

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 681//2006

In the matter between:

NKOSINGIPHILE SIMELANE

Applicant

and

**SPECTRUM (PTY) LTD t/a
MASTER HARDWARE**

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : S. SIMELANE

FOR RESPONDENT : G. NKOSI-REID

J U D G E M E N T – 24/01/2007

1. The Applicant applied to the court on a certificate of urgency for an order

1.1 That the Respondent pays to the Applicant a sum of E1164.00 in respect of remuneration for days worked from the 1st November to

the 30th November 2006; and

- 1.2 Declaring the purported suspension of the Applicant without pay pending finalization of a case against the Applicant in Court unlawful and therefore a nullity.
2. The prayer for payment of the sum of E1164.00 has been resolved by payment of the amount claimed, and it remains for the court to determine whether the suspension of the Applicant without pay is unlawful.
3. The application is supported by a founding affidavit attested by the Applicant. In opposing the application, the Respondent did not file any answering affidavits, but contented itself with filing a notice to raise points of law only. The court will accordingly approach the application on the basis that the factual allegations contained in the founding affidavit are not denied.
4. In her affidavit, the Applicant states that she is employed by the Respondent as a cashier, having worked continuously for the Respondent since March 2004. On 24th November 2006 the Respondent's Assistant Managing Director stopped the Applicant from entering her workplace and verbally suspended her from duty because there were investigations taking place concerning the loss of daily takings in the sum of E2470.00 from the workplace. Shortly thereafter the Applicant was requested by the police to report to the police station to assist with their enquiries into the alleged loss. Subsequently the Applicant was told by the police to stay at home and she would be contacted if the police needed to interview her.

5. On 29th November 2006 the Respondent served the Applicant with a letter dated 27th November 2006 stating as follows:

“ NOTICE OF SUSPENSION

You are hereby informed by management that you will remain suspended without pay until your case is finalized in court.”

6. The Applicant states that at the time of her formal suspension on 29th November 2006, and up until the date she instituted the application proceedings, she had not been charged with any criminal offence, nor had she appeared before any criminal court, nor are any criminal proceedings pending against her in any criminal court, regarding the alleged missing monies.
7. The Applicant complains that her suspension without pay is unlawful and a gross violation of the principles of natural justice because:
 - 7.1 She has been suspended pending finalization of a case in court, yet no such case is pending;
 - 7.2 She was suspended without being given any prior opportunity to make representations to the Respondent.
8. The Applicant alleges that her basic rights have been violated and she is suffering serious financial hardship arising from the Respondent's unlawful conduct. She asks that the suspension be set aside.

9. In opposing the application, the Respondent has raised the following point of law:

“1. Prayer 3 of the Notice of Motion be dismissed on the ground that it has been filed prematurely in terms of Section 39(1)(b) and Section 2 of the Employment Act, 1980 in that:

1.1 Respondent is in compliance with Section 39(1)(b) and Section 2 of the Employment Act, 1980 in that:

1.2 The Applicant's suspension without pay commenced on the 27th November, 2006 and had pertained for 14 days at date of this application.

1.3 The employee's suspension is based on fraud, a dishonest act, which if proven is a valid and fair reason for dismissal.”

10. Grogan in his book **Workplace Law (8th Edition)** at page 102 says that suspension may occur in two accepted forms, namely,

10.1 as a 'holding operation' pending further enquiry, or

10.2 as a form of punitive disciplinary sanction.

11. The essence of an interim suspension pending enquiry is that a finding has not been made against an employee and thus the action is not intended to be a punitive measure, but an administrative one. In the present matter before court, it is clear that the suspension of the Applicant purports to be an interim 'holding' form of suspension, not a disciplinary sanction. The purpose of this 'holding' kind of suspension

was described by Denning MR in **Lewis v Heffer and others 1978(3) All ER 354 (CA)** as follows:

“Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay, pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done, unless he is given notice of the charge and an opportunity of defending himself, and so forth. The suspension in such a case is merely done by way of good administration..... At that stage the rules of natural justice do not apply.”

12. This description of a ‘holding’ suspension by Denning MR was cited with approval in the case of **Jacobus John Muller and 5 others v Chairman of the Ministers Council : House of Representatives and 4 others (1991) 12 ILJ 761 (C) at 771-2**, but Howie J. took pains to emphasize that when Denning held that there was no need for a hearing prior to a ‘holding’ suspension, he was referring to a suspension on full pay, where there were no financial implications arising from the suspension.

13. In a separate concurring judgement in **Lewis’** case (supra), Lane LJ said that where suspension was an administrative action and had to be effected immediately, pending investigations, it was not only impossible to hear the subject but natural justice *“will seldom if ever at that stage demand that the investigation...hear both sides. No one’s livelihood or reputation at that stage is in danger. But the further the proceedings go and the nearer they get to the imposition of a penal sanction or to damaging someone’s reputation or to inflicting financial loss on someone, the more necessary it becomes to act judicially, and*

the greater the importance of observing the (audi rule)."

14. **Grogan (op.cit.)** points out that an interim 'holding' suspension (as well as a punitive suspension) must be on full pay, unless an agreement or applicable statutory instrument provides otherwise.

