IN THE INDUSTRIAL COURT OF ESWATINI

CASE NO. 205/2019

In the matter between:-

PHESHEYA NKAMBULE — Applicant

AND

NEDBANK (SWAZILAND) LTD — Respondent

Neutral citation: *Phesheya Nkambule* vs *Nedbank 205/2019 SZIC 87 (September 18, 2019)*

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

Heard submissions: 24/07/19

Jugdement delivered: 18/09/19

SUMMARY---Labour Law---Applicant placed on suspension with full pay pending finalization of disciplinary hearing---Delay in finalizing the disciplinary hearing---Respondent coming to the conclusion that the Application is deliberately causing the delay in finalizing the disciplinary hearing---Respondent making a decision to change the terms of the suspension to suspension without pay pending the finalization of the disciplinary hearing---Applicant instituting application for an order reinstating the salary---Whether the Industrial Court has the jurisdiction to change or review the decision of the employer without the dispute first dealt with in terms of Part V111 of the Industrial Relations Act.

Held---The true nature and obvious effect of the Applicant's application is to change or review the decision already taken by the employer converting the terms of the suspension from one with pay to one without pay.

Held further---On the strength of the authority in the Industrial Court of Appeal decision in the case of Attorney-General v Sayinile Nxumalo, this Court is not vested with the power to review except in matters that have gone through the procedures laid down under Part V111 of the Industrial Relations Act,

---

JUDGEMENT

---

1. The Applicant is an employee of the Respondent. His position is that of Head of Retail of the Respondent bank.

2. The Applicant is currently on suspension pending finalization of his disciplinary hearing. He was suspended by the Respondent on the 24th December 2018. He was served with the charges on the 14th February 2019 and the disciplinary hearing was scheduled for the 25th February 2019.

3. The Applicant is facing serious charges. After his suspension and during the investigations some inconsistencies were discovered in the business of the Respondent in which the Applicant was implicated involving the misappropriation of amounts in the region of E3 Million.

4. The disciplinary hearing did not proceed on the 25th February 2019 as the Applicant raised some preliminary objections. On the 20th March 2019 the Applicant was served with a revised charge sheet and was invited to attend a disciplinary hearing on the 15th April 2019. The disciplinary hearing commenced, two witnesses were led and the hearing was adjourned until 22nd May 2019.

5. On the 22nd May 2019 the Applicant could not attend the hearing because he was sick and he presented a doctor's sick note. The Respondent was not satisfied with the authenticity of the sick note and began to conduct an investigation around the integrity of the document. The Respondent was of the view that it was unconventional for a medical doctor to book an

employee off duty for more than five days in circumstances where the employee had not been admitted and was able to travel between eSwatini and South Africa.

6. The Applicant thereafter launched a review application before the High Court. That application was argued before the High Court on the 05th June 2019. That application is still pending and is awaiting judgement. In the answering affidavit, the Respondent pointed out in paragraph 25 that the Applicant has now instituted numerous applications before the High Court being case number 63/2018, 219/2019 and case number 851/2019. The Applicant however stated in his founding affidavit that there are two applications pending before the High Court.

7. As a result of the delay in completing the disciplinary hearing caused by the Applicant's applications, the Respondent took a decision to vary the Applicant's conditions of suspension from one with pay, to one without pay pending the finalization of the disciplinary hearing. Before the Respondent took that decision, the Applicant by letter dated the 20th May 2019, was invited by the Respondent to make representations why the terms of the suspension should not be changed from suspension with full pay to suspension without pay pending finalization of the disciplinary hearing.

8. The Applicant responded by letter dated the 23rd May 2019, Annexure E. The Respondent thereafter took a decision to vary the terms of the Applicant's suspension to suspension without pay with effect from the 01st June 2019 pending the finalization of the disciplinary hearing. This decision was communicated to the Applicant by letter dated the 28th May 2019, Annexure F.

