



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 21/2024

In the matter between:

ANXIOUS GAMEDZE

Applicant

And

SOUTHERN STAR LOGISTICS (PTY) LTD

Respondent

Neutral Citation: *Anxious Gamedze vs. Southern Star Logistics (Pty) Ltd*
(21/2024) [2024] SZIC18 (28 February 2024)

CORAM:

V.Z. DLAMINI – JUDGE

*(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango –
Nominated Members of the Court)*

DATE HEARD:

09 February 2024

DATE DELIVERED:

28 February 2024 (Ex Tempore)

SUMMARY: *Urgent Applications – Rule 15 of Industrial Court on Urgency – application enrolled on good cause shown – Good cause shown by fulfilling three requirements – reasons why matter urgent – reasons why provisions of Part VIII of Industrial Relations Act should be waived – reasons why the Applicant cannot be afforded substantial relief at hearing in due course.*

Precautionary suspension – Employer entitled to vary suspension where material change in Employee’s circumstances in terms of section 39 (1) (a) and (b) of Employment Act occurs.

Precautionary suspension – Employer prohibited from varying terms of suspension in retaliation to Employee challenging procedural rulings of the chairperson of the disciplinary hearing in court – Indefinite suspension unlawful.

REASONS FOR EX TEMPORE RULING – 28 February 2024

INTRODUCTION

[1] On the 8th and 9th February 2024, after considering the application, opposing papers, heads of argument and oral arguments, the court issued *ex tempore* rulings enrolling the matter on the urgent roll and granting prayers 3 and 5 of the Notice of Application.

BACKGROUND

[2] The Applicant, an adult liSwati male, is employed as Workshop Manager by the Respondent, a company duly incorporated and registered in terms of the Company laws of Eswatini and situated in Matsapha.

- [3] On the 25th October 2023, the Applicant was suspended with pay and called upon to show cause why five counts of Gross Dereliction of Duty should not be preferred against him. He was subsequently notified of a disciplinary hearing rescheduled for the 6th November 2023. At the disciplinary hearing, the Applicant applied for the recusal of the chairperson, but the application was dismissed by the latter in a ruling delivered on the 15th December 2023. The Applicant then approached the court for urgent relief, but the court dismissed his application for the removal of the disciplinary hearing chairperson.
- [4] The Applicant then launched a review application at the High Court against the judgement of the court and obtained an interim order interdicting the disciplinary hearing pending final determination of the High Court matter. On the 30th January 2024, the Respondent served the Applicant with a letter requiring him to show cause why his suspension with pay should not be varied to suspension without pay with effect from 1st February 2024 due to his repetitious actions of seeking to unnecessarily delay the disciplinary hearing through court applications.
- [5] In response, the Applicant wrote to the Respondent and stated that the contemplated variation of the conditions of the suspension would be unlawful; he therefore demanded that the notice of the impending variation be withdrawn. On the 1st February 2024, the Respondent wrote to the Applicant advising him of the variation of the terms of the suspension from one with pay to one without pay with effect from the 2nd February 2024 until the conclusion of the disciplinary process.

[6] On the 7th February 2024, the Applicant filed an application in which he sought the following orders: -

1. *Dispensing with the usual forms and procedures as relating to time limits and service of court documents, that the matter be heard as one of urgency.*
2. *Condoning the Applicant's non-compliance with the Rules of this court as relate to service and time limits.*
3. *Reviewing and setting aside the decision to withhold the salary of Applicant as communicated through the letter by Respondent dated 1st February 2024, with immediate effect.*

Alternatively;

4. *Declaring the letter and or decision per letter dated 1st February 2024 communicating that Respondent will withhold payment of Applicant's salary effective 1st February 2024 as null and void, as well contrary to the constitution position of right to access courts [sic].*
5. *Directing the Respondent to forthwith pay the Applicant his salary commencing from February 2024 henceforth.*
6. *Costs of the Application against the Respondent at attorney and own client scale.*
7. *Further and or alternative relief.*

POINTS IN LIMINE

Respondent

- [7] The Respondent opposed the application by raising points *in limine* and it was granted leave to respond to the merits of the case after the points were dismissed by the court. The Respondent contended that the urgency was self-created because the Applicant initially brought an application on the 6th February 2024, but it was dismissed by the court which upheld the Respondent's point *in limine* that the prayers sought were incompetent; however, the Applicant filed a second urgent application on 7th February 2024 based on the same cause of action. It was the Respondent's argument therefore that the second urgent application constituted an abuse of court process.
- [8] Furthermore, the Respondent submitted that the application failed to meet the requirements of **rule 15(2) (c)** of the court in that throughout the founding affidavit, the Applicant had failed to set forth explicitly, the reasons why he could not be afforded substantial relief at a hearing in due course.

