



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No 278/2022

In the matter between:

LINDOKUHLE SHONGWE

Applicant

And

**AFRICA MANAGEMENT
DEVELOPMENT INSTITUTE**

Respondent

Neutral Citation : Lindokuhle Shongwe v African Management
Development Institute, Case No. 278/2022
SZIC 50 [2024] (30 May 2024)

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

DATE HEARD : 25th March 2024

DATE DELIVERED : 30th May 2024

SUMMARY : **The Applicant alleges that she was suspended by the Respondent on the 21st January 2022, and the suspension was for a period of 30 days. However, the 30 days period has now elapsed without any disciplinary hearing being conducted by the Respondent. The Applicant has now brought an application to court to set aside the suspension, on account that the period of suspension is now protracted and unreasonable.**

JUDGEMENT

- [1] The Applicant is Lindokuhle Shongwe an adult liSwati female of Mahwalala, zone 6 in the District of Hhohho.
- [2] The Respondent is Africa Management Development Institute, an academic institution duly registered as such and whose offices are situated at 1st Floor Embassy House, Gwamile, Street, Mbabane in the District of Hhohho.
- [3] The Applicant alleges that she is employed as a human resources manager by the Respondent, and has held this position since 2015, earning a salary of E11, 317.00 (Eleven Thousand Three Hundred and Seventeen Emalangeni) per month.
- [4] The Applicant submitted that on or about October 2021, the Respondent entered into an agreement with a third party one Mr Tich Makota to conduct trainings with corporate clients on behalf of the Respondent. The Applicant was assigned by the Respondent's chief executive officer to assist the said Mr Tich Makota in conducting trainings which included amongst others printing and signing of certificates of participation upon completion of the trainings. The substantive part of the trainings were conducted by Tich Makota on line, and the Applicant would complement the fulfillment of the training by issuing the certificates to the corporate clients.
- [5] On or about 5th November 2021, the Applicant alleges that the Respondent had run out of stationery, and she sought to do the printing of the certificates outside the office as per the norm. She thereafter returned with the certificates to the office's receptionist so that the Respondent's driver

can collect the certificates to be delivered to the various corporate clients who participated in the trainings.

- [6] The Applicant alleges that immediately after she had left the office, the Chief Executive Officer of Respondent Mr Jonas F. Bukutu approached the receptionist and took the certificates. When she made a follow up from the receptionist about the status of the delivery of the certificates to the various clients, the Applicant was advised that the CEO had left an instruction to the effect that she should not be informed that the certificates were taken by the CEO.
- [7] The Applicant alleges further that, since the receptionist was directed by the CEO not to say anything to her, she awaited in anticipation for his call. However, the CEO never informed the Applicant of what he had done and the way forward with respect to the issuance of the certificates to the various clients that had participated in the trainings.
- [8] It was Applicant's submission that she continued to work as usual and performed her daily duties until they closed business in December 2021. When they resumed business in January 2022, there was still no communication from the CEO about the issuance of the certificates of participation to the various clients.
- [9] Thereafter, there was a retrenchment exercise that was carried out by the CEO, without the knowledge of the Applicant as the Human Resources Manager. On or about the 27th January 2022, the Applicant made an enquiry by electronic mail to the CEO as to the reason why he decided to retrench some of the employees without involving the office of the Human Resources in view of the fact that the employees were making enquiries in Applicant's office on the basis and criteria used in the retrenchment

exercise. However, the CEO took offence to the enquiries made and responded by sending Applicant a letter of suspension.

- [10] The Applicant submitted that ever since her suspension she has never received her full salary, she is only given rent money after making numerous requests to the Respondent's accountant. Further that, prior to the suspension, the Respondent has failed to pay her full salary. As at June 2022 she was owed the sum of **£75, 355.00 (Seventy five thousand three hundred and fifty five Emalangeni)**.
- [11] The Applicant submitted further that she has been in suspension for a long time now without any disciplinary hearing being conducted by the Respondent, hence, she is of the view that the period of suspension is now unreasonable, and it would seem that the suspension is now being used as a means of punishment before the actual punishment is meted out whether by form of a disciplinary hearing or a court of law. Therefore, she believes that at the end she will suffer what is termed double jeopardy which will result in an unfair labour practice.
- [12] The Applicant prayed that she be granted an order in terms of the Notice of Motion.
- [13] The matter is opposed by the Respondent and argued to the contrary that procedurally certificates are never printed outside the office, this is done for safety reasons because the seal and template can be used for unauthorized certificates. Furthermore, they were printed outside of the office because the Applicant did not want the certificates to be seen or known by the Respondent. The Applicant had together with one of the agencies or consultants conducted trainings on 2 separate occasions being January and September 2021 behind the Respondent's back and the result

of these trainings was that the Respondent would not get its share of the profits.

