

**IN THE INDUSTRIAL COURT OF SWAZILAND**  
**HELD AT MBABANE**

**CASE NO. 49/07**

In the matter between:

**ALEX FAKUDZE**

**APPLICANT**

And

**YKK SOUTHERN AFRICA (PTY) LTD**

**RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE:**

**ACTING JUDGE**

**DAN MANGO :**

**MEMBER**

**GILBERT NDZINISA:**

**MEMBER**

**FOR APPLICANT:**

**MR. S.ZWANE**

**FOR RESPONDENT:**

**MR. M. SIBANDZE**

## **R U L I N G 21.02.07**

[1] This is an urgent application brought by the applicant against the respondent.

[2] The applicant is seeking an order in the following terms:-

"1. Dispensing with the rules of the Honourable Court with regards to notice, service and time limits to hear this matter as one of urgency.

2. Calling upon the respondent to show cause if any, on a date to be fixed and determined by this Honourable Court, why;

2.1. The letter dated the 31<sup>st</sup> January 2007 purportedly suspending the applicant should not be declared null and void and of no force and effect.

2.2. The letter dated the 25<sup>th</sup> January 2007 purportedly preferring charges against the applicant should not be declared null and void of no force and effect.

2.3. Directing the respondent to forthwith suspend the disciplinary hearing against applicant initiated by the letter dated the 25<sup>th</sup> January 2007 pending the hearing of an appeal filed by the applicant on the 15<sup>th</sup> December 2006.

2.4. Interdicting and restraining the respondent from victimizing the applicant

3. That paragraphs 2.1 and 2.3 above operate as an interim order

with immediate effect pending the return date.

4. Ordering the respondent to pay the costs of this application

5. Granting further and/or alternative relief as this Court deems fit."

[3] The respondent accordingly filed an answering affidavit in opposition.

[4] The respondent in its papers raised points of law namely; that the applicant has failed to establish that the employer was not entitled to issue the suspension pending a disciplinary hearing; that the applicant has failed to establish a basis in law for the court to suspend the disciplinary hearing against the applicant pending the finalization of an appeal against a final written warning that, been issued against him on a previous hearing; that the applicant has failed to establish any basis in law for the court to issue an order interdicting the respondent from victimizing the applicant and lastly; that the applicant has failed to satisfy the requirements of an interdict.

[5] The court is called upon to make a ruling on these points of law raised by the respondent. The points of law are challenging the basis of the application in its entirety. If the points are upheld, the effect would be that the application will be dismissed.

[6] In terms of prayer 2.1 the applicant is praying that "the letter dated the 31<sup>st</sup> January 2007 purportedly suspending the applicant should be declared null and void of no force and effect."

[7] The said letter is annexed to the application and is marked "AF6". The letter appears as follows:-

*"This letter is to confirm that your disciplinary hearing to be held today 31 January 2007 is postponed until Tuesday 06 February 2007 at 09:00; this is due to the fact that the Human Resources Manager has had a death in the family.*

*You are therefore suspended with pay."*

[8] The question of suspending an employee with or without pay was adequately dealt with by the President of this court, Dunseith J, in the case of **NKOSINGIPHILE SIMELANE V. SPECTRUM (PTY) LTD t/a MASTER HARDWARE case no. 681/2006 (I.C.)**.

[9] In that case the applicant was suspended without pay pending finalization of an alleged criminal case against him. At page 12 of that judgement the court referred to the case of **FOOD & ALLIED WORKERS UNION V. S.A. BREWERIES LTD (1992) LCD 35 (IC)** in which it was stated that-

*"An employer is entitled to suspend an employee unilaterally provided that he continues to pay wages for so long as the employees services remain available. Failure to pay wages would be a repudiation of the employment contract*

[10] Furthermore, **John Grogan in his book "WORKPLACE LAW" (8<sup>th</sup> edition) 2005** at page 102 dealing with workplace discipline stated that:-

*"Suspension may be of two kinds: it may be imposed either as a 'holding operation' pending disciplinary action, or as a form of disciplinary penalty. The first type of suspension is not punitive in itself; preventive suspension is acceptable, provided the employer bona fide believes that such action is necessary for good administration and the employer continues to pay the employee."*

[11] It is therefore clear to the court that the suspension is lawful as it was issued by the employer for administrative reasons and it is a 'holding' type of suspension pending the finalization of the disciplinary hearing. Furthermore, the suspension is with pay.

