

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No 11/2024

In the matter between:

**NORMAN LOKOTFWAKO
KHULEKANI DLAMINI
SIKHUMBUZO DLAMINI
ZWELI MKHONTA
SIMISO MAMBA
SABELO TFWALA
MAXWELL LUKHELE**

**1st Applicant
2nd Applicant
3rd Applicant
4th Applicant
5th Applicant
6th Applicant
7th Applicant**

And

ESWATINI RAILWAYS

Respondent

Neutral Citation : Norman Lokotfwako and 6 Others v Eswatini
Railways Case No. 11/2024 SZIC 27 [2024]
(13 March 2024)

Coram : **MSIMANGO - JUDGE**
(Sitting with Mr. S Mvubu and Ms N. Dlamini-
Nominated Members of the Court)

DATE HEARD : 23rd February 2024

DATE DELIVERED : 13th March 2024

SUMMARY : The Applicants were suspended without pay by the Respondent on the 12th January 2024, they argue that the suspensions effected upon them were unlawful and unprocedural since the Respondent unilaterally deviated from its disciplinary code. They have now brought an application to Court to set aside the suspensions.

JUDGEMENT

- [1] The Applicants are employees of the Respondent and based at Mpaka area, in the Lubombo Region.
- [2] The Respondent is **ESWATINI RAILWAYS**, a body corporate established by the Swaziland Railways Act 1962, a Category A – public enterprise which has its principal offices situate at Eswatini Railways Building, Dzeliwe Street, Mbabane, in the Hhohho Region.
- [3] The Applicants have brought an urgent application against the Respondent for an order in the following terms:-

3.1 Dispensing with the normal rules relating to time limits, service of process, form and procedure and enrolling and hearing this matter as one of urgency in terms of Rule 15 of the Honourable Court Rules.

3.2 Condoning any non-compliance with the said rules, form and time limits relating to the instituting of proceedings and allowing this matter to be heard on the basis of urgency.

3.3 That a rule nisi do hereby issue operating with interim and immediate effect returnable on a date to be decided by this

Honourable Court calling upon the Respondent to show cause why an order in the following terms must not be confirmed and made final:-

- 3.3.1 Reviewing and setting aside the Respondent's decision and/or letter dated the 12th January 2024 suspending the Applicants without pay as it is in violation of clause 3 (d) of the Respondent's Disciplinary Code & Procedure.**
- 3.3.2 Declaring and/or ordering that the suspension letter of the Applicants dated the 12th December 2024, which was served by the Respondent on the Applicants as null and void, and of no force and effect.**
- 3.3.3 Directing and/or ordering the Respondent to comply with its Disciplinary Code and Procedure.**
- 3.3.4 Ordering and/or directing that the Respondent forthwith pays the Applicants their salaries for the month of January 2024 and the following months.**
- 3.3.5 That prayers 3.3, 3.3.1, 3.3.2, 3.3.3 and 3.3.4 operate with immediate interim effect pending the final determination of this matter on a date to be appointed by the above Honourable Court.**

3.4 Costs of the application in the event of unsuccessful opposition.

3.5 Granting any further and/or alternative relief.

[4] The Applicants allege that they were suspended without pay by the Respondent and contend that:-

- 4.1 Their suspension without pay is unlawful and procedurally unfair, for the reason that in terms of the Respondent's Disciplinary Code and Procedure which came into effect on the 24th October 2018, the Respondent may only suspend its employee without pay wherein the employee is remanded in custody, and this is in terms of Clause 3 (d) of the Code.
- 4.2 There are no exceptional circumstances warranting the suspension without pay, as the Respondent's Train working Regulations and General Appendix requires that an enquiry should be held and a report submitted for all accidents or occurrences. Therefore, the lack of the enquiry is proof that there was lack of exceptional circumstances to warrant the deviation from the code.
- 4.3 The preliminary investigation outcome that was conducted by the Respondent was never shared with the Applicants in order that the Respondent has a chance to dispute same during the pre-suspension hearing. Furthermore, the hearing was hastily convened without affording them a chance to make written representations on the reasons why the Respondent should not suspend the Applicants without pay. If given the chance to make written representations these issues would have been

raised and same would have swayed the decision to suspend the Applicants without pay.