- [14] The Respondent argued that the procedure on the certificates is that the Applicant signs and the CEO Mr Bukutu co-signs. However, on these particular certificates only the Applicant had signed and the CEO's signature was not on the certificates. The CEO was called and asked if he knew anything about the trainings for which these certificates were being issued out for. His response was to the effect that he knew nothing about the trainings and requested that the certificates be brought to him.
- [15] The Respondent submitted that when the CEO saw the certificates he called the Applicant to discuss the matter, but the Applicant would not want to see the CEO over the issue, as a result, thereof, they ended up not discussing the matter. The matter was then reported to the police who have been conducting their investigation. The Applicant's suspension was as a result of evidence that was collected regarding the theft committed by the Applicant of defrauding and stealing from her employer, by conducting trainings behind her employer's back.
- [16] It was Respondent's argument that due to the nature of the offence committed by the Applicant there has been an erosion of trust between her and the employer. The reason for the delay in holding the hearing is that the employer wants the police investigation to be finalized, sadly, it has taken a long time.
- [17] The Respondent prayed that the Application be dismissed with costs.
- [18] It must be pointed out that there are two types of suspension, namely precautionary suspension and punitive suspension. With regards to remuneration and benefits in the circumstances where an employee is suspended on a precautionary basis, that employee by law has the right to

be suspended with full pay and benefits. The converse applies in circumstances where an employee is suspended on a punitive basis. The latter means that the employee is suspended without pay and benefits.

- [19] A precautionary suspension, also known as a preventative suspension, is imposed when an employer anticipates that the employee might have misconducted him or herself or breached a term or condition of his or her employment agreement or has done something which may result in disciplinary action. Due to the employer not knowing the full details of the possible misconduct or breach and whether or not the employee is guilty and should be sanctioned, the employer may then suspend the employee on a precautionary basis with full pay and benefits pending an internal investigation by the employer. The employer must clarify to the employee whether the suspension is precautionary or punitive in order for the employee to be aware that he or she is not being punished and that there is no prejudice to the employee in respect of remuneration. (**LONG V SOUTH AFRICAN BREWERIES (PTY) Ltd and Others [2018] ZACC**).
- [20] A punitive suspension on the contrary is a punishment and a sanction imposed on the employee who has already been found guilty of a misconduct or breach of a term or condition of his or her employment subsequent to a disciplinary hearing. In the circumstances of a punitive suspension, the internal investigation surrounding the misconduct or breach of terms of the employment agreement or any other conduct by the employee which has prejudiced the employer has already been completed. If the employee is found guilty, then punitive suspension is a sanction which can be imposed on the employee as an alternative to dismissal (**LONG V AFRICAN BREWERIES (Pty) Ltd Supra**).
- [21] Suspension of employees is thus a common occurrence in the work place. Accordingly, employers should be aware of the correct processes and

procedures which must be complied with when suspending an employee. In the same breath employees must be aware of their rights in order for the employee to determine whether the suspension is fair or whether the employee has recourse to an unfair labour practice by the employer.

- [22] It is common cause that the suspension imposed on the Applicant is precautionary in nature, as the Applicant has argued that she was suspended by the Respondent in January 2022 on full pay, however, the Respondent began defaulting paying Applicant her salary in full beginning from the month of April 2021 up to the date of suspension and continued to do so until the date of institution of these current proceedings, which state of affairs continues to persist to date.
- [23] The Court has noted that the Applicant has been in suspension for over two (2) years now. It must be mentioned in this regard that any suspension should be brief and kept under review to enable a prompt investigation to take place and speedy finalization of the disciplinary hearing. However, it is also not conducive to good industrial relations for an employer to subject its disciplinary prerogative and contractual obligations to the vagaries and delays of the criminal justice system.
- [24] In **NKOSINGIPHILE SIMELANE V SPECTRUM (PTY) LTD t/a MASTER HARDWARE IC CASE No. 681/2006**, the court held that:-

“It is common Knowledge that criminal cases in the inferior courts are seldom finalized in less than one year, unless the accused person pleads guilty. Moreover, in the view of the court, it is oppressive to suspend an employee pending finalization of a case which will not determine his/her future employment status, the conviction of an employee of a criminal offence against his/her employer does not excuse the employer from holding an

internal disciplinary enquiry..... nor for that matter does the acquittal of the employee preclude the employer from taking disciplinary action against the employee”.

[25] The Applicant submitted further that the period of suspension is now protracted and unreasonable, the Respondent should therefore re-instate her to the position of Human Resources Manager. The court notes that re-instatement at this stage would not be possible as the Applicant has not been dismissed by the Respondent.

[26] In EQUITY AVIATION SERVICES (Pty) Ltd V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (P 428/209) [2010] ZALC 221 and others, the court specifically dealt with the meaning of “re-instatement and Nkabinde J, as she then was had the following to say:-

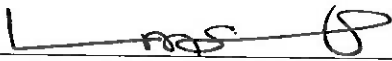
“The ordinary meaning of the word “re-instate” is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. It is aimed at placing an employee in the position he or she would have been in but for the unfair dismissal. It safeguards workers employment by restoring the employment contract. Differently put, if employees are re-instated they resume employment on the same terms and conditions that prevailed at the time of their dismissal”.

[27] The court aligns itself with the sentiments as expressed in the above cited case.

[28] Lastly, the Respondent at paragraph 9.5 of its answering affidavit did not dispute the compensation which is owed to the Applicant. Taking into account all the circumstances of the matter, the court makes the following order:-

- (i) The Respondent is ordered to pay the Applicant's salary arrears from April 2021 to date of suspension.**
- (ii) The Respondent is ordered to pay the Applicant's salary arrears from the date of suspension to the date of final determination of the matter.**
- (iii) The payment is to be made within fourteen (14) days of delivery of the judgement.**
- (iv) There is no order as to costs.**

The Members agree.



L. MSIMANGO

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

**FOR APPLICANT : MR T. HLANZE
(T.V HLANZE ATTORNEYS)**

**FOR RESPONDENT : MR S.M MASEKO
(S.M MASEKO ATTORNEYS)**