



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 394/12

In the matter between:

BONGANI MNDZEBELE

Applicant

And

MINISTRY OF AGRICULTURE

1st Respondent

MINISTRY OF PUBLIC SERVICE

2nd Respondent

CIVIL SERVICE COMMISSION

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Neutral citation: *Bongani Mndzebele v Ministry of Agriculture & Others*(3948 [2013] SZIC 6 (MARCH 1 2013))

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)

Heard : 15th FEBRUARY 2013

Judgement Delivered: 1ST MARCH 2013

Summary :

Applicant was suspended on half pay by the employer for about five years pending finalization of a criminal case. The criminal case was struck off the role. The Applicant's suspension was lifted by the employer on 03rd December 2012. The Applicant filed the present application claiming re-imbursement of the amounts deducted from his salary.

Held—The Applicant should be re-imbursed the monies deducted from his salary in terms of Regulation 39 (4) of the Civil Service Board (General) Regulations.

JUDGMENT 01.03.13

[1] This is an application brought by the Applicant against the Respondents and is seeking an order as follows:

“1. That pending finalization of the above matter the Respondents be and are hereby ordered to reinstate the full salary of the Applicant forthwith.

2. *That the Applicant's suspension be and is hereby set aside and Applicant be and is hereby authorized to return to his duties forthwith.*

3. *That the Respondents be and are hereby ordered to pay Applicant the sum of **E165,053.19 (One Hundred and Sixty Five Emalangi and Fifty Three nineteen cents)** being monies deducted from Applicant's salary pursuant to the suspension that commenced from the 20th August, 2007 to the month of September, 2011 or such amount due upon finalization of this matter.*

4. *That payment of the monies deducted from Applicant's salary be made to the offices of the Applicant's Attorneys Lloyd Mzizi Attorneys, Office No.2, 1st Floor, Amalgam Building, Gwamile Street, Manzini forthwith.*

5. *That the Respondents be and are hereby ordered to pay costs of suit.*

6. *Granting Applicant further and / or alternative relief."*

- [2] When the matter appeared before the court on 04.12.12, the Respondents' attorney informed the court that prayers 1 and 2 have been overtaken by events as the Applicant has since been re-instated and the suspension lifted. The only live issue between the parties therefore is prayer 3.
- [3] An Answering Affidavit was accordingly filed on behalf of the Respondents in opposition to prayer 3 of the Applicant's application. The Answering Affidavit was deposed thereto by Bongani Masusku who stated therein that he is the Acting Principal Secretary of the 1st Respondent.
- [4] In the Answering Affidavit the Respondents raised a point of law, namely, that the Applicant has unreasonably delayed in instituting the proceedings and should therefore be taken to have waived or abandoned his right, and is estopped from enforcing his right.
- [5] The matter was finally argued in court on 15.02.13 after the representatives of the parties have filed Heads of Argument. The point of law raised was argued together with the merits and the court will therefore issue a final judgment on the matter.

[6] The facts are not in dispute. They revealed that the Applicant is an adult Swazi male of Manzini. He is a civil servant and is employed by the Ministry of Agriculture as a Veterinary Assistant.

[7] In 2007 the Applicant was arrested and charged with stock theft. He appeared before the Mbabane Magistrate Court and he was granted bail. By letter dated 09th August 2007 he was suspended from duty with half pay pending the finalization of his case. The suspension of the Applicant was lifted by the Civil Service Commission by letter dated 03rd December 2012. The Applicant was advised to report for duty as soon as he received the letter.

[8] The Applicant is therefore presently at work. The court was informed by the Applicant's attorney when the matter appeared in court on 08.02.12, that the Applicant has still not been paid his salary for December 2012 and January 2013.

[9] The question before the court is whether or not the Applicant is entitled to be re-imbursed the amounts deducted from his salary during the period of suspension on half pay from August 2007 to November 2012 when the suspension was lifted. On behalf of the Applicant it was argued that;

9.1 *The suspension of the Applicant was in terms of the Civil Service Board (General) Regulations, and the Regulations are clear as to what should happen after the suspension of an employee is lifted.*

9.2 *The Applicant is claiming payment of monies that belong to him that were deducted by the employer from his own salary.*

9.3 *Prescription or waiver does not apply in this case as the matter is governed by the Regulations.*

[10] On behalf of the Respondents it was argued that;

10.1 *The Applicant is estopped from claiming the re-imburement as he had delayed for about five years from challenging his suspension.*

10.2 *The Limitation of Legal Proceedings against the Government Act is applicable as this is an application against the Government.*

[11] **The Law Applicable:-**

Mr. T. Vilakati who is appearing on behalf of the Respondents relied on a number of this court's judgments for his argument on waiver or unreasonable delay. He cited the cases of **Vusi Sikelela Dlamini v. Eagles Nest (Pty) Ltd case No. 150/10 (IC); Tokyo Ntshangase v. Swaziland National Provident Fund, case No. 19506 IC; Thomas Themba Motsa v. Usuthu Pulp Company Ltd. Case No. 327/05 and Usuthu Pulp Company Ltd. v. Jacob Seyama & 4 Others case No. 01/04 (ICA)**. All these cases are however clearly distinguishable from the present matter as they involved employees who had been dismissed from employment. The Applicants in the cited cases had either delayed in reporting the dispute, or after reporting the dispute, they had delayed in instituting legal proceedings in court. In the present case, the period of five years lapsed while the Applicant was still under suspension by the employer. The employer is estopped from using a situation created by it to the prejudice of the employee.

[12] In the present case, the Applicant was never dismissed. He never at any point since he was employed, cease to be an employee of the Government. He was merely under suspension pending the finalization of the criminal case. Suspension is commonly of two types. It may be imposed by an

employer as a holding operation pending disciplinary action, or it may be imposed by the employer as a form of disciplinary penalty. In the present case it was clearly a holding operation pending the criminal case. (See: **John Grogan: Workplace Law, 8th edition p. 102.**)

[13] The employer was within its rights to impose the suspension on the Applicant. The provision for interdiction is to be found under **Regulation 39(1)** which provides that;

“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.”

Regulation 39 (4) provides that :

“If the disciplinary proceedings do not result in the officer’s dismissal or other punishment he shall be entitled to the full amount of the emoluments which he would have received if he had not been interdicted.”

Mr. Vilakati argued that **sub-regulation 4** does not apply the Applicant as he was not disciplined by the employer, but was facing a criminal charge.

[14] The argument is clearly casuistic. The interdiction of the Applicant by the employer was the start of the disciplinary process at the workplace. That the Applicant was facing a criminal charge did not bar the employer from conducting its own investigations and thereafter subjecting the Applicant to a disciplinary hearing if there was evidence that the Applicant had committed an offence. The employer in this case decided to abandon the disciplinary process and did not subject the Applicant to a disciplinary hearing. The disciplinary process which was initiated by the employer by interdicting the Applicant did not result in the dismissal of the Applicant. **Regulation 39(4)** is therefore applicable to the present situation.

[15] It was further argued on behalf of the Respondents that the Limitation of Legal Proceedings against the **Government Act, No.21 of 1972** was applicable in this case. It was argued that in terms of **Section 2 (1) (c)** of the Act, no legal proceedings shall be instituted against the Government in respect of any debt after the lapse of a period of twenty-four months as from the day on which it the debt became due.

[16] The next inquiry therefore is when did the debt become due? The evidence before the court revealed that the suspension of the Applicant was lifted by the employer on 03rd December 2012. The lifting of the suspension by the employer meant that the disciplinary process had come to an end. From this period, the monies that were being deducted by the employer from the Applicant's salary became due because the disciplinary process did not result in the dismissal of the Applicant. It is therefore clear that the period of twenty-four months had not lapsed when the Applicant instituted the present proceedings taking into account that his suspension was lifted on 03rd December 2012.

[17] It was also argued on behalf of the Respondents that the money cannot be paid to anyone other than the Applicant in terms of the Government Accounting Procedures. There was no counter argument on this point. The court will therefore assume in favour of the Respondents that in terms of the Government Accounting Systems, the amount owed is payable only to the employee.

[18] As an aside, it was clear to the court that the Respondents had no valid defence to the Applicant's claim. The need to defend the claim may have

been caused by the amount claimed by the Applicant. If Government is of the view that it will not be able to pay the amount due at once, the parties can negotiate and reach an agreement to repay the amount by instalments equal to the amount that the Government was deducting from the salary of the Applicant when he was on suspension.

[19] On the question of costs, the attitude of this court is that, generally, it will not award costs where the employer/employee relationship still exists in order to preserve harmonious industrial relationship. The present case however is an exception in that the employer set out to defend the indefensible, to the prejudice of the Applicant. There was no need for the Applicant to even seek the court's intervention. After the suspension was lifted, by operation of the law the monies that were deducted during the suspension period became due and payable to the Applicant.

[20] Taking into account all the factors and circumstances of this case, the court will make the following order;

a) The 1st – 4th Respondents are jointly severally ordered to pay to the Applicant the monies deducted from the Applicant's salary during the suspension period. The one paying, the others to be absolved.

- b) The 1st – 4th Respondents are jointly and severally ordered to pay the costs of suit. The one paying, the others to be absolved.**

[21] The members agree.

**N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR L.N. MZIZI
(LLOYD MZIZI ATTORNEYS)**

**FOR RESPONDENTS: MR. T. VILAKATI
(ATTORNEY-GENERAL'S CHAMBERS)**