9. The Applicant did not accept the Respondent's decision to vary the terms of the suspension. He wrote a letter to the Respondent dated 02nd July 2019 directed to the Managing Director asking her to reinstate his salary. (Annexure J of the Applicant's founding affidavit). The Respondent refused to reverse the decision that it had taken and sent correspondence to the Applicant to that effect dated 05th July 2019, Annexure L. The Applicant therefore decided to launch the present application under a certificate of urgency for an order in the following terms;

1. *Dispensing with the usual forms and procedures as relating to time limits and service of Court documents, that the matter be heard as one of urgency.*

2. *Condoning the Applicant's non-compliance with the Rules of this Court as relate to service and time limits.*

3. *That a Rule Nisi do hereby issue calling upon the Respondent to show cause on a date to be determined by the Honourable Court why an order in the following terms should not be made final:*

3.1 *Directing the Respondent to reinstate the Applicant's salary forthwith from the date of the order of this Honourable Court.*

3.2 *Directing the Respondent to reinstate all benefits of the Applicant flowing from the employment contract inclusive of the mobile cellphone contract and medical aid.*

3.3 *Directing that the Respondent reinstate the Applicant's staff loan benefits being another benefit flowing from the contract of employment which still subsists.*

4. *That prayers 1, 2, 3, and 4 operate with immediate interim effect pending finalization of this matter.*

5. *Costs of the Application in the event it is opposed.*

6. *Further and or alternative relief.*

10. The application was opposed by the Respondent which filed an answering affidavit. The Applicant thereafter filed his replying affidavit thereto. In the answering affidavit the Respondent raised two points of law. Firstly, it was argued that this Court has no jurisdiction to review the decision of the employer. Secondly, it was argued that the Applicant failed to establish urgency.

11. Both parties filed heads of argument. The points of law raised were argued simultaneously with the merits. On the 14th August 2019, the Applicant filed supplementary heads of argument. There was no objection from the Respondent as it was also served with the document.

12. The Court will dismiss the point of law relating to urgency. The dispute in this application involves the payment of monthly salary. The Industrial Court has held in numerous decisions that the non-payment of an employee's monthly salary will be treated with urgency by the Court.

13. The evidence before the Court revealed that after the Respondent had taken the decision to change the terms of the suspension on 28th May 2019 and the Applicant challenged that decision by letter dated the 02nd July 2019, Annexure J. The Respondent responded by letter dated the 05th July 2019, Annexure L, and confirmed its decision to have the

Applicant placed on suspension without pay pending the finalization of the disciplinary hearing.

14. The Applicant instituted the present legal proceedings on the 09th July 2019. There was clearly no delay in instituting the legal proceedings. Again, for this reason the Court will allow the matter to be enrolled and dealt with as an urgent application.

15. The Respondent also argued that the Applicant set oppressive time lines for filing of the pleadings. This argument does have substance taking into account that the Respondent is a legal persona and carries out its functions through its management which will first have to meet and take a resolution to instruct an attorney. However, the Court will not dismiss the Applicant's application on that basis because any prejudice likely to be suffered by the Respondent could be ameliorated by an application in Court to extend the time lines in order to afford the Respondent a longer period within which to file its answering affidavit.

16. The second point of law relates to the gist of this application, hence the agreement that the points of law be argued simultaneously with the merits of the case. In summary, the Respondent's case before the Court is that the Applicant is engaged in a systematic and deliberate ploy to delay the finalization of the disciplinary, hence its decision to change the terms of

the suspension from suspension with pay to suspension without pay pending the finalization of the disciplinary hearing. It was argued that this Court has no jurisdiction to review the employer's decision unless the dispute has first gone through the dispute resolution route provided for by Part V111 of the Industrial Relations Act.

17. On behalf of the Applicant it was argued that;

17.1 The Court is being called upon to interpret and enforce the provisions of Section 39(2) of the Employment Act number 5 of 1980 as amended which provides that suspension without pay shall not exceed a period of one month.

17.2 There is no decision that was made by the employer which stands to be reviewed by the Court and that the words used in the letter of the 05th July 2018 that *"we are not obliged to reinstate your remuneration"* cannot be equated to a decision.

17.3 The conduct of the Respondent of withholding the Applicant's salary is in breach of the existing contract of employment between the parties.

17.4 The Applicant is not complaining about any procedures leading to any decision.

18. On behalf of the Respondent it was argued to the contrary that;

18.1 The employer did make a decision in this matter to vary the terms of the suspension from one with pay to suspension without pay.

18.2 This Court has no jurisdiction to review the employer's decision as there is no legislative amendment giving the Court such powers.

