

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 87/2007

In the matter between:

THEMBANI SIMELANE

Applicant

and

**CHAIRMAN OF THE CIVIL SERVICE
COMMISSION**

1st Respondent

SWAZILAND GOVERNMENT

2nd Respondent

ATTORNEY GENERAL

3rd Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : M. MKHWANAZI

FOR RESPONDENT : S. KHULUSE

J U D G E M E N T - 22/03/04

1. The Applicant is an accountant in the employ of the Swaziland Government. On the 24th January 2007 she was criminally charged

with contravening the provisions of the Prevention of Corruption Act, 2006 and with fraud simpliciter arising from the performance of her duties as a civil servant.

2. On 13th February 2007 the Applicant received a letter from the Secretary of the Civil Service Commission inviting her to appear before the Commission on 21st February 2007 to show cause why she should not “be subjected to a disciplinary action on the charges of serious misconduct i.e. fraud.”

3. Portion of the letter reads as follows:

“Note that as a preliminary measure your misconduct warrants the Commission to hear your views, decide and issue certain disciplinary measures including, but not limited to, interdiction from exercising the powers and functions of your office in terms of Regulation 39 of the Civil Service Board (General) Regulations, suspension in terms of the Employment Act 1980 as amended both read with the Constitution of the land, pending a final decision of your case.”

4. The Applicant duly appeared before the Commission on the said date. She complains that although she had brought documentary evidence of her innocence to the hearing, as she was invited to do in the letter of invitation, she was not afforded the opportunity to present her defence and the hearing lasted less than five minutes.

5. On 23rd February 2007 the Applicant received a further letter from the Secretary of the Commission, informing her as follows:

“Having heard your representations and considering the provisions of

Regulations 38 and 39 of the Civil Service Board (General) Regulations of 1963, the Commission directed that you should be interdicted or suspended from the performance of your duties.

(a) *You are therefore interdicted from the performance of your duties from the 21st February 2007 pending finalization of your criminal case.*

(b) *Disciplinary proceedings shall be instituted against you after the conclusion of the pending criminal case.”*

6. The Applicant submits that the Civil Service Commission has no authority in terms of Regulation 39 to interdict or suspend her from her duties on half pay, and she avers that it is only the Prime Minister who has authority to exercise such powers.

7. The Applicant has applied to court by way of notice of motion, asking the court to dispense with the usual requirements of the Rules of Court and hear the matter as one of urgency, and to grant an order setting aside the suspension of the Applicant on half-pay.

8. The Respondents have raised no issue with regard to the urgency of the application. In the case of **Bunnie Patrick Mhlanga v P.S. Ministry of Public Works & Transport and Another (IC Case No. 130/03)** at p.13 this court held that an unlawful suspension without pay has serious consequences to the means of livelihood of an employee and warrants the urgent intervention of the court. We are satisfied that this matter should be enrolled for a determination as to whether the suspension on half-pay is unlawful, and the usual procedures in

terms of the Rules of the Court and Part V111 of the Industrial Relations Act 2000 are dispensed with.

9. The Respondent has raised a legal issue regarding the *locus standi* of the Applicant, namely that as a married woman she is presumed to lack legal standing to institute legal proceedings on her own without the assistance of her husband. By failing to disclose her marital regime and failing to allege that he sues with the assistance of her husband, the Applicant has failed to set out sufficient allegations in her founding affidavit to establish that she has *locus standi* to bring this application.

10. At common law, a woman who is married subject to the marital power is regarded as a minor and she has no *locus standi in judicio*. Any legal proceedings instituted on her behalf must be brought by her husband in his capacity as her guardian, and where the marriage is in community of property, as administrator of the joint estate. Alternatively she may sue “assisted by” her husband in her own name.

See **LAWSA 111 para 51**.

11. An Applicant must establish that he/she has legal standing to institute proceedings before the court. However, in the case of **Carson & Others NNO v Spencer 1982 (2) SA 755 T** it was held that if the Applicant is a natural person, then his/her legal standing is presumed in the absence of any indication of a legal disability.

