

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No.87/22

In the matter between:

ZABOMAKAMA

Applicant

And

AFRITRADE SERVICES SWAZILAND (PTY) LTD

Respondent

Neutral Citation: Zabo Makama vs Afritrade Services Swaziland (Pty) Ltd
(87/2022) [2022] SZIC 39 (14 April 2022)

Coram: **MSIMANGO- ACTING JUDGE**
*(Sitting with Mr. S. Mvubu and Mr. TE. Mtetwa -
Nominated Members of the Court)*

DATE HEARD: 05th April, 2022

DATE DELIVERED: 14th April, 2022

SUMMARY: *The Applicant alleges that on the 1st February, 2022 she was formally suspended with full pay from duty and with immediate effect by the Respondent. However, on the 1st March, 2022 she received a letter advising her that the Respondent has since taken a decision to vary her suspension from with full pay to without pay pending finalisation of the disciplinary hearing. The Applicant has now*

brought the present application seeking the Court's intervention in setting aside the Respondent's decision of the 11th March, 2022.

JUDGEMENT

- [1] The Applicant is an adult Liswati female of Ngwane Park Township in the Manzini Region. She is currently employed as an accountant of the Respondent.
- [2] The Respondent is AFRITRADE SERVICES SWAZILAND (PTY) LIMITED, a juristic entity duly registered under the laws of the Kingdom of Eswatini, carrying on business at the Matsapha Industrial Site, in the Manzini Region.
- [3] The Applicant instituted the present legal proceedings against the Respondent under a certificate of urgency, seeking an order in the following terms:-
- 1. Dispensing with the Rules of this Honorable Court as relate to forms, service and time limits and enrolling the matter as one of urgency.**
 - 2. Condoning the Applicant's non-compliance with the aforesaid Rules.**
 - 3. That a *rule nisi* operate with immediate and interim effect pending finalisation of this application interdicting the Respondent from effecting the decision to vary the Applicant's conditions of suspension from full pay to without pay.**

- 4. Setting aside the Respondent's decision of the 11th March 2022 varying the Applicant's conditions of suspension from being with full pay to without pay.**
- 5. Ordering the Respondent to forthwith re-instate the Applicant's salary with all arrear payments which may have accrued at the time the judgement is granted.**
- 6. Costs of suit against the Respondent.**
- 7. Granting Applicant such further and/or alternative relief as the court may deem.**

- [4] In her affidavit the Applicant states that she is employed by the Respondent as an accountant, and that on the 18th February 2022 she was fonnally suspended with full pay from duty with immediate effect.
- [5] During the course of the suspension a number of events took place between the Applicant and the Respondent. One of which is whereby the Applicant was served with a letter on the 9th March, 2022, wherein she was called upon to make written representations on why her suspension should not be changed and /or varied from with full pay pending finalisation of the company's investigations. The Applicant was directed to present same by close of business on Thursday the 10th March, 2022.
- [6] In compliance with the Respondent's letter, the Applicant presented her response in the morning hours of the 10th March, 2022. In the afternoon hours on the same day she received a call from the Respondent summoning her to her workplace the following day being Friday the 11th March, 2022.

- [7] On the said day the Applicant was served with two sets of documents, one of those documents was a letter dated the 11th March, 2022, advising the Applicant that the Respondent has since taken a decision to vary the suspension from with full pay to without pay pending finalisation of the disciplinary hearing. The other letter also dated 11th March, 2022 was an invitation to a disciplinary hearing at the Respondent's premises. The letter embodied the charges that were preferred against the Applicant.
- [8] The Applicant argued that there was now a serious contradiction much to her prejudice in so far as the Respondent's basis for varying her suspension was concerned for the reason that, in the letter she received on the 9th March, 2022 she was called upon to make formal representations on why her suspension with full pay should not be changed and/or varied to without pay, the condition stated was that such would be pending finalisation of the Respondent's investigations. However, in terms of the letter dated 11th March, 2022 her suspension without pay was now pending finalisation of the disciplinary hearing, yet she was never given the latitude to make representations in this regard.
- [9] The Applicant submitted that the Respondent had no legal basis of varying her conditions of suspension from with full pay to without pay after the conclusion of the investigations. The decision by the Respondent to vary the suspension is a clear indication that the written representations were totally disregarded, and that the Respondent's letter of 7th March, 2022, calling upon the Applicant to make representations on why her suspension should not be varied was cosmetic, and a mere sham or facade designed to hoodwink whomsoever to believe that the Respondent has complied with

the procedural legal prerequisites prior to varymg the conditions of suspension.

[10] The Applicant argued that the Respondent's decision was taken in violation of the *audi alteram partem* rule, for the reason that the Respondent took the decision without affording the Applicant an opportunity to state her side and thereafter be called upon to show cause why such decision should not be given effect to.

[11] The Applicant submitted that the *audi alteram partem* rule requires more than lip service, other than to call upon the employee on a "show cause basis" which is in itself unlawful, as the employee is made to assume the onerous burden of overturning a decision that has already been taken in his/her absence. Hence, the Respondent's decision should be set aside on the basis that it is procedurally flawed in every sense of the word.

[12] The Respondent opposed the application and raised points of law that were argued simultaneously with the merits. The Court will now therefore issue a final order. The Respondent argued that the application was before Court prematurely, for the reason that, in light of the provision of **Section 39(1)(b) and Subsection 2 of the Employment Act, 1980 (as amended)** the Respondent was in compliance with the wording and spirit of the section, in that the Applicant's suspension is predominantly based on five serious allegations of theft and a single allegation of gross misconduct, therefore it is of paramount importance to note that all these allegations are dishonest acts, which if proven are valid and fair reasons for dismissal.

[13] The Respondent submitted that, the Applicant is not alleging that the suspension has gone beyond a month, which would be in violation of **Section 39 (2) of the Employment Act**, nor is she alleging and proving that the charges are so complex such that the hearing cannot reasonably be expected to be completed within a month.

[14] The second point of law raised by the Respondent was that, there was no legal basis on which the Applicant has approached this Honorable Court on, in particular because there is nowhere in Applicant's application where she is alleging violation of **Section 39 of the Employment Act**. Instead the Applicant over-exaggerates the financial prejudice which she will suffer due to the suspension without pay.

[15] It was also Respondent's argument that the Applicant was portraying herself to have been left without a remedy, yet Section 39 (3) of the Employment Act provides remedies for the Applicant, in that should the Applicant be cleared of all charges, her salary will be re-instated and she will accordingly be paid any arrear salaries. Wherefore the Respondent prayed that the application should be dismissed with costs based on any or both points of law.

[16] On the merits the Respondent argued that:-

(a) There may be occasions when it is not practical to give an employee a hearing prior to suspension without pay. In such event the employer may suspend without pay pending a hearing in due course to determine whether the suspension should be without pay. The Applicant was suspended with pay whilst investigations were ongoing, the

Respondent unearthed and/or suspected fraudulent and theft activities allegedly committed by the Applicant as an accountant of the Respondent, thus decided to suspend her without pay, as these were serious offences and if proven might lead to dismissal.

- (b) The alleged contradictions pointed out by the Applicant are neither here nor there, the main aim is to cloud the issues for determination before Court. The reason for the Applicant's suspension was solely to safeguard both the investigations which were conducted and the disciplinary enquiry which had already commenced. The suspension does not serve to dispense punishment upon the Applicant, it was not motivated by anger retribution or for purposes of humiliating the Applicant, but it was done in the interest of good corporate governance and administration, which is a fair reason for precautionary suspension.
- (c) The *audi alteram partem* rule was extensively complied with before the Applicant was suspended without pay as she was called upon to make her representation. However, the right to make representation does not necessarily require an oral hearing, giving the Applicant in this regard an opportunity to make the written representation was sufficient compliance with the rules of natural justice. The reasons for non acceptance can never be said to be illogical nor irrational under the prevailing' circumstances.
- (d) The suspension of the Applicant was both substantively and procedurally fair in its implementation. The Applicant seem not to appreciate the fact that, the Respondent is entitled to vary the terms of her suspension to suspension without pay but only for one month, had the Applicant taken serious consideration of that, she would have waited for the lapse of a month to challenge the variation.

[17] In the circumstances the Court is now faced with the duty to determine whether or not it is competent for an employer to vary its decision, from suspension with pay to suspension without pay, further that, if the employer is entitled to implement the variation, the next inquiry is whether the employer arrived at its decision using a fair procedure.

[18] In answer to the above, this Honourable Court in the case of **WALIGO ALLEN V NATIONAL EMERGENCY RESPONSE COUNCIL ON HIV AND AIDS AND ANOTHER CASE NO. 147/2017 IC** held that:-

"In principle an employer should be legally entitled to vary the terms of the employee's suspension, from suspension with pay to suspension without pay or vice versa. A decision to suspend an employee with or without pay depends on whether or not the circumstances are justified under Section 39 (1) (a) and (b) of the Employment Act. If there is a material change in the employee's circumstances, such change may justify the employer in varying its earlier on suspension. However, the variation must be preceded by a fair procedure and be based on legally competent grounds.

"

[19] **Section 39 of the Employment Act** 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(!) (b), the suspension without pay shall not exceed a period of one month.

[20] This section is clear in that the power of an employer who intends to invoke the provision of **Subsection (2)** is not unfettered. It entitles the employer to impose a suspension without pay for a period not exceeding one (1) month.

[21] The Applicant having been suspended without pay on the 11th March 2022, the one month period was to lapse on the 11th April, 2022. At the date of institution of the application proceedings, the suspension without pay had not yet exceeded the period of one month provided for in **Section 39 (2) of the employment Act**, therefore the Court is of the view that the application was prematurely brought before Court.

[22] Dealing with a similar matter, the Court in the case of **NKOSINGPHILE SIMELANE V SPECTRUM (PTY) LTD t/a MASTER HARDWARE (IC) 681/2006** held that:-

*"where the suspension is without pay in terms of **Section 39(1) (b)** and the disciplinary process is not completed within one month, payment of the employee's remuneration must be resumed. "*

[23] In the same case the Court went on to state further that:-

"/t is incumbent on the Respondent to place evidence on affidavit before the Court which established on a balance of probabilities that at the date of suspension the Respondent bona fide believed or suspected the Applicant had committed a disciplinary offence. "

In Casu, there is evidence before Court to indicate that the Applicant is suspected to have committed an act which, if proven would justify dismissal or disciplinary action. This evidence is in the form of annexure "NEG" and "NEG 3" attached to the Respondent's answering affidavit. Hence the Court is of the view that the Applicant is facing serious charges which meet the requirements of **Section 39 (1) (b)** aforementioned. This entitled the Respondent to invoke the provision of **Section 39 (2) of the Act**

- [24] Turning to the Applicant's argument that the Respondent's decision was taken in violation of the *audi alteram partem* rule, the Applicant in this regard submitted that the Respondent took the decision without affording her an opportunity to be heard before varying the suspension.
- [25] On the other hand the Respondent argued that the *audi alteram partem* rule was complied with before the Applicant was suspended without pay, in that she was called upon to make written representations of which it was sufficient compliance with the rules of natural justice.
- [26] The principle of *audi alteram partem* is the basic concept of the principle of natural justice. This principle simply means "hear the other side" or "no man should be condemned unheard." Before any action is taken, the affected party must be given a notice to show cause against the proposed action and seek his/her explanation. Any order or decision taken without giving notice is against the principles of natural justice and is void *ab initio*. This rule may be complied with by providing an oral hearing or providing written submissions.

[27) In support of the above notion, the Court in the case of **NKOSINGIPHILE SIMELANE SUPRA**, held that:-

"The right to make representations does not necessarily require an oral hearing. In appropriate circumstances the opportunity to make written representations may be sufficient compliance with the_ audi alteram partem rule. "

[28) The Court aligns itself with the above position of the law, for the following reasons:-

- (a) On the 7th March, 2022 the respondent wrote to the Applicant inviting her to make representations on why her suspension with full pay should not be varied to suspension without pay being Annexure "AC" attached to the Applicant's founding affidavit.
- (b) That the Applicant responded to the said letter which was electronically sent to the Respondent, however, it does not state the date on which it was sent, that being annexure "AD" attached to Applicant's founding affidavit.
- (c) On the 11th March 2022, the respondent reverted to the Applicant advising her that the representations have been noted, however, as a result of the seriousness of the charges she was suspended without pay.

(29) In light of the above the Court finds that the Applicant was heard before the decision to vary the suspension was taken by the Respondent.


[30) Accordingly the Court makes the following orders:

(a) The application is dismissed.

(b) The Respondent is, however, ordered to expedite the completion of Applicant's disciplinary inquiry, if it has not yet been finalised.

(c) There is no order as to costs.

The Members agree.



L.MSIMANGO

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT: Mr. G. Mhlanga

· (Motsa Mavuso Attorneys)

FOR RESPONDENT: Mr. N. Ginindza

(N.E. Ginindza Attorneys)