18.3 The decision of the employer remains valid until reviewed and set aside by a Court with competent jurisdiction.

18.4 It is not equitable that an employer should be prejudiced by paying a salary to an employee who is deliberately prolonging the duration of the disciplinary hearing.

18.5 It is unfair that the employer should be made to carry the burden of the postponements occasioned by the suspended employee exercising his rights under the law.

19. In his supplementary heads of argument the Applicant asked the Court to find that the Applicant in his prayers is not seeking an order to review any decision, but he is merely seeking to compel the Respondent to comply with its contractual obligation to pay its employee. In support of this argument the Applicant relied on the case of **Reginald Mxolisi Mazibuko v Peak Timbers Limited (1st Respondent) and Mphilisi Mntshali (2nd Respondent), case number 88/2019 (IC).** That case is however distinguishable from the present one. The Court in that case found as a matter of fact that the chairman (2nd Respondent) did not make any ruling or decision that called for review by the Court when a point of law was raised that the Court lacks the power to review and set aside the decision of the chairman. At paragraph 30, the Court, per Mazibuko J, pointed out that;

"A second point that was raised by the Respondent is that the Court lacks the power to review and set aside the decision of the chairman. As aforestated the chairman did not make a decision or ruling on the application to have the minutes completed, corrected and adopted....There is no decision therefore that is being reviewed."

In casu, the Respondent did make a decision to vary or convert the Applicant's suspension conditions from suspension with pay to suspension without pay.

20. The Applicant's argument that there was no decision that was taken by the employer in this case is clearly without substance. The matter is before the Court because the Applicant is aggrieved by that decision. Before the Respondent took that decision, the Applicant was invited to make representations and he did so by letter dated 23rd May 2019, Annexure E.

21. In casu, there was a decision that was made by the employer. Before the employer made that decision, the Applicant was given an opportunity to be heard by letter dated 20th May 2019, Annexure D. In paragraph 6 of that letter to the Applicant, the Managing Director stated the following;

> *"6. Having considered the above resume, we are of the view that there is good cause for the Bank to vary the terms of your suspension from suspension with full pay to suspension without pay. In this regard, we call upon you within five (5) days of receipt of this letter, to show cause why the Bank should not vary the terms of your suspension*

from suspension with pay to suspension without pay. Your written reasons should be addressed and delivered to the undersigned."

22. Indeed, the Applicant responded by his letter dated 23rd May 2019, Annexure E. After having considered the Applicant's response the Respondent took its decision on the 28th May 2019, Annexure F. In paragraphs 2 and 4 the Managing Director stated that;

"2 We have considered your response and have undertaken further investigation into your inability to resume the disciplinary hearing on the scheduled dates. We have also had regard to your employment file with particular reference to your sick leave absence record. It is our finding that you are indeed involved in a systematic and deliberate ploy to hamper the finalization of the disciplinary hearing.

4. In view of the foregoing and in order to protect the organization the Bank has decided to vary the terms of your suspension from suspension with pay to suspension without pay

with effect from 1 June 2019 pending the finalization of the disciplinary hearing."

23. It is easy to understand why the Applicant did not want to admit that there was a decision that was taken by the employer in this case. The Applicant's attorney is aware of the numerous decisions by the High Court and the Industrial Court of Appeal that have put the matter to rest that the Industrial Court has no power to review a decision of the employer, unless the dispute has gone via the dispute resolution procedures provided for under Part VIII of the Industrial Relations Act. (See:**The Attorney General v Sayinile Nxumalo, case number 14/2018** (ICA).

24. From the evidence before the Court as whole, the argument by the Applicant that there was no decision that was taken by the employer is without substance and will be dismissed by the Court. The Court has already made a finding in paragraph 21 herein that there was a decision that was taken by the employer to change the terms of the Applicant's suspension from suspension with full pay, to suspension without pay pending the finalization of the disciplinary hearing. The Applicant was

afforded the opportunity to make representations before the decision was taken.

25. It was argued on behalf of the Applicant that the Applicant has not asked for review in his the prayers. The Court does not agree with the Applicant's argument that the Court should consider the Applicant's prayers in isolation to the evidence contained in the supporting affidavit. Admittedly, the prayers are not couched in the conventional language of "seeking review" but essentially the Court will have to make a determination whether or not the decision taken by the Respondent was lawful taking into account the provisions of section 39 (2) of the Employment Act.

26. The supporting affidavit contains the facts upon which the Applicant relies for the relief sought. The Court has a duty to consider the pleadings as a whole. In application proceedings the affidavits filed constitute not only the evidence, but also the pleadings. The affidavits filed must contain all the essential averments in support of the relief claimed.

27. This Court has had the occasion to deal with applications where the Applicants have come to Court having couched their prayers as "declaratory order" or "interdict" or orders for specific performance.

(See: **Cleopas Dlamini v Aveng Infraset Swazi (Pty) LTD, case No. 183/2017 (IC); Phumelele Dlamini v NERCHA, case No. 205/2017 (B) (IC).** The view of the Court is that the Court must consider the essence of the application rather than the form or style. The Court finds support in this position in the Industrial Court of Appeal decision in the case of **Nedbank v Sylvia Williamson (1st Respondent) And SUFIAW (2nd Respondent), case number 17/2017 (ICA).** In that case the Court *aquo* dealt with an application for a declaratory order that the letter of dismissal be declared unlawful, void and invalid. The Court *aquo* found that the application before it was not a review application. On appeal, dealing with question whether the Court *aquo* had the jurisdiction, the Industrial Court of Appeal held as follows at paragraph [41]:-

"In light of the above it seems to me the approach taken by the Court aquo in disregarding the true nature and obvious effect of the application, by characterizing the problem as a breach of contract remediable by specific performance or enforcement of a term of contract is with respect, artificial". (Underlining for emphasis only).

28. Similarly, the Applicant in the present case is asking the Court to disregard the true nature and obvious effect of the application just

because he framed his prayers in the form of a specific performance or *mandamus*. However, the essence of the present application is that the Applicant is aggrieved by the Respondent's decision of stopping his monthly salary and he wants his salary to be reinstated. His main argument is that this conduct by the Respondent is unlawful and is in violation of Section 39(2) of the Employment Act and also the terms of the employment contract between the parties. Section 39(2) of the Employment Act provides that;

"If the employee is suspended under sub-section (i) (b), the suspension without pay shall not exceed a period of one month."

29. The Respondent argued to the contrary that when the non-continuance or postponement of the disciplinary hearing is on account of the employee, the employer should not be obliged during the intervening period to pay the suspended employee his salary. It was argued that the present case constitutes an exception to the provisions of Section 39(2). It was further argued on behalf of the Respondent that the primary duty of the law is to promote fairness and equity in labour relations. It was argued that it was not fair or equitable that the employer should be expected to pay the salary of an employee that is on suspension pending the finalization of

his disciplinary hearing when that employee is the main cause of the disciplinary hearing not being brought to finality.

30. In support of its argument that it is unfair, unjust and inequitable for the employer to continue paying the salary of a suspended employee who is unduly delaying the completion of the disciplinary hearing the Respondent relied on the case of **Msipho V Plasma Cut (2005) 26 ILJ 2276 (BCA).** The Court was unable to lay its hands on this case and it relied on the Respondent's heads of argument. In that case the Applicant applied for a postponement in order to get union representation. He was granted a six week's postponement and in the meantime the employer did not pay his salary until the re-commencement of the hearing. The Applicant challenged this decision by the employer but the arbitrator dismissed the Applicant's application holding that;

"If a scheduled disciplinary hearing is postponed at the instance of an employee, an employer may not be liable for remuneration between the date of postponement and the following date of hearing. In the circumstances, it would be unfair to hold an employer responsible for an employee's actions. Further, if this

were to be the case, employees would find reason to delay the disciplinary proceedings as it would be at the employer's cost."

31. The Respondent also relied on the case of **Abel Sibandze V Stanlib Swaziland (Pty) Ltd, case number 440/09 (IC)** where this Court made the following observations in paragraph 51.

"The Court has noted that the Respondents also have genuine concerns. The Respondents have complained about the delay in conducting the disciplinary hearing. The hearing has been pending for twenty-two (22) months. The Respondents suffer irrecoverable economic loss on a monthly basis by way of salary paid to the Applicant without corresponding service....."

32. In essence, the Respondent came to the conclusion that it is unfair that it should be bled dry by having to pay a salary for an employee who is not currently rendering any service to the employer. The Respondent argued that the suspension should be without pay with the condition that should the Applicant be acquitted of the charges he would be paid the arrear salaries.

33. Having heard the submissions by both parties and having regard to the pleadings filed in Court, there is no doubt to the Court that the Applicant is aggrieved by the Respondent's decision of converting the terms of the suspension from paid to unpaid. The Applicant's argument is that this conduct is unlawful as it offends the provisions of Section 39 (2) of the Employment Act. The Applicant therefore wants his salary to be reinstated.

34. The Respondent argued to the contrary that it is entitled to withhold the Applicant's salary and that a blanket or unqualified application of Section 39 (2) of the Employment Act would be unfair and prejudicial to it taking into account the provisions of Section 8 (4) of the Industrial Relations Act which requires this Court to make any order that it deems reasonable and which will promote the purpose and objects of the Act. It was argued that one of the objects of the Act is outlined in Section 4 (1) (b) as being to promote fairness and equity in labour relations. It was argued that it was not fair and/or equitable on the part of the Respondent to continue to pay the Applicant his salary when he was the cause of the delay in the completion of the pending disciplinary hearing.

35. The Respondent has used its management powers or prerogative to stop the Applicant's salary. The Respondent's decision was premised on the understanding that the Applicant was deliberately engaged in a systematic

ploy to delay the finalization of the disciplinary action. For the Court to re-instate the Applicant's salary it will have to undo or review the Respondent's decision stopping the Applicant's salary and make an order that the salary be reinstated. There cannot be two decisions existing concurrently on the same issue. The Respondent has come to a decision that there is an exception to the applicability of Section 39 (2) of the Employment Act and that that section is not applicable where the suspended employee is the one that is deliberately causing the delay of the disciplinary hearing. Whether or not the Respondent was correct in coming to this conclusion would necessarily require the Court to investigate if the Respondent properly exercised its powers or properly exercised its discretion in coming to the conclusion that the Applicant is engaged in spurious Court applications with the sole objective of delaying the completion of the disciplinary hearing. Fundamentally, the Court will have to review the decision of the Respondent.

36. Having looked at the pleadings as a whole and having heard the arguments by both attorneys, the Court is unable to escape the conclusion that although the prayers are framed as one seeking a *mandamus*, fundamentally the Applicant is aggrieved by the decision that the Respondent took to stop his salary and wants that decision to be reversed and his salary reinstated. He has accordingly approached Court for an

order directing the Respondent to reinstate his salary. To reinstate the salary the Court will have to address the circumstances that led the Respondent to stop the salary. The Court will have to investigate whether or not the Respondent was correct in coming to conclusion that Section 39 (2) is not applicable to the present case and therefore entitled to keep the Applicant on suspension without pay pending the finalization of the disciplinary hearing. The Court is unable to close its eyes to the fact that the employer has already made a decision to stop the salary. The Applicant is not happy about that decision. To reinstate the salary of the Applicant it will have to review the decision taken by the Respondent and make an order reinstating the salary.

37. It is the view of the Court therefore that in the light of the decision in the case of **The Attorney - General v Sayinile Nxumalo (Supra),** once the Court finds that the employer has made a decision on the issue of the salary, the enquiry should end there as this Court has no power to review the decision of the employer unless the dispute has first gone via the dispute resolution procedures provided for under Part V111 of the Industrial Relations Act. The Industrial Court of Appeal pointed out clearly in paragraph 50 of its judgement that;

"The power to review is not one vested in the Industrial Court in terms of Section 8 of the IRA and Section 151 (3) (a) of the Constitution."

38. In casu, one member had a dissenting opinion. The member was of the view that the present application does not seek to review the decision of the chairman but seeks to compel the Respondent to comply with its contractual obligation and the law in terms of Section 39 of the Employment Act.

39. Consequently, the Court will make the following order;

(a) The application is dismissed.

(b) There is no order as to costs.

N.NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: *Mr. M. Ndlangamandla*
(Attorney at MLK Ndlangamandla Attorneys)

For Respondent: *Mr. Z.D. Jele*
(Attorney at Robinson Bertram)