4.4 The suspension without pay is not in line with the common practice of the Respondent. The purpose of a disciplinary code amongst other things is to promote consistency, predictability and convenience in managing disciplinary matters in the work place. The code is binding on both employer and employee, thus, it is not open to the employer to unilaterally deviate from the provisions of the code. The party wishing to deviate from the code would have to engage the other and further establish that exceptional and/or appropriate circumstances exist which necessitate the proposed deviation.

4.5 They stand to suffer irreparable harm since their suspension without pay is causing them a financial loss, which has seriously disrupted their livelihood since they have not been paid for the month of January 2024 by the Respondent, yet they have financial obligations to take care of.

4.6 That there is no other remedy save to approach the Honourable court for an order as prayed for in the Notice of Motion. This is because the Respondent has been engaged internally through the union, however, the Respondent refused to overturn its decision for suspending the applicants without pay. Therefore, internal remedies have already been exhausted.

[5] The matter is opposed by Respondent and argues to the contrary that:-

5.1 That in view of the seriousness of the misconduct both in terms of its nature and that it constituted organized crime, the

Respondent took a decision that the implicated employees be suspended from employment. The reasons for the suspension were:

5.1.1 There was a reasonable apprehension that the implicated employees would interfere with the investigation by concealing or destroying evidence, interfering with investigations or witnesses, obstructing the course of the investigation. There was the added factor that due to seriousness of the allegations there was a likelihood that if the allegations were proven at the disciplinary hearing, the Applicants would face dismissal.

5.1.2 The nature of the misconduct could easily be repeated or there be a continuation. In order to mitigate against the possibility of the implicated employees repeating the misconduct, it was necessary that the Applicants be placed on precautionary suspension.

5.2 The fact that preliminary investigations revealed that the implicated employees were part of a larger criminal syndicate constituted an exceptional situation which was not within the contemplation of the drafters of the code. This was amplified by the magnitude of the losses, the theft of fuel cost the organization millions of Emalangení and the sabotage of the railway infrastructure in the form of derailments and vandalism also resulted in losses in the hundreds of thousands of Emalangení.

- 5.3 Owing to the exceptional circumstances that are contained in this matter there was good cause to deviate from the provisions of the disciplinary code and have the implicated employees suspended without pay and suspensions without pay are provided for in **Section 39 (1) (b) of the Employment Act** of which can be imposed at the discretion of the employer where the employee is suspected of having committed an act of serious misconduct.
- 5.4 Having reflected on the outcome of the preliminary investigations, the Respondent consulted with all stakeholders including the union and staff association on the intended course of action. Pursuant to that process the Respondent then invited the implicated employees for pre-suspension hearings. At the pre-suspension hearings all the Applicants were represented by union representatives and they were informed that they would be placed on suspension pending finalization of the investigations and any ensuing disciplinary process. It was further proposed that the terms of suspension be without pay, the Applicants were thereafter accorded an opportunity to make representations on the aspect of suspension without pay, which opportunity they utilized.
- 5.5 The Respondent considered the representations as well as the interests of the organization and concluded that in the interests of fairness, the employees should be placed on a precautionary suspension.
- 5.6 The disciplinary code in casu is not a product of collective bargaining but was developed unilaterally by the employer. It is trite that it is only in respect of disciplinary codes which are

a product of collective bargaining where the duty to engage with the union is a pre-requisite. Nevertheless, and even though it was not a pre-requisite in this instance because the code was unilaterally developed by the employer, there was an engagement with the union on the deviation. Further, the employees were represented by the union during the pre-suspension hearings and in that process the exceptional and appropriate circumstances were outlined.

5.7 The existence or non-existence of exceptional circumstances is a matter for determination. Generally, exceptional circumstances relate to something out of the ordinary and of an unusual nature. The mere fact that the nature of the misconduct falls within the ambit of organized crime and involves a criminal syndicate, is on its own out of the ordinary within the context of a workplace. The ordinary rules which were developed to deal with workplace misconduct do not find application in such instances.

5.8 The Applicants will not suffer irreparable harm as it is the Respondent's intention to expedite the disciplinary proceedings having due regard to the requirements for fair procedure. The loss that is being visited upon the Applicants must be contrasted with the loss in the millions of Emalangeni that is being suffered by the Respondent as a consequence of the alleged conduct of the Applicants.

[6] The Respondent prayed that the application be dismissed with costs.

[7] The purpose of a disciplinary code and procedure is to regulate standards of conduct of employees within a company or organization. The aim of a

workplace disciplinary code is to provide mechanisms to correct unacceptable behavior and to create certainty and consistency in the application of discipline.

- [8] It must be pointed out that employers may deviate from the code provided they act fairly and lawfully. However, when a disciplinary code is incorporated into employees' terms and conditions of employment in the contract of employment, the employer loses flexibility in respect of the amendment and application of the disciplinary code. The employer will be required to abide by the code as a binding contractual term. Further, if the employer wishes to effect any amendments to the code, it may only do so with the consent of the employees concerned.
- [9] In principle this means that deviation from the code is permissible provided it is done by consent with the employee, and there are exceptional and compelling circumstances in support of the deviation. Where an employer in the course of a disciplinary hearing, takes a decision that is prejudicial to the employee, and does so without legal authority and/or in breach of any of the provisions in the code, the employee is entitled to apply to court to set that decision aside on the basis that it is invalid or null and void.
- [10] Clause 3 (d) of the Respondent's disciplinary code provides as follows on suspension without pay:-

“(d) Suspension without pay may only be used:

a. Where an employee is remanded in custody”

- [11] In terms of the Respondent's Disciplinary Code and Procedure as quoted in the preceding paragraph, the Respondent may only suspend its employee

without pay wherein the employee is remanded in custody. In casu, none of the suspended employees are in custody.

[12] Once there is a code in operation at the work place, neither party is permitted to unilaterally vary the provisions therein. In casu, the Respondent unilaterally varied a provision in the code when it appropriated to itself power it did not have, and further exercised that power to suspend the Applicants without pay. The unilateral variation amounted to a manipulation of the code by the Respondent to the prejudice of the Applicants.

[13] **IN SWAZILAND POSTS AND TELECOMMUNICATIONS WORKERS UNION AND ANOTHER V SWAZILAND POSTS AND TELECOMMUNICATIONS CORPORATION CASE NO. 04/2016**, the court held as follows:-

“Once put in place, a code becomes legally binding upon the employer and employee, irrespective of the manner in which it has come about i.e whether through the unilateral act of the employer or through a negotiated process”.

[14] The employer cannot, therefore, disregard the provisions of the disciplinary code and the rights of the employee concerned. The right to manage discipline at the workplace does not place the employer above the law and does not give the employer power to deviate from the provisions of the code in order to achieve a result that is favourable to itself. The purpose of a disciplinary code is to establish disciplinary rules and procedures at the work place that are:-

- (a) fair
- (b) predictable
- (c) applied with consistency and

(d) not subject to manipulation or abuse by either party.

[15] The Respondent argued that there were exceptional circumstances which warranted that the Applicants be suspended without pay, for the reason that the nature of the misconduct falls within the ambit of organized crime and involves a criminal syndicate, hence, on its own it is out of the ordinary within the context of a workplace. As a result the ordinary rules which were developed to deal with workplace misconduct do not find application in such instances.