12. The Respondent has not alleged any facts which indicate that the Applicant is disqualified from instituting legal proceedings in her own right without the assistance of her husband. The Respondent merely submits that the Applicant as a married woman is presumed to suffer from a legal disability. This submission is incorrect in law – **See**

Carson's case (supra).

13. Rule 17 (4) of the High Court Rules of Court specifically requires a plaintiff to allege the sex of the plaintiff and, if female, her marital status. There is no similar requirement in the Industrial Court Rules of Court, nor in our view can any such requirement be implied if regard is had to the provisions of our Constitution. In particular:

13. 1 Section 20 (1) of the Constitution provides that all persons are equal before and under the law and shall enjoy equal protection of the law.

13.2 Section 20 (2) makes it clear that no person shall be discriminated against on the grounds of gender.

13.3 Section 28 (1) provides that women have the right to equal treatment with men.

14. In the case of **Nedcor Bank Ltd v Hennop & Another 2003 (3) SA 622 T**, the court dealt with an objection similar to that of the present Respondent in the following terms:

“..... The reference to the defendant's sex and women's marital status as required by Rule 17 (4) is certainly outmoded and anachronistic, It indeed offends the equality provision contained in the Constitution[which] provides that every person shall have the right to equality before the law and is emphatic that no person shall be unfairly discriminated against, directly or indirectly on the grounds of sex, gender or disability. In my view, in these enlightened times, the omission to state the defendant's sex and, in the case of a woman, her marital status in the summons is of no consequence and certainly not amenable to render the plaintiff's application for summary

judgement to be fatally defective. Accordingly the point in limine cannot succeed.”

15. We agree with the above remarks. The right to equality before the law means that a married woman, whatever her marital status, no longer requires the assistance of her husband to sue or to be sued, and she may sue and be sued in her own name.
16. It has been held in South Africa that the common law rule, that a husband acquires marital power over his wife where they marry without an antenuptial contract to the contrary, is invalid because it offends against the equality and anti-discrimination provisions of the Constitution – see **Prior v Battle & Others 1999 (2) SA 850 (TK)**.

It would be going far beyond the ambit of this judgement for this court to express any view on the present validity of the common law consequences of a marriage. Suffice it to say that in the light of our new constitutional dispensation, this court will not deny a married woman access to the court without the assistance of her husband anymore than the court will deny a married man access without the assistance of his wife.

17. Moreover, in the particular circumstances of this case, the Applicant is also guaranteed access to the court by section 33 (1) of the Constitution:

“A person appearing before any administrative authority has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved.”

18. The Civil Service Commission did not invite the Applicant’s husband to

appear before it, nor require the Applicant to be assisted by her husband at the hearing. It is disingenuous for the Respondents to question the legal capacity of the Applicant at this stage.

19. For all the above reasons, the Respondent's preliminary objection to the *locus standi* of the Applicant is dismissed.

20. The Respondents have filed an opposing affidavit deposed to by Almon Mbingo in his capacity as Acting Chairman of the Commission. Mr. Mbingo sets out in his affidavit that the Applicant was granted an opportunity to present her side of the story before the Commission but she opted not to say much save to deny the criminal charges leveled against her and to leave it in the hands of the Commission to decide what steps to take against her. Mr. Mbingo submits that the failure of the Applicant to produce her documentary evidence in her defence constitutes a waiver of her right to use such evidence. Mr. Mbingo also points out that the Commission is not bound to conduct its hearings as if they are judicial trials, and it is only required to act fairly and in accordance with the tenets of natural justice.

21. In support of its defence, the Respondents have produced the minutes of the hearing on the 21st February 2007. The minutes reflect the following exchange between the Commission and the Applicant:

“Commission: We wish to inform you that the law states that once an officer is charged with a criminal offence, the Commission may suspend that officer from duty. However before the suspension the Commission gives the officer an opportunity to exculpate himself. The purpose of inviting you was to give you that opportunity. You are requested to state reasons why you should not be suspended pending the

finalization of the case.