[12] In the light of the above authorities it is clear that the applicant has failed to show that the employer was not entitled to suspend him.

[13] In prayer 2.2 the applicant seeks an order that "the letter dated the 25<sup>th</sup> January 2007 purportedly preferring charges against the applicant should be declared null and void of no force and effect."

[14] The said letter consists of the charge of dishonesty preferred against the applicant. The applicant in terms of paragraph 14 of the founding affidavit believes that preferring of the charge against him was made out of spite and was meant to punish him for having attended a workshop which his union had asked the employer to release him but declined due to a pending hearing against him.

[15] The response of the employer to the request is contained in annexure "AF3". In that letter the employer stated clearly that the applicant could not be released to attend the workshop because of the pending hearing which was to take place on one of the days during which the workshop would be held. The employer however went further to state that it had no problem releasing an alternative person by the name of Delisile Zondo to attend the workshop.

[16] It seems that the employer now has information that in fact the applicant did attend the workshop on a day that he had asked to be excused from work because he wanted to attend to his wife who was due to give birth by caesarean section.

[17] It is not clear why the applicant is asking the court to declare the charge null and

void. The power to prescribe standards of conduct for the workplace and to initiate disciplinary steps against transgressors is one of the most jealously guarded territories of managers everywhere. It forms an integral part of the broader right to manage or managerial prerogative (see **Grogan WORKPLACE LAW op cit** at page 91; **BHEKIWE DLAMINI V. SWAZILAND WATER SERVICES CORPORATION** case no. 411/06; **SWAZILAND ELECTRICITY BOARD V. MASHWAMA MICHAEL BONGANI AND 2 OTHERS** case no. 21/2000 (ICA).

[18] The disciplinary code was not attached to the notice of application. It is not the applicant's case that the charge be suspended because it relates to events that took place a long time ago. Even if that was his case, such could be properly raised before the chairman of the disciplinary hearing.

[19] It is the court's finding that it has not been shown on what basis should the court intervene and suspend the charges.

[20] Under prayer 2.3 the applicant is asking the court to suspend the disciplinary hearing initiated by the letter dated the 25<sup>th</sup> January 2007 pending the hearing of an appeal filed on the 15<sup>th</sup> December 2006.

[21] Evidence in support of this prayer is found in paragraphs 15-18 of the founding affidavit. The applicant says in those paragraphs that he is afraid that if the disciplinary hearing is allowed to continue, the chairman of the hearing will take into account an earlier final written warning which sentence he has appealed against.

[22] Again the court will point out it was unfortunate that the disciplinary code was not attached to the applicant's application. Presently the court is not aware what the code provides regarding the question of previous convictions. Is the employer entitled to consider these even if they don't relate to a similar charge?

[23] Mr. Sibandze told the court that he did advise the respondent that it cannot take

the final written warning against the applicant in the present hearing. Mr. Zwane conceded before the court that indeed the attorneys discussed that issue and that the respondent did make that undertaking.

[24] The current charges of dishonesty relates to events that took place in August 2006. The final written warning relates to a charge of insubordination of which the applicant was found guilty on the 14<sup>th</sup> December 2006. The court does not see how this final written warning can be used or taken into account against the applicant as it was issued on the 14<sup>th</sup> December 2006, and the current charges relates to events of August 2006.

[25] It is clear that, unless it is provided for in the disciplinary code, the respondent would be misdirecting itself if it takes the final written warning into account against the applicant if he is found guilty on the current charge. Assuming that, the code prohibits the holding of a disciplinary hearing whilst an appeal is pending, that could be raised as an objection before the chairman of the hearing. The court will be loathe to interfere with an internal process.

[26] Under prayer 2.4 the applicant seeks an order interdicting and restraining the respondent from victimizing him.

[27] From the applicant's papers, the court is unable to find any evidence suggesting that the applicant is being victimized by the employer.

[28] Taking into account all the foregoing observations, the court will make the following ruling;

- (a) the points in limine are upheld.
- (b) The application is dismissed.
- (c) No order for costs is made.

**NKOSINATHI NKONYANE A.J.**

**INDUSTRIAL COURT**