[16] The general rule is that where there is a disciplinary code that operates at the workplace, the parties are obliged to comply with that code. However, circumstances may arise where strict application of the code could be impracticable or may result in an injustice or unfairness being visited upon the employee. In the SPTC case (supra) the Honourable Court re-stated the legal principle regarding deviation from the code as follows:-

“It is settled law that a code may be deviated from by the employer in exceptional circumstances. The position, therefore, is that the deviation is not allowed if it occasions or has the potential to occasion prejudice upon the employee or employees....deviation can also be justified where it is to the benefit of the employee”.

[17] In **CENTRAL BANK OF SWAZILAND V MANDLA LUSHABA AND OTHERS 990/2018**, the court held that:-

“There are exceptional and appropriate circumstances which may justify a deviation from the code by the employer. However, it cannot be through the employer’s unilateral conduct, the employee must be brought on board in all these deliberations in the interest of transparency and fairness”.

[18] In **NEDBANK SWAZILAND LIMITED V SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS UNION AND ANOTHER 10/2012**, the court confirmed the principle that a unilateral deviation from the code is permissible and held as follow:-

“.....Even where the said exceptional and appropriate circumstances exist, the party wishing to deviate from the code should engage the other”.

[19] In essence this means that where deviation becomes necessary or desirable, both sides must engage in order to find a mutually acceptable way forward.

[20] As afore mentioned the code does not authorize the Respondent to suspend its employee without pay, also the Respondent's argument that prior to the commencement of the suspension proceedings it engaged with the recognized trade union on its intentions to place certain employees on precautionary suspension does not suffice. On the papers filed before court it transpires that after the Applicants were suspended without pay they duly approached their union, Eswatini Railway Workers Union to report same and seek advice.

[21] On the 17th January 2024, the union wrote to the Respondent on behalf of the Respondents, wherein, it demanded that the Respondent revokes the suspension without pay within forty eight (48) hours of receipt of the letter since the suspensions were unlawful, for the reason that it was a unilateral deviation from the Respondent's Disciplinary Code and Procedure, as the Applicants were not in custody nor were they facing any criminal charges that warranted the suspension without pay. This is per annexure “NL8” attached to the Applicants Notice of Motion.

[22] In response thereto, the Respondent advised the union that the suspensions were in strict alignment with the statutory provisions as outlined in **Section**

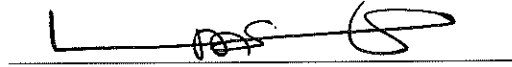
39 (1) (b) of the Employment Act, 1980. Further that, disciplinary codes are to be used as a guideline in the application of discipline in the work place, and in appropriate circumstances an employer is entitled to depart from the provisions of a disciplinary code once it has adhered to the procedural requirement. This is per annexure “NL 10” attached to the Applicants Notice of Motion.

[23] In light of the correspondence exchanged between the parties the court concludes that there was no consultation between the Applicants and the Respondent on the variation of the disciplinary code. The code is binding on the parties hereto. The employer’s approach amounts to an abuse of the code. If the code is binding on the employee, it should be equally binding on the employer as well. The court cannot ignore or condone an abuse of the disciplinary code by one party to the prejudice of the other.

[24] In the circumstances the application succeeds, and the court makes the following order:-

- (a) The purported suspensions without pay of the Applicants by the Respondent are null and void, and of no force and effect, and are hereby set aside.**
- (b) The Respondent is ordered to comply with its Disciplinary Code and Procedure.**
- (c) The Respondent is ordered to forthwith pay the Applicants their withheld salaries, within fourteen (14) days from date of judgement.**
- (d) There is no order as to costs.**

The Members agree.

A handwritten signature in black ink, appearing to be 'L. MSIMANGO', is written over a horizontal line.

L. MSIMANGO

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANTS : MR P. KHUMALO
(THWALA AND ASSOCIATES)

FOR RESPONDENT : MR S. SIMELANE
(ROBISON BERTRAM)