See also **Koka v Director-General: Provincial Administration North West Government (1996)7 (5) SALLR 64 (LC) at 73H.**

15. The Employment Act, 1980 does make provision in certain specific circumstances for suspension of an employee from his or her employment without pay. Section 39 of the Act (as amended) sets out these circumstances, and the section is quoted here in full:

"Suspension of employee

39 (1) An employer may suspend an employee from his or her employment without pay where the employee is –

(a) remanded in custody; or

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 (2) (b), the suspension without pay shall not exceed a period of one month.

(3) If the employer finds that the employee did not commit the act referred to in subsection (1) (b), the suspension shall be lifted and the employer shall pay to the employee an

amount equal to the remuneration he would have been paid during the suspension.

(4) *Where the employee is suspended because he was remanded in custody, and is subsequently acquitted of the charge and any other charges for which he was placed in custody, the suspension shall be lifted, and subject to subsection (5), the employer shall not be obliged to pay any wages to the employee for the period the employee was in custody.*

(5) *Where an employee is remanded in custody as a result of a complaint laid by his employer in relation to his employment naming him as an accused is subsequently acquitted of that charge or any other related charges, the employer shall pay to the employee an amount equal to the remuneration he would have been paid during the period of suspension.”*

16. The statute makes provision for only two situations in which an employee may be suspended without pay, namely:

- Where he is remanded in custody

Where dismissal or disciplinary action is contemplated.

17. It is logical that an employer should not be liable to remunerate an employee who has been remanded in custody and thereby precluded from rendering his/her services. This logic applies whether the offence for which he/she is in custody was committed against the employer, or has nothing to do with his/her employment. The legislation accordingly permits the employer to suspend the operation of the employment contract during the period that the employee is in custody. The

employee is unable to render his services, and the employer is excused from remunerating him/her. However, if the employee is in custody as a result of an *unwarranted* complaint laid by his/her employer, then it is equally logical that on the acquittal of the employee the employer should be liable to remunerate him for the period of suspension.

18. It is common cause that the Applicant has not been remanded into custody, and the Respondent cannot and does not rely on the provisions of Section 39 (1)(a) to justify the suspension without pay.
19. The Respondent avers in its notice to raise points of law that the employee's suspension is based on fraud, a dishonest act, which if proven is a valid and fair reason for dismissal. The Respondent submits that the suspension accordingly complies with Section 39(1)(b) and Section 2 of the Employment Act, 1980. Moreover, at the date of institution of the application proceedings, the suspension without pay had not exceeded the period of one month provided for in Section 39 (2).
20. There is no evidence before the court to indicate that the Applicant has, or is suspected of having, committed an act which, if proven, would justify dismissal or disciplinary action. The founding affidavit refers to a loss of daily takings amounting to E2470.00, but there is no evidence that the Applicant is in any way implicated, or suspected of being implicated, in this loss. It is not for the court to speculate as to the reasons, if any, why the Respondent decided to suspend the Applicant. It was incumbent on the Respondent to place evidence on affidavit before the court which established on a balance of probabilities that at the date of suspension the Respondent bona fide

believed or suspected that the Applicant had committed a disciplinary offence. No such evidence has been presented.

21. On the postponed date of the hearing, during the course of legal submissions, the Respondent's representative sought to hand in from the bar documents which would purportedly indicate that the Applicant has now been formally charged with a criminal offence by the prosecuting authorities. The Applicant's representative objected to the documents being handed in from the bar, without verification and out of time. The court upheld the objection, since the admission of the documents at that stage would prejudice the Applicant in the conduct of her case and, in any event, the documents were not in existence at the date of suspension and were accordingly irrelevant to the lawfulness of the suspension.
22. Although the common law permits an employer to suspend as a 'holding' operation, such suspension must be done fairly and must not be oppressive to the employee. The Respondent suspended the Applicant without pay "until your case is finalized in court." At the date of suspension, there was no case pending in any court. It was clearly unfair to suspend the employee pending a speculative and uncertain future event.
23. 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. It is common knowledge that criminal cases in the inferior courts are seldom finalized in less than one year, unless the accused person pleads guilty.

24. 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 (See **Mphikeleli Sifani Shongwe v Principal Secretary, Education & others (IC Case No. 207/2006)**); nor for that matter does the acquittal of the employee preclude the employer from taking disciplinary action against the employee.
25. Provided the Respondent bona fide suspected that the Applicant was implicated in the commission of a disciplinary offence, it could have suspended the Applicant pending finalization of investigations and any disciplinary charges which might be brought against the Applicant as a result of such investigations. The suspension was not however imposed on these terms, and the actual terms of the suspension are unfair and oppressive.
26. The suspension is also unlawful because it purports to suspend the Applicant without pay for an indefinite period which, in the circumstances of the matter, would undoubtedly have exceeded the period of one month permitted by Section 39 (2) of the Act. On a reading of the letter of suspension, the Applicant was entitled to apprehend that the Respondent intended to deprive her of her remuneration for a substantial period exceeding one month.
27. Turning to the question whether the Applicant should have been granted the opportunity to make representations before she was suspended without pay, the court will first make certain observations regarding the principle of *audi alteram partem*.

This principle was described in the case of **South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A)** as follows:

“A rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or whenever such an individual has a legitimate expectation entitling him to a hearing unless the statute expressly or by implication *indicates the contrary.*”

Common law courts have in the past expressed the view that the *audi* maxim is a principle of administrative law and has no application in the field of private law. Contractual rights and obligations, including those pertaining to employment, are governed by the law of contract.

See **Embling v The Headmaster, St. Andrew's College (Grahamstown) and another (1991) 12 ILJ 277 (E)**

This view has been strongly criticized - see RATTLING THE CHAINS OF SIBANYONI'S GHOST: CONTRACT AND NATURAL JUSTICE REVISITED IN THE CISKEI HIGH COURT (1999) 20 ILJ 2228

28. The *audi* principle is but one facet of the general requirement of natural justice that a person must be treated fairly. Since the Industrial Court has an equitable jurisdiction which requires it to promote fairness and equity in labour relations, the court is required to apply the rules of natural justice, including the *audi alteram partem* rule.

See Section 8(4) of the Industrial Relations Act 2000 (as amended), read together with Section 4(1)(b).

However one characterizes the rule, it is a fundamental requirement of fair labour practice that a person who may be adversely affected by a decision should have an opportunity to make representations on his own behalf.

29. There can be no doubt that a suspension without pay adversely affects the suspended employee and constitutes a serious disruption of his/her rights.

See the remarks of Howie J in the case of **Jacobus John Muller (cited above) at page 25J.**

30. A suspension without pay in terms of Section 39 (1)(b) of the Employment Act has a punitive element. The employee has not withdrawn his services, but the employer is entitled to unilaterally withhold his/her remuneration. Even if the disciplinary action culminates in the dismissal of the charge, and/or the reinstatement of the employee to his employment, the employee will not be remunerated for the period of suspension. The decision to suspend without pay inevitably inflicts a financial loss on the employee. In terms of the dictum of Lane LJ cited in paragraph 13 above, such a decision requires observation of the *audi* rule. In other words, the employee has the right to be heard before the decision is taken.

31. In the case of **FOOD & ALLIED WORKERS UNION v SA BREWERIES LTD (1992) 1 LCD 35 (IC)**, the South African industrial court considered the applicability of the *audi alteram partem* rule to a suspension pending a disciplinary enquiry. In terms of the common law, said the court, an employer is entitled to suspend an employee unilaterally provided that he continues to pay wages for so long as the employee's services remain available. Failure to pay wages would be a repudiation of the employment contract. Secondly, the court looked at the fairness of such a suspension. It distinguished between suspension with and without pay and held that in a situation where an

employee is suspended and wages are withheld, there can be little doubt that a hearing would be a necessary prerequisite for that suspension to be fair. However, where a suspension occurs with due payment of wages the court decided that a hearing is not required.

32. This court respectfully agrees with the conclusions reached in the **Food and Allied Workers** case, subject to the following remarks:

32.1 A suspension on full pay will not normally require a prior hearing where it is solely as a 'holding' measure aimed at promoting orderly administration. If it has any ulterior object, or is used as a punitive or disciplinary device, or will have that effect, a hearing will be required.

32.2 The employee is entitled to a speedy and effective resolution of the matter. The investigation must be concluded within a reasonable time taking all the relevant factors into account and the employee must be formally notified without undue delay whether disciplinary proceedings are to be instituted or he may return to work. The disciplinary hearing must be initiated and concluded within a reasonable time of the employee being suspended.

32.3 Where the suspension is without pay in terms of Section 39 (1)(b) and the disciplinary process is not completed within one month, payment of the employee's remuneration must be resumed.

32.4 There may conceivably be occasions when it is not practical to give an employee a hearing prior to his suspension without

pay. In such event the employer may suspend with pay pending a hearing to determine whether the hearing should be without pay, or alternatively suspend without pay and convene a hearing at the earliest opportunity to afford the employee the opportunity to challenge the decision.

- 32.5 The right to make representations does not necessarily require an oral hearing. In appropriate circumstances the opportunity to make written representations may be sufficient compliance with the *audi* rule.

See **Secretary to Cabinet and others v Ben Zwane (Civil Appeal 2/2000)**

33. It is the judgement of the court that the suspension of the Applicant was unlawful for the following reasons:

- 33.1 The suspension pending finalization of a criminal case was unfair and oppressive, particularly because no case was pending, the outcome of the case would not determine the Applicant's future employment status, and there was no apparent intention to hold an internal disciplinary enquiry.
- 33.2 The suspension without pay in terms of Section 39(1)(b) for an indefinite period likely to exceed one month was unlawful.
- 33.3 The Applicant was not given any opportunity to make representations concerning her suspension without pay.

34. **The court makes the following order:**

34.1 The suspension of the Applicant is set aside;

34.2 The Respondent is directed to remunerate the Applicant for the period during which she was under purported suspension;

34.3 The Respondent is to pay the costs of the Application.

The members agree.

P. R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT