IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case No. 117/18B

In the matter between:

QUINTON DLAMINI Applicant

And

THE NATIONAL PUBLIC SERVICE AND

ALLIED WORKERS UNION (NAPSAWU) Respondent

Neutral citation: Quinton Dlamini v The National Public Service and Allied Workers Union (NAPSAWU) *(117/2018B)* [2019] *SZIC 10* (18 February 2019)

Coram: **NSIBANDE S. JP**

(Sitting with Nominated Members of the Court Mr N. Manana and Mr M.P. Dlamini)

Heard: 27 September 2018

Delivered: 18 February 2019

JUDGMENT

[1] The Applicant approached the Court for an order:

1. *Setting aside the decision of the Respondent suspending the Applicant from membership of the Respondent Union and from Union activities as irregular, unlawful and against Respondent's own constitution;*

2. *Reinstating Applicant back into his position as Chairperson of the Manzini Branch of the Respondent;*

3. *Interdicting and restraining the Respondent from preventing the Applicant from carrying out his duties as a member of the Union and as Chairperson of Manzini Branch of the Respondent to dispatch the minutes and record of proceedings from the respective branches leading to the adoption of the resolutions for the suspension of the Applicant from Union membership and activities of the Respondent;*

4. *Directing the Respondent to dispatch the minutes and record of proceedings from the respective branches leading to the adoption of the resolution for the*

suspension of the Applicant from union membership and activities of the Respondent;

5. *Declaring that the unilateral suspension of Applicant from the membership of the Respondent Union and from Union activities is an unfair labor practice and unlawful;*

6. *Costs of the application on the attorney and own client scale;*

7. *Granting Applicant further and/or alternative relief.*

[2] The facts of this matter are largely common cause. The Applicant is the Chairman of the Manzini Branch of the Respondent and thus is also a member of the Respondent. He was suspended on 5th April 2018, pending the finalization of the work of a Commission of Enquiry appointed by the Respondent had to look into the purchase of Portion 25 of Farm Trelawney Park No. 868 (**the house**) when the Applicant held the office of President of the Respondent.

[3] The Applicant challenges the suspension on the basis that he was not given a hearing prior to the suspension contrary to the by-laws of the Respondent, and secondly that none of the structures of the Respondent took a resolution to

suspend them and that in the absence of such resolution the Secretary General of the Respondent lacks the requisition power to suspend him.

[4] When the matter was argued the Respondent emphasized that the Applicant was suspended as a means to allow its Commission of enquiry into the purchase of the house to proceed smoothly, thus it was termed a "cautionary suspension" which, it was argued, the Mid-Term Conference of the Respondent was empowered to effect.

[5] At the hearing of the matter, Respondent raised the point that the matter was *res judicata*. The point was dismissed as being ill conceived. The Applicant had previously brought a similar application which this Court dismissed on a point of law regarding urgency. That matter having been dismissed is not pending before this Court and the Respondent was unable to point out any other Court in which the same issue was being adjudicated upon. On this basis, the point raised in *limine* was dismissed.

[6] Right to be heard prior to the suspension.

The Applicant raised **section 21(1)** of the **Constitution of Eswatini** to submit that the need to give notice prior to suspending an employee has now crystalised into a right that obliged the Respondent to hear the Applicant before it suspended him.

It was submitted that in terms of the constitution this right exists whether the suspension is cautionary as alleged by Respondent. To this end, the Court was referred to **Patrick Mooi Dlamini v Commissioner Anti-Corruption Commission and Attorney General Industrial Court Case No. 217/17**.

[7] The Applicant further submitted that in terms of the Respondent's Constitution in particular, article 7 (e) (1) the Branch Executive Committees were entitled to impose any discipline or sanction against any member falling within its jurisdiction upon giving him/her a fair hearing. It was submitted that the Applicants had not received a hearing at all let alone a fair one.

[8] In response the Respondent submitted that the Applicant was suspended to enable the Union to investigate and that no disciplinary action was being taken against the Applicant. The investigation through the Commission of enquiry would reveal whether any disciplinary action should be taken against the Applicant. It was conceded that the Applicant had not been heard prior to the suspension but it was submitted that the suspension not being punitive, it was not necessary in the circumstances of this case to hear the Applicant before he was suspended. It was submitted that Article 7 (3) of the constitution gave Respondent the right to suspend a member, *"for acting against the interests of the union and its members."*

It was submitted that a cautionary suspension, even though not provided for specifically in the constitution of the Respondent, was a good administrative measure which the Respondent was entitled to take. This was meant to prevent the Applicant from interfering with the on-going Commission of Inquiry into the purchase of the house.

[9] The Respondent's "cautionary suspension is what is also known as preventative suspensions the learned author John Groyan in Workplace Law 8th Edition at page 102 stated that -

"the High Court held that employees are entitled to a hearing before being suspended, even if the suspension is preventative."

[10] Our own Court in the cited case **Patrick Mooi Dlamini v Commissioner Anti-Corruption Commission** (supra) having cited with approval **Mogothle v Premier of the North West Province and Another (2009) 4 BLLR 331 (LC)** came to the conclusion that it is just, fair and equitable to give an employee an opportunity to state a case or to be heard before any final decision to suspend is made.

[11] In the **Mogothle v Premier of the North West Province and Another** (supra) three prerequisites for a fair suspension were laid down being:

(a) a justifiable reason to believe, *prima facie* at least, that the employee had committed serious misconduct;

(b) that there was an objective reason for denying the employee access to the work place; and

(c) the employee being given an opportunity to state a case before the decision to suspend is made.

[12] In the matter before Court, it is common cause that the Applicant was not heard before he was suspended. That being the case it is clear that one of the prerequisites for a fair suspension was not met. On that basis alone the application succeeds. It is not necessary to get into the enquiry regarding the other two prerequisites. Nor is it necessary to make enquiry into the issue of whether the Respondent had the mandate (in the form of a resolution) to suspend the Applicant.

[13] We acknowledge that the relationship between the parties is not one of employer and employee. However there is no reason why the principles set out in the cases cited above can not be extend to their relationship particularly where the Constitution governing such relationship is silent on the concepts of preventative suspensions.

[14] In the circumstances we come to the conclusion that the Applicant was entitled to be heard prior to the suspension. The suspension was therefore unfair and unlawful and ought to be set aside. The application succeeds. There is no order as to costs.

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicant: Mr P.K. Msibi

For the Respondent: Mr M. Dladla