IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.405/2022

In the matter between:

ZANELE MABUZA Applicant

And

ESWATINI ROYAL INSURANCE CORPORATION Respondent

Neutral Citation	:	Zanele Mabuza v Eswatini Royal Insurance Corporation, Case No. (405/2022) [2023] SZIC 12
Coram	:	**THWALA - JUDGE.** *(Sitting with Mr. M. Mtetwa and Mr. A.M. Nkambule - Nominated Members of the Court)*
HEARD	:	7 March 2023.
DELIVERED	:	15 March 2023

RULING

Introduction

[1] This matter first came before us on the 22 December 2022, through a certificate of urgency in which Applicant sought to challenge Respondent's decision of placing her under suspension without pay. Indeed, it was on this note that Mr. S Simelane, who appeared on behalf of the Respondent,

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applied for leave of this Court to be granted more time so as to take further instructions from his client.

[2] And in that regard, the Court directed that the matter be tentatively postponed to the 13 February 2023, subject to this caveat that Applicant could reinstate the matter, on 48 hours' notice to the Respondent, if the issue of the non-payment of her salary was not expedited by the Respondent.

[3] As it turned out, Applicant was indeed forced to revert to the 48 hour notice to the Respondent, which notice effectively caused the matter to be set down for the 3 February 2023. On the 3 February 2023, the matter was postponed by consent of both parties to the 12 February 2023. There were two things that were playing out in the background of both the Court as well as the parties on the 12 February 2023. The first was the attainment of an out-of-court settlement between the parties, which settlement was to be then brought to the attention of the Court for endorsement as an order of Court. The second was to ensure the expeditious prosecution of the matter in the event of the collapse of the negotiations. On the 12 February 2023, when the matter was called Mr. Dlamini, who appeared on behalf of the Applicant advised the Court that the parties were still engaged in negotiations for the possible out-of-court settlement. To that end, Mr Dlamini applied for more time, hence the postponement of the matter to the 15 February 2023. Unfortunately, on the 15 February 2023, when the matter was called the supposed deed of settlement had not been signed, and a fresh application for yet another postponement was made this time to the 21 February 2023.

[4] On the 21 February 2023, the matter took a complete turn around as counsel for the parties advised the Court that the parties have since abandoned their efforts of arriving at any form of a negotiated settlement. Having hit this dead end, the matter was allocated the 7 March 2023, for the hearing of arguments. The parties were also invited to file their Heads of Arguments together with their respective Bundle of Authorities before that date.

[5] As regards the case itself, the following chronological facts are not in issue, viz:

5.1 That, by correspondence dated 8 November 2022, Respondent served Applicant with a notice of its intention to constitute a disciplinary enquiry against her for certain alleged acts of misconduct, whose particulars were set out in a charge sheet which was attached to the notice. The date of the hearing was scheduled to be the 17-18 November 2022, starting at 0900hrs. It is regrettable that none of the parties has taken time to allude to what transpired regarding the disciplinary proceedings on the said two (2) dates.

5.2 That, in the course of the disciplinary hearing, and by correspondence of 7 December 2022, Respondent purported to afford Applicant the opportunity to show cause why she should not be suspended from rendering her services pending the finalization of the disciplinary hearing against her. In the said letter, Applicant was directed to submit her responses, if any, by no later than midday on Thursday, 8 November 2022. The reference to the month of November instead of December was a typographical error for which Respondent cannot be faltered.

5.3 That, by way of return and on the said 8 December 2022, Applicant filed her responses, in which, she essentially challenged the Respondent's intended actions on multiple fronts, including the alleged breach of the Respondent's very own disciplinary code on the procedural aspect of effecting a suspension. Applicant further took issue with Respondent's delay in exercising its right to suspend her. Applicant reckoned this delay from the date of issuance of the disciplinary notice, i.e the 8 November 2022. The next cause of complaint by Applicant related to the Respondent's failure to state the reasons that warranted her placement under suspension.

5.4 That, having received Applicant's representations, and by correspondence dated 9 December 2022, the Respondent proceeded to suspend Applicant with immediate effect, i.e the 9 December 2022.

5.5 That, in the letter of suspension cited above, the Respondent further advised Applicant that the suspension had been effected in terms of **Section 39 (1) (b) of the Employment Act**, as opposed to **Clause 4.2** of the **Respondent's Disciplinary Code**. The Respondent did not bother to tender any reasons for its deviation from the code.

[6] And so it was that the above sequence of events then degenerated into this dispute for which Applicant then invoked the provisions of **Rule14** of the Rules of this Court by launching these motion proceedings, via a certificate of urgency in an attempt to secure its expeditions resolution. As towards its resolution, it was common cause amongst all, firstly, that the right to suspend an employee who is under investigation for an alleged misconduct and/or during the course of a disciplinary hearing vests with the Respondent.

What appeared to be a heavily contested issue was the procedure to be followed by the Respondent in bringing about Applicant's suspension.

[7] That, the suspension of an employee must be done in a procedurally fair manner is now trite law[1]. Indeed, in the said case, the Court there held that: **"A suspension without pay in terms of Section 39(1) (b) of the Employment Act has a punitive element. The employee has not withdrawn his services, but the employer is entitled to unilaterally withhold his/her remuneration. Even if the disciplinary action culminates in the dismissal of the charge, and/or the reinstatement of the employee to his employment, the employee will not be remunerated for the period of suspension. The decision to suspend without pay inevitably inflicts financial loss on the employee. In terms of the dictum of Lane LJ cited in paragraph 13 above, such a decision requires observation of the audi rule. In other words, the employee has the right to be heard before the decision is taken".** At Para 30

[8] In the case before us, there is obviously no doubt that Applicant was afforded the opportunity to make representations prior to her suspension. What is, perhaps contentious are the contents of the notice. The notice of intention to place Applicant under suspension as contained in Respondent's letter of the 7 December 2022, made no mention about Respondent's intention to invoke the provisions of Section 39(1) (b) of the Employment Act. Respondent failed and/or omitted to expressly mention that it intended to place Applicant under suspension without pay. This was a

[1] See the case of Nkosingiphile Simelane v Spectrum (Pty) Ltd t/a Master Hardware. Case No. 681/2006.

material non-disclosure by the Respondent which then rendered the purported instrument of suspension to be defective and invalid, and this defect extended to its consequences, i.e Respondent's purported letter of suspension of the 9 December 2022. This is so because if Respondent's letter of the 7 December 2022, did not allude to the provisions of Section 39 (1) (b), then any subsequent reference to the said section *est post facto* was irregular. In other words, Respondent had a legal duty to advise Applicant that it was intent on exercising its statutory discretion of suspending her in terms of Section 39 (1) (b). This legal duty of disclosure cannot be gain said. This therefore means that, in the circumstances of this case, Respondent's latitude only extended to having Applicant placed on suspension **with full pay**.

[9] The Respondent's notice of intention to place Applicant on suspension without pay contained yet another procedural defect which, in the eyes of the Court, was very critical to the satisfaction of the principles of fairness. This is the duty to disclose the facts and/or circumstances that had suddenly emerged, to warrant Applicant's suspension since the institution of the disciplinary proceedings on the 8 November 2022, and the 7 December 2022. It is significant to observe that the period from the 8 November 2022, up to the 7 December 2022, represent a full month. And in the absence of evidence to the contrary, this Court is entitled to assume that within this period, i.e prior to the 7 December 2022, Applicant was rendering her services to the Respondent. We are therefore inclined to hold that Respondent had a duty to set out, in the 'show cause why' letter of the 7 December 2022, the facts and/or circumstances which had then emerged to warrant Applicant's placement under suspension.

[10] Even assuming that our reasoning under paragraphs 8 and 9 were to be said to be wrong, again it is settled law that the two (2) social partners can enter into a written agreement with each other, with the aim of covering the terms and conditions of employment, including procedures for the amicable settlement of disputes. In her papers, Applicant averred the existence of a disciplinary code, being an instrument promulgated by the Respondent, with the full concurrence of Applicant's union, for the purposes of regulating disciplinary matters within Respondent's workplace. The default position, **post** the signing of such code by the two (2) parties, is that it becomes binding **ex contractu** as between its two signatories.

[11] The binding effect of the code goes to the extent that none of the parties is allowed to unilaterally act in a manner that may be prejudicial to the interest of the other. And to the extent that there may be such attempt, then the defaulting party may be taken to task through the courts. And by filing these proceedings before this Court, Applicant has done exactly just that, viz; sought for the assistance of this Court in holding Respondent to both the letter and spirit of its disciplinary code. Again, it was common cause as between the parties that the said code debarred the Respondent from interfering with Applicant's salary during the course of the disciplinary hearing.

[12] Lastly, we record our displeasure in the manner that Respondent appears to have 'refused' to take guidance from the outcome of judgements/orders of this Court in matters wherein it (Respondent) was a litigant[2]. One cannot

[2] See Irene Motsa v Eswatini Royal Insurance Corporation and Another [211/22] [2022] SZIC 115 (27 September, 2022); Thembi Mabuza v Eswatini Royal Insurance Corporation (388/2019) [2019] SZIC 25 (06 March 2020).

help but note that in each of the cases cited below, this Court took its valuable time to prepare two carefully reasoned judgements, whose primary purpose was intended to serve as a guide for future disputes of a similar nature to the Respondent. When this matter first appeared before us on the 22 December 2022, again this Court took time to enquire from Mr Simelane as to the existence of any peculiar facts to warrant Respondent's deviation from the now well-established position of our law on suspension. It is now common cause, from the facts as pleaded in Respondent's replies, that there were no such peculiar facts and/or circumstances in existence, on the date of Applicant's suspension to justify Respondent's actions. To that extent therefore and bearing in mind that Respondent had unsuccessfully litigated on this very area of our law before, this Court cannot help but conclude that Respondent's actions were devoid of any basis at law. In fact, to the extent that they appear to have been in wanton disregard of the law, grave financial prejudice that was occasioned to the Applicant then they deserve censure with an appropriate order for costs.

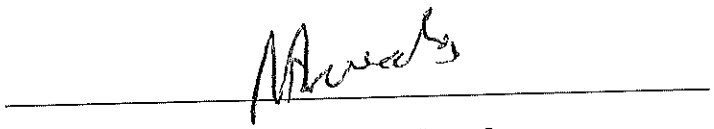
[13] **In the result, the following orders are hereby issued**:

13.1 Respondent's letter of the 9 December 2022, is declared to be void and of no legal force and/or effect; and

13.2 Respondent is directed to pay, within 7 days of this order, all of Applicant's outstanding salary commencing from December 2022 up to date.

13.3 Respondent is ordered to pay for the costs of this application, such costs to be at attorney and own client scale.

The members agree.



Manene M. Thwala

Judge of the Industrial Court of Eswatini

For Applicant : **Mr A. Dlamini.**

For Respondent : **Mr S. Simelane.**