Themrani: I don't know all that I have been charged with. I only know of E100.00 which was given to me by one of the directors to buy ourselves lunch as we had worked over lunch hour. However if the Commission decided to suspend me there is nothing I can say."

22. The minutes record the hearings in respect of the Applicant and 3 other officers charged with similar and related offences. The minutes conclude:

"The Commission then deliberated at length on this matter and thereafter decided that the four (4) officers be suspended from the performance of their duties pending the finalization of the matter in Court with effect from the 21st February 2007. The Commission further decided that during the period of their suspension they be paid half of their salary."

23. Finally, the Respondents aver that the Commission is the correct authority to exercise disciplinary control over public officers and its decision cannot be said to be ultra vires.

24. At the hearing of this matter, the Applicant's counsel raised the following additional legal issues:

24.1 The Applicant was not afforded the right to be legally represented at the hearing before the Commission.

24.2 The Applicant was not treated justly and fairly before the commission and in particular she was not given the opportunity to address the issue whether her suspension should be on half pay.

24.3 The Commission has failed to give reasons for its decision, and thereby breached the Applicant's right to administrative justice.

24.4 The Applicant has been incorrectly charged under the Prevention of Corruption Act, 2006 because the offences charged were allegedly committed before the Act came into force. Since the suspension of the Applicant is based in part upon charges which have no legal validity, it is flawed and unfair.

25. The court shall now address the various issues arising for decision.

AUTHORITY TO INTERDICT PUBLIC OFFICERS

26. Regulation 39 of the Civil Service Board (General) regulations, 1963 purports to vest the power to interdict public officers in the Prime Minister. However, in terms of the King's Proclamation No. 1 of 1981, this function now reposes in the Civil Service Commission.

-see the judgement of the Swaziland Court of Appeal in **Elias Dlamini v P.S. Ministry of Agriculture & Cooperatives and Another (Appeal Case No. 12/2000)** at page 7.

- see also **Section 187 (1) of the Constitution.**

27. There is no merit in the argument that the suspension of the Applicant is ultra vires the Commission, and Mr. Mkhwanazi for the Applicant conceded as much during his argument.

28. The Attorney General was advised four years ago by this court of

the pressing need to review and harmonize the Civil Service Order, the Civil Service Board (General) Regulations, Government General Orders and the King's Proclamation No. 1 of 1981, **especially in view of the expected new constitutional dispensation. See *Bunnie Patrick Mhlanga v PS Ministry of Public Works & Transport & Another (IC Case No. 130/03)***. The new constitution has been in force for more than one year, but the legislation governing the discipline and interdiction of public officers continues to be a morass of contradiction and confusion. Public officers cannot be expected to understand their disciplinary rights and obligations without professional guidance of an attorney, in view of the uncertainty created by the inconsistent legislation, regulations and general orders. This is inimical to healthy labour relations in the civil service and creates an obstacle to fair disciplinary process.

29. This leads on to the next issue, namely whether the Applicant was afforded her right to legal representation at the hearing before the Commission.

LEGAL REPRESENTATION

30. Section 182 of the Constitution affords any person appearing before a Service Commission the right to legal representation at his/her own expense.

31. A consideration of the letter inviting the Applicant to appear before the Commission shows that she was not informed in advance of this right. She appeared before the Commission without representation. It appears from the minutes of the hearing that she was not informed of her right to legal representation at the hearing, nor was any inquiry made whether she wished to be represented.

32. In the case of **Yates v University of Bophutatswana & Others (1994) (3) SA 815 (BG)**, the court said that it is a fundamental principle of justice *“that a person appearing before a statutory or quasi-judicial or disciplinary tribunal be accorded every opportunity of putting his/her case clearly and concisely. Inherent in this principle is that the said person is entitled to engage someone trained in the law to put his/her case to the tribunal concerned, in that a legal practitioner is better able to put the case than the person involved.”*

This is the basis of the right to legal representation.

33. In view of the inherent difficulty for a layperson to interpret the conflicting law relating to the discipline and interdiction of public officers – see paragraph 28 above – the entitlements to legal representation assumes even greater importance.

34. In the field of criminal law, it has been held that there is “ a *general duty on the part of judicial officers to ensure that unrepresented persons fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place*” - per **Goldstone J in S v Radebe 1988 (1) SA 191 (T) AT 195 B.**

Later in his judgement Goldstone J goes on to say:

“If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time

within which to do so.” (at 196F-l).

35. Should this duty to inform an accused person of his/ her right to legal representation also apply to service commissions with regard to persons appearing before them?

In the case of **MAWU & Others v Transvaal Pressed Nuts (1988) 9 (ILJ) 129 (IC)** the Industrial Court of South Africa held that the failure of a chairman of a disciplinary hearing to inform the employee of his right to representation, constituted a procedural defect.

A similar view was expressed in the case of **SA Allied Workers Union & Another v Steiner Services (1987) ICD (1) 551.**

In **Khumalo & Another v Otto Hoffmann Hand Weaving co (1988) ICD (1) 549** however, the Industrial Court was prepared to overlook the fact that the Applicants were not told that they had a right to be assisted at the enquiry, **because they were both experienced shop stewards who must have known their rights and how to conduct their defence.**

36. The eminent jurist **Edwin Cameron** in his article **The Right to a Hearing Before Dismissal Part 1 (1986) 7 ILJ 183**, after analyzing all the authorities, concludes that *“short of actual waiver by the employee, the right to representation should be enforced and that a duty should accordingly be held to rest on employers to draw the attention of an accused employee to the right to assistance.”*

We are in respectful agreement with this view, save to add that if it can be shown that an employee is aware of his/her right to representation and deliberately elects not to exercise such right then

the failure to inform the employee of his right will not constitute a procedural defect sufficient to render the hearing unfair.

c.f. **S v Mabaso & Another 1990 (3) SA 185 (A) AT 204.**

37. An administrative tribunal acting qua employer has, if anything, a greater duty than the chairman of a domestic disciplinary enquiry to ensure that the employee appearing before it is aware of her rights.

See **Advance Mining Hydraulics & Others v Bates NO & Others 2000 (1) SA 815 (T).**

A fortiori where the right to legal representation is a constitutional right.

38. The Civil Service Board (General) Regulations permit legal representation in the discretion of the Commission – see regulation 46. This regulation conflicts with the provisions of the Constitution, and is yet another example of the contradictions contained in the Regulations. There is no evidence that the Applicant was aware of her right to representation, and in view of the state of the legislation no public officer can be reasonably expected to understand his/her rights.
39. In our view the Commission had a duty to inform the Applicant in advance of her right to legal representation, and to ascertain from her at the hearing whether she had been given sufficient opportunity to obtain representation. Unfortunately it failed to perform such duties, and the Applicant was denied her right to legal representation.
40. The Applicant was called upon at the hearing to “exculpate” herself from pending criminal charges. She was entitled to have her lawyer present to protect her from the risk of self-incrimination. She was alone before a

tribunal consisting of seven commissioners. The Principal Secretary for her line Ministry was also present. She was entitled to the moral and legal support of her representative on such an intimidating occasion. The Applicant was asked to state reasons why she should not be suspended. She was entitled to legal advice as to the appropriate response. In our view, the Applicant was placed at a clear disadvantage in the absence of her legal representative, and the proceedings were unfair and prejudicial to her interests. On this ground alone, the Applicant is entitled to the relief that she seeks.

SUSPENSION ON HALF PAY

41. It is the view of the court that the suspension on half pay was also irregular and unfair because the Applicant was given no opportunity to address the issue of the suspension of half her remuneration.

