks to do so, he is totally out of order. The net result is that the purported reasons put forward by the Respondent serve to undermine the memorial of their agreement which it is common cause was reduced to writing and signed by both parties, signifying that they bound themselves to the terms thereof.

[47] It is common cause that the Applicant was suspended in terms of Clause 4.0 of the Disciplinary Code and procedure, and in the absence of a provision for suspension without pay in the Disciplinary Code, then the Respondent is not entitled to impose same unilaterally.

[48] In the circumstances the application succeeds, and the court makes the following order:

- (a) The variation letter dated the 27th April 2023 is null and void, and of no force and effect, and it is hereby set aside.
- (b) The Applicant’s purported suspension without pay is null and void and of no force and effect, and it is hereby set aside.

(c) Each party is to pay its own costs.

The Members agree.

L. MSIMANGO
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : **MS H. MKHABELA**
MKHABELA ATTORNEYS

FOR RESPONDENT : **MR Z. D JELE**
ROBINSON BERTRAM