

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 579/01

In the matter between:

SHOBANE DUBE

1st Applicant

MAJAHA ZULU

2nd Applicant

PRUMAN MSIBI

3rd Applicant

and

**IMVUNULO RETAIL GROUP (PTY) LTD
T/A SNEAKERS**

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : S. MNISI

FOR RESPONDENT : M. SIBANDZE

J U D G E M E N T - 9/01/08

1. On the 26th November 2007 the Respondent suspended the

Applicants from their employment until further notice. The suspension was without pay.

2. The letter of suspension states inter alia as follows:

“Re: Fraudulent Credit Card Transactions

Due to re-occurring credit card fraud at the Manzini branch, we are restructuring Sneakers - Manzini with immediate effect.

The amount so far discovered to have been stolen currently stands at E45,000-00 this appears to be just a fraction of the total amount since more evidence is still being looked at As a matter of urgency the abovementioned persons are suspended from work without pay until further notice.

This matter has been handed over to the Police and criminal investigations have already started”

3. In terms of section 39 (1) of the Employment Act 1980 (as amended), an employer may only suspend an employee without pay whether the latter is remanded in custody or “has or is suspected of having committed an act which, if proven, would justify dismissal or disciplinary action.” In terms of section 39 (2), the suspension without pay shall not exceed a period of one month.
4. Although the letter of suspension refers to fraudulent credit card transactions which are the subject of criminal investigations, the letter does not allege nor suggest that the Applicants committed, or were suspected of having committed credit card fraud. On the face of the letter of suspension, the suspension of the Applicants was merely a holding suspension pending investigations to ascertain the identity of

the culprits. Such a holding suspension is permitted in law, but it should be on full pay - see **Nkosingiphile Simelane v Spectrum (Pty) Ltd t/a Master Hardware (unreported IC Case No. 681/2006 at page 6)**.

5. In its Answering affidavit, the Applicant states that *“the Applicants were suspended from their employment on suspicion that they were involved in a credit card scam, as stated in the letter of suspension attached hereto.”* The letter of suspension states no such thing, and the Respondent gives no facts in its affidavit to support the bald assertion of a suspicion that the Applicants were involved in a “credit card scam.” No details are given of the alleged scam, nor why the involvement of the Applicants is suspected.
6. Instead of justifying the suspension of the Applicants without pay, the Respondent alleges that – subsequent to the suspension – its investigations have revealed illicit stock transfers perpetrated by the Applicants, and a secret profit made by the 2nd Applicant in competition with the Respondent.
7. Suspension of an employee pending investigations should be on full pay in the absence at that stage of the suspicion required by section 39 (1) of the Act. Such suspicion must be reasonable and bona fide. In the view of the court the Respondent has not established that at the time of the suspension it bona fide and reasonably suspected the Applicants of having committed an act which, if proven, would justify disciplinary action or dismissal.

It is not permissible for an employer to post facto justify suspension without pay on grounds which only come to light from investigations carried out after the suspension.

8. The Applicants submit that their suspension without pay was also unlawful and unfair because they were not afforded the opportunity to make representations on the question of the suspension of their remuneration. In its judgement in **Nkosingiphile Simelane v Spectrum (Pty) Ltd t/a Master Hardware (op. cit. at page 12)** the Industrial Court followed the decision of the South African Industrial Court in the case of **Food and Allied Workers Union v SA Breweries Ltd (1992) 1 LCD 35 (IC)** in holding 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.”*

9. Mr. Sibandze for the Respondent has argued that the Nkosingiphile Simelane judgement per incuriam overlooks section 39 (3) of the Act stating (at paragraph 30) that an employee suspended without pay will not be remunerated for the period of suspension even if the disciplinary charges against him are subsequently dismissed and he is reinstated to his employment. Mr. Sibandze appears to be correct, but this does not alter the ratio of the judgement that a suspension without pay has a punitive element and inevitably inflicts financial prejudice on the suspended employee. As stated by Howie J in the case of **Jacobus John Muller & 5 Others v Chairman of the Ministers Council : House of Representatives & 4 Others (1991) 12 ILJ 761 (c)**, a suspension without pay constitutes a serious deprivation of an employee's right. The implications of being deprived of one's pay are obvious: rentals and accounts cannot be paid; the necessities of daily life cannot be purchased; financial commitments cannot be honoured; educational expenses of one's children cannot be paid. This kind of prejudice occasioned by a suspension without pay cannot be remedied even if the employee is ultimately vindicated and paid his arrear wages. The potential for

prejudice is significantly greater where the earnings of the suspended employees, as in the present matter, only cover the bare cost of living.

10. Notwithstanding that section 39 permits a suspension without pay for a period not exceeding one month, it does not provide for the exclusion of the rules of natural justice and fairness in relation to such suspension. The Applicants had a right to be heard on the question whether they should be suspended without pay, and the failure of the Respondent to afford them such a hearing results in their suspension without pay being void as an unfair labour practice.

11. The Applicant has asked for an order:

1. Dispensing with Rules of Court as to time limits as services, procedure and dealing with this matter as one of urgency;
2. That a rule nisi so hereby issue and returnable on a date to be fixed by the above honourable court calling the Respondent to show cause why an order in the following terms should not be made final:
 - 2.1 Directing the Respondent to pay the Applicants their wages for the month of November 2007.
 - 2.2 Declaring the purported suspension of the Applicants without pay unlawful and therefore a nullity and that the Applicants be reinstated to their employment with immediate effect.

Alternatively:

2.3 That the Applicants suspension having been imposed for purposes of restructuring is unlawful and without effect and Applicants are hereby reinstated to their employment pending institution of a proper disciplinary hearing.

2.4 Directing the Applicants' disciplinary hearing be presided over by an independent chairperson to be appointed by the Respondent and such disciplinary hearing is to take place within 7 days and Applicants be notified of same.

3. Costs.

12. In our view, the unlawful withholding of wages during the period of suspension entitles an employee to approach the court as a matter of urgency for an order enforcing compliance with the employer's obligation to pay wages so long as the employment relationship subsists and the employee tenders his services. We are however unable to accede to prayers 2.2 or 2.3 of the notice of application since we consider the suspension of the Applicants pending investigation into credit card fraud to be lawful and fair, provided such suspension is on full pay. With regard to prayer 2.4, no basis for this relief has been made out in the founding affidavits of the Applicants.

13. The court makes the following order:

- (a) The matter is dully enrolled as one of urgency and the normal time limits and procedures provided by the rules of court are dispensed with.
- (b) The suspension of the Applicants in terms of the Respondent's letter dated 26th November 2007 shall be on full pay.
- (c) The Respondent is directed to forthwith pay to the Applicants any outstanding wages for the months of November and December 2007.
- (d) The Respondent is to pay the costs of the application.

The members agree.

PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT