

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 416/2007

In the matter between:

THEMBANI SIMELANE

Applicant

and

CHAIRMAN OF THE CIVIL SERVICE COMMISSION

1st Respondent

SWAZILAND GOVERNMENT

2nd Respondent

THE ATTORNEY GENERAL

3rd Respondent

CORAM:

P, R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: M. MKHWANAZI

FOR RESPONDENT: S. KHULUSE

J U D G E M E N T - 4 / 1 0 / 2 0 0 7

1. The Applicant is an accountant in the employ of the Swaziland Government. On the 24th January 2007 she was criminally charged with contravening the provisions of the Prevention of Corruption Act 2006 and with fraud simpliciter arising from the performance of her duties as a civil servant. It is common cause that a date for the trial of the Applicant on the aforesaid charges has not yet been allocated.

2. On 23rd February 2007 the Civil Service Commission interdicted the Applicant from her duties on half pay pending finalization of her criminal case.

3. The Applicant challenged her interdiction by way of an application to the Industrial Court. On 22nd March 2007 the Court ruled that the decision of the Civil Service Commission was unlawful, and the suspension of the Applicant on half pay was set aside.

4. The reasons for the Court's ruling were that:

4.1. The Applicant was not informed of her right to legal representation, and she was not given proper opportunity to exercise such right; and

4.2. She was not afforded any opportunity to make representations on the issue of the suspension of half her emoluments.

5. The Civil Service Commission thereafter convened a fresh hearing and invited the Applicant to appear before it, to show cause why she should not be interdicted from her duties on half pay. The Applicant attended before the Commission on 19th June 2007 accompanied by her representative.

6. Prior to her attendance before the Commission, the Applicant objected to the Commission hearing the matter, arguing that the same Commission whose decision had been set aside by the Industrial Court would be biased against her. Notwithstanding this objection the Commission proceeded with the hearing on the 19th June 2007.

7. After the hearing the Secretary to the Commission wrote to the Applicant in the following terms:

"Having heard your representations and considering the provisions of regulations 38 and 39 of the Civil Service Board (General) Regulations of 1963, the Commission directed that:

(a) You are interdicted or suspended on half-pay from the performance of your duties from the 19th June 2007 pending finalization of your criminal case.

(b) Disciplinary proceedings, if any, will be instituted against you after the conclusion of the pending criminal case."

8. The Applicant has again challenged her suspension by way of an urgent application to the Industrial Court, seeking an order-

- Reviewing and setting aside the suspension of the Applicant and declaring same null and void ab initio;
- Reinstating the Applicant to her position as Accounts Officer with the Ministry of Finance forthwith.

9. The grounds for this legal review, as set out in the Applicant's founding affidavit, are as follows:

9.1. The suspension is unlawful and unfair because it depends upon the uncertain event of a criminal trial whose date of commencement is indeterminate and may be unreasonably delayed;

9.2. The Applicant was not invited at the hearing, personally or through her legal representative, to make representations on why her suspension should be on half pay.

9.3. The decision of the Commission to suspend the Applicant on half pay was grossly unreasonable and based on a misconception of the law relating to the interdiction of civil servants.

9.4. The refusal of the Commission to constitute a different panel for the hearing gives rise to the reasonable apprehension of bias.

10. The Respondents oppose the application and they have filed an opposing affidavit made by the deputy secretary of the Commission. In their affidavit, the Respondents raise the issue that there is no objective urgency that justifies a waiver of the normal requirements of the rules of the Industrial Court. If there is any element of urgency, it is self-created.

11. In response to the Applicant's grounds for review on the merits the Respondents state as follows:

11.1. The period of Applicant's suspension is subject to section 194 (4) of the Constitution of Swaziland (Act No. 1 of 2005) which provides:

"194 (4) the matter of a public officer who has been suspended shall be finalized within six months failing which the suspension shall be lifted."

The Respondents submit that the period of the suspension is governed by section 194 (4) and cannot be regarded as uncertain or indefinite or unreasonably prolonged since it will expire after 6 months "in the event the criminal trial fails to take off."

11.2. The Respondents deny that the Applicant was given no opportunity to make representations on the suspension of half her emoluments.

11.3. The Respondents submit that the Commission applied its mind to the issues before it in accordance with the laws of Swaziland and there are no grounds for interfering with its decision.

11.4. The allegation of bias or the appearance of bias is denied and the Respondents say that the setting aside of the previous suspension is no reason to conclude that the Commission will not approach the new hearing with an open mind.

12. The court will deal with each of these issues in turn.

13. On the question of urgency, this court held in the case of **Bunnie Patrick Mhlanga v P. S. Ministry of Public Works & Transport and Another (IC Case No. 130/03 at 13)** that an unlawful suspension without pay has serious consequences to the means of livelihood of an employee and warrants the urgent intervention of the court.

14. The Respondent's counsel in his argument did not challenge the urgency per se, but submitted that the Applicant delayed unduly in coming to court and she cannot now "move into high gear and expect the court and the other litigants to adjust to her motion"

(see **Gallagher v Normans Transport Lines 1992 (3) SA 500WJ**)

15. The Applicant was suspended on the 19th June 2007. She says that shortly thereafter she fell ill and had to be hospitalized for over two weeks. Her attorney requested reasons for the Commission's decision on 9th July 2007. The reasons were only furnished on the 19th July 2007. The Applicant's mother also fell ill and was hospitalized until mid-August 2007, during which time the Applicant had to look after her. The Applicant instructed her attorney to institute these proceedings on 20th August 2007.

16. None of these allegations are denied by the Respondents. They do provide some explanation as to the delay. Although the matter is distinctly borderline, the court will condone the delay and allow the matter to be heard as one of urgency.

With regard to suspension pending the result of criminal proceedings, the following provisions of the Civil Service Board (General) Regulations , 1963 are pertinent:

"38 (3) If criminal proceedings are instituted against an officer in any court, disciplinary proceedings, upon any grounds involved in the criminal charge shall not be taken pending the result of criminal proceedings."

"38 (6) No officer acquitted of a criminal charge shall be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent the officer being dismissed or otherwise punished on any other charge arising out of his conduct in the matter, unless the charges raise substantially the same issue as those on which he has been acquitted."

"39(1) If the Minister considers that the interests of the service require that an officer should cease forthwith to exercise the powers and functions of his office, he may interdict him from the exercise of those powers and functions, if disciplinary proceedings are being taken or are about to be taken or if criminal proceedings are being instituted against him."

18. These regulations were made at a time when our criminal justice system was not subject to the extended delays we now regard as normal. In dealing with the suspension of a private sector employee, the Industrial Court recently made the following remarks:

"It is also not conducive to good industrial relations for an employer to subject its disciplinary prerogative and contractual obligations to the vagaries and delays of the criminal justice system

Moreover in the view of the court it is oppressive to suspend an employee pending finalization of a case which will not determine his/her future employment status: the conviction of an employee of a criminal offence against his/her employer does not excuse the employer from holding an internal disciplinary enquiry, nor for that matter does the acquittal of the employee preclude the employer from taking disciplinary action against the employee."

-per Dunseith JP in **Nkosingiphile Simelane v Spectrum (Pty) Ltd t/a Master Hardware (IC Case No. 681/2006 at page 5).**

19. The need for a complete overhaul of the Civil Service Board (General) Regulations, 1963 has been repeatedly drawn to the attention of the Attorney General by this court, to no avail. The disciplinary procedures provided in the regulations are antiquated and out of line with the standards of modern labour law. The regulations vest disciplinary functions in the Prime Minister whilst the Civil Service Order, 1973 has long been amended to vest those same functions in the Commission. Certain of the regulations directly conflict with the provisions of the Employment Act 1980 and the Constitution.

20. Nevertheless, ex facie Regulation 39 (1) the commission is permitted to interdict the Applicant pending the outcome of the Criminal case, and in terms of Regulation 38 (3) the Commission is prohibited from instituting disciplinary proceedings against the Applicant pending the result of the criminal trial. In the premises, the Applicant's submission that a suspension pending finalization of criminal proceedings is unlawful cannot be sustained.

21. We note in passing that if the Applicant is acquitted of the criminal charges against her, the Government is precluded by Regulation 38 (6) from instituting disciplinary proceedings against her on the same charges - notwithstanding that the criminal charges require the higher burden of proof beyond a reasonable doubt, whereas disciplinary charges can be proved on a balance of probabilities.

22. The interdiction of a civil servant, and the postponement of disciplinary proceedings pending the result of criminal proceedings, as prescribed by the regulations, would normally result in an unreasonably prolonged suspension to the prejudice of the civil servant and the Government. Fortunately, section 194 (4) of the Constitution has now ameliorated the position by limiting the period of suspension to six months.

23. We do however reject the Respondent's contention in paragraph 12.1 of its affidavit that the suspension will be lifted "in the event the criminal trial fails to take off until the lapse of the six months period." Section 194 (4) states that "the matter of a public officer who has been suspended shall be finalized within six months....." (emphasis added). This means that if the officer is suspended pending criminal proceedings, then those proceedings must be finalized within six months (not merely "take off" within six months), failing which the suspension shall be lifted.

24. With regard to the Applicant having been denied an opportunity to make representations concerning her suspension on half pay, this allegation also has no merit. The minutes of the hearing reveal that both the Applicant and her legal representative made representations that

she be suspended on full pay, giving as reasons that the case will take long to be concluded; the Applicant is a single parent; she has a long and clean service record and is about to retire; and she has financial commitments.

25. We will now consider whether the Commission's decision to suspend the Applicant on half pay is fair and reasonable.

26. If an employee is willing and able to work in accordance with the contract of employment, the employer is bound to pay his/her wages even though it has no work for the employee to do.

Johannesburg Municipality v O' Sullivan 1923 AD 201.

27. The same principle applies where the employee is willing and able to work but the employer for administrative reasons decides to stop the employee from working. Unilateral suspension of the contract of employment does not relieve the employer of its duty to pay the employee's wages. The employer may only suspend an employee without pay to the extent that they have contracted to that effect, or express provision is made in a statute.

See **Grogan : Workplace Law (Juta) at 86.**

28. There is no evidence before court that the parties have contracted to permit suspension or interdiction without pay. However Regulation 39 (3) of the Civil Service Board (General) Regulations, 1963 states:

"An officer who is interdicted shall, subject to regulations 38 (4) and (5), receive such emoluments not being less than one half of his normal emoluments, as the Minister [read Commission] thinks fit."

29. Thus a suspended civil servant shall receive such emoluments as the Commission in the exercise of its discretion "thinks fits". The Commission's discretion is not however unfettered. It must be exercised judiciously and according to the rules of reason and fairness.

Ismail & Another v Durban City Council 1973 (20 SA 362 (N) at 371H-372D.

These rules requires that the Commission takes relevant considerations into account in a reasonable and fair manner.

30. It is important to bear in mind that the Applicant is presumed to be innocent until she is

proved or has pleaded guilty (section 21 (2) (a) of the Constitution.) Her interdiction does not imply any wrongdoing on her part. It is merely a holding operation done by way of good administration. It is not a punishment and there is no reason why it should contain any penal element.

31. It is worth noting that special legislation in South Africa that once expressly provided for suspension without pay of certain categories of public-sector employees has now been repealed; it is no longer permissible in South Africa to suspend an employee, as a holding action pending disciplinary action, without pay. This development in the South African law reflects the modern labour law approach that it is intrinsically unfair to deprive an employee of some or all of his/her remuneration before it has been determined whether he/she has committed any disciplinary offence.

Grogan : Workplace Law (Juta) at page 63.

NIJMSA v Nu - Fiber Form Plastics SA (2005) 26 ILJ 204 (BCA)

In so far as Regulation 39 (3) interferes with the rights of a civil servant to receive his/her emoluments, it must be given a restrictive interpretation. This principle is not relaxed merely because Regulation 39 (4) provides for a refund of the emoluments withheld if the disciplinary proceedings do not result in dismissal or other punishment.

33. In the minutes of the hearing before the Commission, the following exchange occurs:

"Mamba (Applicant's representative):

I would like to appeal to the Commission not to suspend Ms. Simelane on half pay because section 39 does not compel the Commission to suspension on half pay but can exercise its discretion. I would also like to submit that it may take long for the case to be concluded and if Ms. Simelane is suspended on half pay she will suffer financially.

Commission:

What are the reasons for requesting suspension on full pay?"

34. This question suggests that the Commission adopted an approach that the Applicant must provide reasons why her salary should be on full

pay, rather than that reasons must exist why her salary should not be on full pay.

35. The Commission furnished written reasons for its decision that Applicant be suspended on half pay. Sound reasons are given for the decision to suspend the Applicant from her duties. On the question of half pay, after confirming that the Commission has a discretion in the matter, the Commission states the reason for its decision as follows:

"It is a long established practice for the Civil Service Commission that civil servants charged with criminal offences be suspended on half pay pending finalization of their cases. This case therefore should not be treated in isolation because that would amount to different treatment

(discrimination) to civil servants who are subject to the same rules and regulations."

It is clear from the above quoted statement that the Commission did not give any consideration to the factors advanced by the Applicant to show that suspension on half pay would cause her financial hardship and loss. The Commission considered that it was bound to suspend the Applicant on half pay because that is its invariable practice and to do otherwise would amount to discrimination.

This is a profoundly wrong approach. If there is an established practice of automatically suspending on half pay without looking at the individual circumstances of the affected employee, then that is an unfair and irregular practice which needs to be changed. The Commission's blind adherence to such a practice means that it did not exercise its discretion at all, let alone reasonably and fairly.

The logic of Regulation 39 (3) appears to be that, if the employee has committed an act of misconduct for which he/she deserves to be dismissed, then he/she has no right to be paid his/her full emoluments whilst his/her guilt is established through due process. If the employee's guilt is not proved, then the emoluments withheld must be refunded.

In our view, withholding a portion of emoluments in anticipation of dismissal or other disciplinary sanction is intrinsically unfair. In a modern credit-financed society, suspending payment of a portion of the emoluments of an employee may result in the repossession of his/her house, car or furniture. The education of his/her children may also be disrupted if school fees are not paid. Access to necessary medication may be financially compromised. These kind of consequences cannot be reversed by refunding the emoluments withheld in the

event that the employee's guilt is not proven.

40. In our view it is necessary for the Commission, when considering what emoluments an interdicted officer shall receive during the period of suspension, to give consideration inter alia to the following factors;

- the anticipated period of suspension;

- Whether the officer may suffer any irreparable loss or prejudice if he/she does not receive his/ her full emoluments;

- The personal circumstances of the officer;

- Whether the officer is otherwise prevented from performing his/her duties during the period of suspension e.g. because he/she is in custody;

- The nature of the charges and the likelihood of the officer being found guilty of a serious disciplinary offence.

41. The starting point of the Commission should be that an employee who is willing and able to work is entitled to payment of his/her emoluments unless there is good reason to withhold a portion.

42. The Commission did not properly apply its mind to the Applicants individual circumstances and wrongly considered that it had no discretion to depart from the practice of suspending on half pay. Its decision to suspend the Applicant on half pay was irregular and unfair and must be set aside.

43. The final issue for adjudication is the question of bias. The Applicant submits that the Commission should have recused itself from rehearing the matter because it had already decided the matter. The Applicant says that a reasonable person would apprehend that the Commission could not keep an open mind after its first decision had been set aside by the court.

44. Administrative bodies perform their functions with varying degrees of competence. When the requirements of natural justice are not observed, it is usually because such bodies are not skilled in the law, or are inexperienced and know no better, or because a requirement is

simply overlooked. The mere fact that the Commission's first decision was declared null and void does not justify an inference of bias.

45. There is no evidence that the commission approached the rehearing having prejudged the issues or having closed its mind to persuasion that its first decision was wrong.

46. Notwithstanding that the Commission failed to properly exercise its discretion with respect to the proper application of Regulation 39(3), we do not find that this arose from bias and partiality.

47. The suspension of the Applicant stands, subject to the provisions of section 194 (4) of the Constitution, but the condition that the suspension is on half pay is set aside. The matter is remitted to the Commission for a proper determination of the emoluments the Applicant should receive during the period of her suspension. Pending such determination, the Applicant is to receive her normal emoluments. Each party will pay its own costs.

The Members agree.

**PETER R DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT.**