Applicant

- [9] In meeting the points *in limine*, the Applicant argued that bearing in mind the background of the dispute between the parties, the court ought to consider whether the Applicant had inordinately delayed filing the second application; he denied that he had delayed at all. Seemingly, the Applicant's counsel conceded that **rule 15(2) (c)** was not complied with.

MERITS

Applicant

[10] The Applicant contended that the suspension without pay was unreasonable and unlawful for a number of reasons. Firstly, the variation of suspension was not contemplated by **section 39 (1) (b)** of the **Employment Act, 1980**. Secondly, the Respondent had an election to suspend the Applicant without pay before the commencement of the disciplinary inquiry as permitted by the aforesaid section, but chose to suspend him with pay; the Respondent was therefore bound by its election. Thirdly, the suspension without pay was punishment for having challenged the decision of the disciplinary hearing chairperson; he denied that his court applications were a stratagem to delay the disciplinary proceedings. Lastly, the suspension without pay was indefinite.

Respondent

[11] The Respondent submitted that the suspension without pay was lawful and not susceptible to being reviewed for a number of reasons. Firstly, **section 39 (1) (b)** permitted the employer to vary a paid suspension to one without pay and vice versa provided that the suspension without pay does not exceed one (1) month, which was the position in the present matter. Secondly, the variation was preceded by a hearing where the Applicant was called upon to show cause why it should not be effected, but the latter elected not to give satisfactory reasons; hence, the variation. Thirdly, the Respondent was not retaliating to the court applications filed by the Applicant because it did not seek to vary the suspension when the Applicant approached the Industrial Court. It was only when the Applicant filed a review application to the High

Court that it became clear to the Respondent that he was litigating for purposes of delaying the disciplinary hearing.

[12] The Respondent also argued that since the review application would be protracted, it would not be fair for the Respondent to pay the Applicant's salary of E80, 000 per month while he elected to litigate indefinitely; as it is the disciplinary hearing had been pending for three (3) months.

ANALYSIS

Points in limine

[13] **Rule 15** of the rules of this court that governs urgent applications reads as follows:

"Urgent applications.

(1) A party that applies for urgent relief shall file an application that so far as possible complies with the requirement of Rule 14.

(2) The affidavit in support of the application shall set forth explicitly

(a)the circumstances and reasons which render the matter urgent;

(b)the reasons why the provisions of Part VIII of the Act should be waived; and

(c)the reasons why the Applicant cannot be afforded substantial relief at a hearing in due course.

(3) On good cause shown, the Court may direct that a matter be heard as one of urgency.

(4) The party who brings the application shall satisfy the Court, when the application is heard, that a copy of the application has been served on all affected parties or that sufficient and adequate notice of the content of the application has been brought to the attention of the affected party by other acceptable means, unless giving notice of the application will defeat the relief sought in the application.

(5) A party who intends to oppose the application or make representation concerning the application shall notify the Registrar and the party who brings the application as soon as possible after the application has come to the notice of the party.

(6) The Court may deal with an urgent application in any manner it considers fit, and may dispense with the usual time limits, forms and service prescribed by the Rules of Court.

(7) Unless otherwise ordered a party may anticipate the return date of an interim order granted in the absence of such party on not less than twenty-four (24) hours' notice to the Applicant and the Registrar".

[Underlining added].

- [14] The court has a discretion to enroll a matter for urgent hearing provided that the Applicant has shown good cause. Good cause may only be demonstrated by setting out the circumstances that render the matter urgent, reasons why **Part VIII of the Industrial Relations Act, 2000 (as amended)** should be waived and reasons why the Applicant cannot be afforded substantial redress at a hearing in due course. The aforesaid principle was affirmed by the court in the following decisions: **Nhlanhla Hlatshwayo v Swaziland Government and Another (IC Case No. 398/06)**; **Memory Ndwandwe v Evangelical Church Schools Manager and 2 Others (IC Case No. 25/2020)** and **Lomati**

Mine (Pty) Limited v Ian Dawson and 2 Others (243/2021) [2023] SZIC 84 (23 August 2023).

- [15] Despite counsel for the Applicant's lack of conviction on whether the Applicant had satisfied **rule 15 (2) (c)** above, the court had no hesitation to enroll the matter as aforementioned. It seemed to us that counsel for the parties were in agreement that the Applicant had not satisfied **rule 15 (2) (c)** because of the absence of an averment in his founding affidavit that regurgitated the provisions of the said rule.
- [16] Having read the founding affidavit before and after hearing of arguments, the court was satisfied that the Applicant had met the requirements of **rule 15 (2) (c)**. The Applicant told the court that he stood to suffer harm and prejudice if the Respondent went ahead and withheld his salary because he was still in employment and was therefore entitled to a salary; moreover, the non-payment of his salary was intended to be indefinite.
- [17] The foregoing averments taken together with Applicant's reasons why the matter was urgent and why the provisions of **Part VIII** should be waived coupled with the fact that the prayers sought *in casu* were distinct from those sought in the first application, persuaded the court to dismiss the Respondent's points *in limine* and enroll the matter for urgent hearing.

Merits

- [18] The Respondent's notice to vary the terms of suspension (show cause letter), the Applicant's response and Respondent's subsequent letter varying the

suspension were vital to the determination of the matter; consequently, they bear repetition:

"PRIVATE & CONFIDENTIAL

30th January 2024

Mr. Anxious Gamedze

C/O P.O. Box 360

Manzini

Dear Anxious

RE: VARIATION OF CONDITIONS OF PRECAUTIONARY SUSPENSION FROM EMPLOYMENT

- 1. Reference is made to our letter dated 25th October 2023 in which we suspended you from employment on a precautionary basis pending investigations into your alleged misconduct and our subsequent Notice to Attend a Disciplinary Hearing wherein disciplinary proceedings were initiated against you on the 8th November 2023.*
- 2. Notwithstanding the initiation of disciplinary proceedings on the 8th November 2023, it is disheartening to note that such proceedings have not been conducted almost three months later due to repetitious actions on your part seeking to unnecessarily delay the disciplinary proceedings to the detriment of both Management and your own self. These delays in the form of requests for postponements and meritless Urgent Court applications meant to solely frustrate the process are not in the interest of justice and are prejudicial to the business operations of the company since you are paid whilst not providing services to the company.*
- 3. You are called upon, therefore, to show cause why the terms and conditions of your suspension should not be varied from suspension with full pay to an unpaid suspension with effect from the 1st February 2024. Kindly submit such representations stating why the terms and conditions of the suspension should not be varied in this way within twenty-four hours of receipt hereof.*

4. Should you fail to respond, or should your reasons be found to be without substance, the Company shall proceed to suspend payment of your salary with effect from the 1st February 2024.

Yours Sincerely

(Signed)

Wayne Levendale

Managing Director

Cc; Human Resources Manager....." [underlining added].

[19] The Applicant responded as follows:

“

31st January 2024

SOUTHERN STAR LOGISTICS (PTY) LTD

MATSAPHA

Dear Sirs

RE: VARIATION OF CONDITIONS OF PRECAUTIONARY SUSPENSION FROM EMPLOYMENT

1. Your letter dated 31st of January 2024 and the contents thereof bear reference.
2. I have read the letter and I am of the view that your contemplated actions are unlawful in that you have found me guilty of misconduct without affording me a hearing to ventilate the matter and a decision has been taken to vary my suspension from with pay to without pay.
3. It is my view that your actions are unlawful.
4. In the aforesaid, it is proper for you to withdraw your letter and advise me of your decision by 12:00 noon of the 1st February 2024.
5. Your cooperation is appreciated in advance.

Yours Faithfully

(Signed)

ANXIOUS GAMEDZE”

[20] The letter that eventually varied the terms of the Applicant's suspension reads as follows:

““PRIVATE & CONFIDENTIAL

1st February 2024

Mr. Anxious Gamedze

C/O P.O. Box 360

Manzini

Dear Anxious,

RE: VARIATION OF CONDITIONS OF PRECAUTIONARY SUSPENSION FROM EMPLOYMENT

- 1. Reference is made to your letter dated 31st January 2024 which was in response to our letter dated the same instant wherein you were requested to show cause why the terms and conditions of your suspension from work pending a disciplinary hearing should not be varied from a paid suspension to an unpaid suspension.*
- 2. Having reviewed your reasons why the terms and conditions of your suspension should not be varied from a paid suspension to an unpaid suspension, the Company has decided to vary the terms of your suspension. We therefore advise that your suspension shall, with effect from the 2nd February 2024, be an unpaid suspension pending the conclusion of the disciplinary process.*
- 3. All other terms and conditions of your precautionary suspension will remain unchanged.*

Yours Sincerely

(Signed)

Wayne Levendale

Managing Director

Cc; Human Resources Manager.....” [Emphasis added].

[21] The precautionary suspension of an employee is regulated by **Section 39 (1) (a) and (b), (2) and (3)**, which read as follows:

“(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.

(3) If the employer finds that the employee did not commit the act referred to in subsection (1)(b), the suspension shall be lifted and the employer shall pay to the employee an amount equal to the remuneration he would have been paid during the suspension.”

[22] It is clear from the contents of the Respondent’s letters that its reason for seeking to vary the terms of the Applicant’s suspension and the eventual variation was the delay in the conclusion of the disciplinary hearing, which the former attributed to the latter. The Applicant denied causing an unnecessary delay in the finalization of the hearing. It is also evident from the contents of the Respondent’s letters that the unpaid suspension would continue until the finalisation of the disciplinary hearing.

- [23] The Respondent's averment that the unpaid suspension would be for only one month as envisaged by **section 39 (2)** of the **Employment Act** is an afterthought. There is nothing express or implied in the show cause letter and the variation letter showing that the unpaid suspension would not exceed one month. It is now established law that an indefinite suspension without pay is unlawful. This principle was confirmed in the following cases: **Nkosingiphile Simelane v Spectrum (Pty) Ltd t/a Master Hardware (IC Case No. 681/2006)**; **Sikhumbuzo Dlamini v GMR Freight (Pty) Ltd (450/2014) [2016 SZIC 06 (2016)** and **Simiso Mamba and 7 Others v Eswatini Railways (349/2021) [2022] SZIC 112 (04 January 2022)**.
- [24] Although an employer has the right to vary an employee's paid suspension to unpaid suspension and vice versa, the rationale for such variation must be a material change in the employee's circumstances under **section 39 (1) (a)** and **(b)**. The aforesaid principle was stated in the case of **Waligo Allen v National Emergency Response Council on HIV and AIDS (147/2017) SZIC 78 (2017)** and affirmed in the case of **Timothy Vilakazi v Lidwala Insurance Company and Another (300/2017) [2017] SZIC 86**.
- [25] While the court in **Waligo Allen** (above) did not expand on the aforesaid principle, it is our view that, a material change in the circumstances of an employee under a precautionary suspension could occur where an employee is suddenly remanded in custody during a disciplinary hearing or where an employee initially faced less serious charges, but during the course of the hearing has her charges amended to include new charges which if proven could warrant dismissal. Whichever the case, the reason for variation of a paid suspension to an unpaid one must not be retributive.

- [26] As alluded above, the reason for varying the terms of the Applicant's suspension is his alleged stratagem of delaying the disciplinary hearing by engaging in unnecessary urgent court applications. Similar reasons were alleged by the employer for varying the employee's suspension in **Waligo Allen** (above) and the court found the conduct of the employer to be punitive, irregular and unfair.
- [27] It was contended by the Respondent's counsel that the Respondent's actions found support in the principle laid down by the Supreme Court in **Nedbank Swaziland Ltd v Pheheya Nkambule and Four Others (70/2020) [2021] SZSC 15 (1st September 2021)**. With respect, **Pheheya Nkambule** (above) is not authority for the principle that an employer should retaliate by indefinitely suspending an employee without pay if that employee challenges decisions of the chairperson of the disciplinary inquiry in court.
- [28] In our view, **Pheheya Nkambule** (above) opined that where an employee's unpaid suspension during a disciplinary hearing punctuated by court applications, has exceeded one month and the employee subsequently files a court application to challenge the unpaid suspension, the court hearing that application is enjoined to investigate whether the previous litigation was a stratagem to delay the finalisation of the disciplinary inquiry and if not, whether the delay in the finalisation of the court proceedings could be attributed to one party.
- [29] Furthermore, in the court's view **Pheheya Nkambule** (above) propounded the principle that where the disciplinary hearing exceeded one month and

there had been no external proceedings contributing to the delay in finalizing the inquiry, the employer had no right to suspend an employee without pay for a period exceeding one month.

[30] What compounds matters for the Respondent is that, the suspension is not even targeted at the duration of the court proceedings; not that doing so would render it lawful. What happens if the court proceedings take less than a month and the hearing thereafter takes six months? Does it mean the Applicant will be on unpaid suspension for the duration of the disciplinary proceedings that are entirely within the control of the chairperson appointed by the Respondent? That is not what **Phesheya Nkambule** (above) advocated.

[31] It is for the aforesaid reasons that the court granted prayers **1, 2, 3** and **5** of the Notice of Application and undertook to furnish them not later than the 29th February 2024.

Members agree.



V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Ms. G. X. Mnisi
(MLK Ndlangamandla Attorneys)

FOR RESPONDENT : Mr. S. Dlamini
(Musa M. Sibandze Attorneys)