

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No: 349/2021

In the matter between:-

SIMISO MAMBA

1st APPLICANT

SIFISO DLAMINI

2nd APPLICANT

LUSITO NXUMALO

3rd APPLICANT

CHARLES DLAMINI

4th APPLICANT

BHEKANINGUBANE

5th APPLICANT

NHLANHLA DLAMINI

6th APPLICANT

SIBUSISO DLAMINI

7th APPLICANT

SAMUEL BHEMBE

8th APPLICANT

And

ESWATINI RAILWAY

RESPONDENT

Neutral citation: Simiso Mamba and 7 Others v Eswatini Railway

(349 /2021)[2022] SZIC 112 (04Januaiy 2022)

Coram: MSIMANGO, ACTING JUDGE

(Sitting with Mr M. Dlamini and Ms N. Dlamini nominated
Members of the Comi).

Date Heard: 15th DECEMBER 2021

Delivered: 4th JANUARY 2022

Summary: The Applicants were served with letters of suspension without pay, The Applicants allege that the suspension effected on them is procedurally and unfairly implemented, for the reason that the prescripts of labour law require that an employee be given the right to be heard prior to being suspended without pay.

JUDGEMENT

1. The Applicants are employed by the Respondent as train drivers.
2. The Respondent is Eswatini Railways a Statutory Public Enterprise duly established in tenns of the **Swaziland Railway Act no. 15 of 1962**. The

Respondent has its Head Office situated at Dzeliwe Street, Mbabane, Hhohho Region.

3. The Applicants allege that on the 2nd December 2021 they were served with suspension letters, and in terms of the suspension letters they were being suspended without pay.
4. The Applicants contend that the kind of suspension effected on them was procedurally and unfairly implemented for the reason that this kind of suspension require that an employee be given the right to be heard prior to being suspended without pay.
5. The Applicants submit that the suspens10n without pay is unlawful and procedurally unfair for the following reasons:-
 - 5.1 They were not afforded their right of being heard pnor to their suspension.
 - 5.2 The payment of their salaries was effectively stopped / withheld without being afforded the right to be heard.
6. The Respondent denies that the suspension is wrongful or unprocedural for the following reasons.
 - 6.1 There is no law that obliges an employer to hold a pre- suspension hearing in respect of adverse conditions .of a suspension.
 - 6.2 The courts have developed a rule that requires an employer (where appropriate and possible) to hold a pre-suspension hearing, only in

circumstances where the employer intends to effect a suspension with half pay or no pay.

6.3 Where the circumstances are such that it is impractical to hold such a hearing, the employer is not compelled to hold such a hearing. In the present matter, the circumstances that obtained on the ground, were such that it was impractical to hold a pre- suspension hearing in relation to the conditions of the suspension.

7. The Respondent argues further that suspension without pay is permitted in terms of **Section 39 of the Employment Act**, hence, there is nothing in the legislation that obliges an employer to conduct a pre- suspension hearing where the employer intends to effect a suspension without pay.
8. The Respondent submits that there is nothing that precludes an employer from holding a hearing in respect of the conditions of the suspension, at any time prior to the end of the suspension period. Once the environment is conducive, when the threats and violence have subsided, the Respondent will accord the Applicants an opportunity to be heard on the conditions of suspension.
9. It is not in dispute that an employer has the right to suspend an employee for a period not exceeding a period of one month. Such a decision by the employer, however, inevitably inflicts a financial loss on the employee. In simpler terms, such a decision has adverse effects on the employee. The employee should therefore be afforded the opportunity to make representations before the decision is taken by the employer.

10. In the case of NKOSINGIPHILE SIMELANE v SPECTRUM (PTY) LTD t/a MASTER

HARDWARE Case Number 681/06 (IC), the comi stated that:-

"A rule of natural Justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or when ever such an individual has a legitimate expectation entitling him to a hearing unless the statute expressly or by implication indicates the contra1J1".

11. The comi went on to state that:-

"The audi alteram partem principle is but one facet of the general requirement of natural justice that a person must be treated fairly. Since the Industrial Court has an equitable jurisdiction which requires it to promote fairness and equity in labour relations, the court is required to apply the rules of natural justice, including the aucli alteram partem rule. It is a fundamental requirement of fair labour practice that a person who may be adversely affected by a decision should have an opportunity to make representations on his own behalf. There is no doubt that a suspension without pay adversely affects the suspended employee and constitutes a serious disruption of his/ her rights".

12. The Respondent argued that suspension without pay is permitted by Section 39 of the Employment Act No. 5/1980 (as amended by Act No. 5/1977). The Section provides as follows:-

39. (1) *"An employer may suspend an employee from his or her employment without pay where the employee is*

(a) remanded in custody, or

(b) has or is suspected of having committed an act which if proven would justify dismissal or disciplinary action.

(2) If the employee is suspended under subsection (1) (b), the suspension without pay shall not exceed a period of one month".

13. 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 the fairness in relation to such suspension. The Applicants have a right to be heard on the question whether they should be suspended without pay, and the failure by the Respondent to afford them such a hearing results in their suspension without pay being void as an unfair labour practice.

14. Furthermore, the suspension is also unlawful because it purports to suspend the Applicants without pay for an indefinite period, which in the circumstances of the matter, would undoubtedly have exceeded the period of one month permitted by **Section 39 (2) of the Act**. The suspension letters read as follows:-

"You are therefore suspended from work without pay with immediate effect pending finalization of the investigation process".

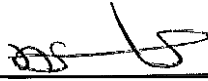
15. The court is of the view that the period of suspension imposed by the Respondent is indefinite, and is therefore contrary to the provision of **Section 39 (2)**, as the investigation process is likely to exceed the period of one month, taking into account the number of Applicants involved.

16. The Respondent submitted that the hearings will be conducted at any time before the end of the suspension period. It stands to reason in this regard that representations made after the decision to suspend has been taken, may compromise the audi alteram partem rule. The representations would need to be of a compelling nature to persuade a decision maker to change his or her mind and reverse the original decision. Therefore, the right to be heard before the decision has been taken is the more meaningful option to enable the decision maker to weigh up the representations made by both parties and then arrive at a fair decision.
17. His Lordship P. Dunseath affirmed the above position in the case of **ARCHIE SAYED V USUTHU PULP COMPANY LIMITED 432/06**, where he stated as follows:-

"Consultation on the other hand, involves seeking information or advice on, or a reaction to a proposed cause of action. It envisages involving the consulted party, an opportunity to express its opinion and make representations with a view to taking such opinion into account. It certainly does not mean affording an opportunity to comment about a decision already made and which is in the process of being implemented".

18. Taking into account all the foregoing observations, the court makes the following order:
- (a) The suspension of the Applicants without pay is set aside.
 - (b) There is no order as to costs.

18. The Members Agree.



L. MSIMANGO

ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicants : Mr M. Ndlangamandla.
(MLK Ndlangamandla Attorneys)

For Respondent : Mr Z.D Jele.
(Robinson Bertram Attorneys)