42. The Commission has a discretion under regulation 39 to determine what emoluments a public officer shall receive during suspension (not being less than one half his/her normal emoluments. This decision follows on, but is separate from, the decision to suspend. Different considerations apply. Depriving an employee of a portion of his/ her remuneration has serious consequences on his/her livelihood and ability to support his/her dependants. The employee must be given notice that he/she is entitled to make representations regarding this aspect, and at the hearing he/she must be afforded the opportunity to address the issue whether he/she should be deprived of a portion of his/her emoluments whilst he/she is on suspension.

See **Jacobus John Muller & 5 Others v Chairman of the Ministers Council: House of Representatives (1991) 12 ILJ 761 (C) AT 774.**

43. The Applicant was neither informed that the suspension of a portion of her remuneration was a possibility, nor was she given the opportunity to make representations regarding this issue. In our view this was a breach of the audi alteram partem rule which results in the decision to suspend the Applicant on half pay being procedurally irregular and unfair.

FAILURE TO GIVE REASONS

44. The right to administrative justice entrenched by section 33 of the Constitution includes the right of a person appearing before any administrative authority to be given reasons in writing for the decision of that authority. It is common cause that the Commission has not furnished any reasons for its two-fold decision to suspend the Applicant and on half pay. It is also common cause that the Applicant has never requested such reasons to be furnished.

45. In dealing with a similar right formerly entrenched in the South African Constitution, the Court in **Commissioner, SA Police Service & Others v Maimela & Another 2003 (5) SA 480 T** held that the practical interpretation of the constitutional provision is that reasons must be furnished to affected persons who assert the right to be furnished with reasons. The court said that the administrative decision-maker is obliged to furnish reasons within a reasonable time after receipt of a request for such reasons from a person whose rights or interests have been affected by the administrative decision. The court said that whilst the practice of an administrative authority furnishing reasons automatically is to be encouraged, that is not what the Constitution requires.

46. The court in the above-cited case was dealing with a much broader constitutional provision than ours, which gave a right to be given

reasons to every person whose rights or interests are affected by administrative action. Section 33 (2) of the Swaziland Constitution restricts the right to persons “appearing before any administrative authority.” Nevertheless, the same practical considerations apply: if statutory boards like the Liquor Licensing Board and Road Transportation Board are obliged to give reasons without request in respect of every decision made by them, their work will be greatly increased.

47. In our view, section 33 (2) of the Constitution should be interpreted as entitling a person appearing before an administrative authority to receive written reasons for any decision given within a reasonable time after a request for such reasons has been made. The Applicant has never requested reasons, so in our view she cannot complain that her right to be given reasons has been contravened.

ERRONEOUS CHARGES

48. When considering whether to interdict a public officer who has been charged with a criminal offence, the Commission is required to determine whether the interdiction is in the interest of the public service on the basis of the charges as framed and instituted by the Director of Public Prosecutions. The Applicant did not raise any issue before the Commission with regard to the validity of the charges under the Prevention of Corruption Act, and the Commission cannot be criticized for not delving mero motu into the legal basis of the charges.

49. The Applicant raised certain other issues regarding signature of the minutes, and whether the minutes reflect that the decision of the Commission was a majority decision. In view of our findings on issues of more substance, it is not necessary to deal with these technical

matters.

50. The Applicant did not have a proper opportunity to prepare for the hearing, nor was she given a fair hearing by the Commission, because:

50.1 she was not informed of her right to legal representation, and she was not given proper opportunity to exercise such right; and

50.2 she was not afforded any opportunity to make representations on the issue of suspension of a portion of her emoluments.

51. For these reasons, the hearing was unfair and contravened the Applicant's constitutional right to administrative justice.

52. The court grants the following order:

(a) **The decision of the Civil Service Commission to suspend the Applicant on half pay is declared null and void and of no force and effect, and such decision is hereby set aside.**

(b) **The 2nd Respondent is to pay the costs of the application.**

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT