

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

CASE NO. 167/06

In the matter between:

**BONGANI MDLULI**

**APPLICANT**

And

**UNIVERSITY OF SWAZILAND**

**RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE :**

**JUDGE**

**DAN MANGO :**

**MEMBER**

**GILBERT NDZINISA:**

**MEMBER**

**FOR APPLICANT:**

**MR. M. MKHWANAZI**

**FOR RESPONDENT:**

**MR. M. SIBANDZE**

**JUDGEMENT 16.07.07**

[1] The applicant initially brought an urgent application before the court on the 3<sup>rd</sup> May 2006 for an order in the following terms.

"1. Waiving the usual requirements of the rules of court regarding time limits, forms and service and hear this matter as one of the urgency.

2. Setting aside the suspension of the applicant and reinstating him to the position of Security Guard/Officer with the respondent.

3. Costs of application.

#### 4. Further and or alternative relief."

[2] On the 26<sup>th</sup> June 2006 a consent order in terms of prayer 2 only was granted with effect from the 3<sup>rd</sup> July 2006.

[3] The applicant indeed reported for work on the 3<sup>rd</sup> July 2006.

[4] The applicant was not however paid his arrear wages for the period of November 2000 when he was suspended, to the date of resumption of duty on the 3<sup>rd</sup> July 2006.

[5] The applicant has therefore instituted the present proceedings on a certificate of urgency and he claims, inter alia, an order directing the respondent to pay him his arrear salary calculated from November 2000 to the date of judgement.

[6] By date of judgement the applicant must be understood to mean the date when the consent order was granted on the 26<sup>th</sup> July 2006. It is common cause that when the applicant returned to work on the 3<sup>rd</sup> July 2006, he was served with a letter of suspension which was with immediate effect pending the outcome of a disciplinary hearing. That suspension was however with pay.

[7] The facts of this matter are as follows: the applicant was employed by the respondent as a Security Guard on the 4<sup>th</sup> April 1995. He was stationed at the Luyengo Campus.

[8] In May 2000 a crime was committed at the applicant's work station and a chain saw was stolen from a storeroom. There was no sign of forced entry. The matter was reported to the police.

[9] Shortly thereafter, there was a second burglary and a grinder and a welding machine were stolen. This incidence was also reported to the police. The police

investigations led to the arrest of the applicant's colleague by the name of Zakhele Dlamini. The police later came and arrested the applicant in November 2000.

[10] The applicant was thereafter suspended without pay by the respondent by a letter dated 13<sup>th</sup> November 2000. The letter appears as follows:-

**"Re: suspension without pay**

*Following your apprehension by the Swaziland Royal Police, on a charge of theft of University property, you are hereby suspended from duty without pay in accordance with Article 7 of the agreed Terms and Conditions of Service between the parties.*

*Your suspension is with effect from Thursday 9<sup>th</sup> November 2000 and shall remain in force pending the outcome of the case."*

[11] The applicant was released from custody on the 16<sup>th</sup> November 2000 after he had paid a bail deposit of E500.00. He continued to appear before the court for remand hearings. The charge was withdrawn on the 28<sup>th</sup> January 2004.

[12] He reported to work, but was not reinstated by the respondent. The respondent wanted him to produce a written confirmation from the Magistrate's Court that indeed the charge had been withdrawn. The applicant failed to get such as he was informed by the Clerk of Court they were unable to locate the court record.

[13] The respondent refused to reinstate the applicant without first producing the written confirmation. The applicant reported the matter to the union and also instructed his attorneys.

[14] The applicant was unsuccessful in his bid to get a written confirmation from the Magistrate's Court.

[15] The applicant then applied to the High Court for an order that he be prosecuted within thirty days, failing which a certificate of *nolle prosequi* be issued. The applicant obtained the order. The thirty days lapsed and the Crown failed to prosecute the case.

[16] There is therefore presently no criminal case that is pending against the applicant.

[17] Two questions of law are raised by these facts. These are whether an employer has the right to suspend an employee without pay for an indefinite period, or differently put, whether it is fair for that an employee be suspended without pay for an inordinately long period. The second question of law is whether the applicant was entitled to be paid his arrear wages when he was reinstated following the consent order setting aside the suspension.

[18] The question whether an employer can suspend an employee without pay for an indefinite period 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 (I.C.) CASE NO. 681/2006.**

[19] In that case the applicant was also suspended without pay pending finalization of her case in court. She applied to the court to have the suspension set aside. The facts of that case showed that she had not been charged with any criminal offence and there were no criminal proceedings pending against her.

[20] The court dealing with the issue of suspending an employee pending a criminal trial held as follows on page 9:

*"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."*

The court pointed out further at paragraph 24 that;

*"Moreover, in view of the court 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 (I.C.) CASE NO. 207/2006**); nor for that matter does the acquittal of the employee preclude the employer from taking disciplinary action against the employee."*

The court held in that case that the suspension was unlawful because it purported to suspend the applicant without pay for an indefinite period.

These findings apply with equal force to the present case. **SECTION 39 (2) OF THE EMPLOYMENT ACT NO. 5 OF 1980** as amended, provides that suspension without pay shall not exceed a period of one month.

It follows therefore that in the present case, the suspension without pay of the applicant for an indefinite period was unlawful and unfair.

An employer is entitled to suspend its employee without pay pending investigations and disciplinary hearing. These must however be initiated and concluded within a reasonable time, and must not exceed a period of one month.

The other question that the court must answer is; what was the effect of the reinstatement order granted on the 26<sup>th</sup> June 2006. It was argued on behalf of the respondent that the court only made a reinstatement order and it never said that the applicant should be paid his arrear wages.

With respect, the court does not agree with this submission. That argument was clearly casuistic. Reinstatement is defined in the **INDUSTRIAL RELATIONS ACT NO. 1 OF 2000** as amended to mean;

*"An action or situation whereby an employee's services or employment are treated as if the services or employment have never been terminated, including the payment of wages, salary and any remuneration payable by virtue of the services or employment"*

[28] This definition is written in very clear and unambiguous language. It states that the employee's services or employment is treated as if it was never terminated. When the applicant was reinstated therefore, his employment was to be treated as if it had never been terminated or disrupted by the suspension. Had the service of the applicant not been disrupted by the respondent, he would have received the monthly wages due to him.

[29] It was argued that the applicant should have presented himself to the duty station when he was out of custody. That argument was fanciful. The applicant was not at work because of his choice. He was under suspension. It was the respondent that had told him to stay away from work. He had no right to return to work until the respondent told him to do so.

[30]The respondent is however not bound to pay arrear wages for the period that

the applicant was in custody.

[31] It is the judgement of the court that the suspension without pay of the applicant for an indefinite period was unlawful and that upon his reinstatement he was entitled to be paid his arrear wages, excluding wages for the period that he was in custody.

[32] The respondent is an academic institution where law graduates, among others, are trained. It could have easily sought free legal advice on the matter. The applicant told the respondent that the charges had been withdrawn, but still it failed to re-instate him. This is therefore one case where the respondent should be made to bear the costs of the proceedings.

[33] Taking into account all the foregoing observations and all the circumstances of this case, the court will make the following order:

- 1. The respondent is directed to pay the applicant his arrear salary calculated from November 2000 up to the 3<sup>rd</sup> July 2006 when he was re-instated excluding the period that he was in custody.**
- 2. The respondent is to pay the costs of the application.**

The members agree.

**NKOSINATHI NKONYANE**  
**JUDGE- INDUSTRIAL COURT**