



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGMENT**

Case NO. 163/2012

In the matter between:

**MABANDLA SIBANDZE**

**Applicant**

And

**SWAZILAND GOVERNMENT**

**1<sup>st</sup> Respondent**

**ATTORNEY GENERAL**

**2<sup>nd</sup> Respondent**

**Neutral citation:** *Mabandla Sibandze v Swaziland Government & Another (163/12 [2012] SZIC 16 (JUNE 29 2012)*

**Coram:** NKONYANE J,  
*(Sitting with G. Ndzinisa & S. Mvubu  
Nominated Members of the Court)*

**Heard:** 15 JUNE 2012

**Delivered:** 29 JUNE 2012

**Summary:**

***Applicant, a civil servant put on indefinite suspension pending the finalization of a criminal trial--. Suspension unfair and unreasonable as it depends on an unknown future event over which the employer has no control-- The judgement by the Criminal Courts will not determine the employment status of the Applicant as the employer is required in terms of labour law principles to hold its own enquiry on the basis of which it would make the decision whether or not to dismiss the Applicant—Section 194(4) of the Constitution—The use of the word “shall” means that it is imperative that the suspension be lifted if the matter of a public officer is not finalized within six months.***

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**JUDGMENT 29.06.12**

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[1] This is an urgent application brought by the Applicant against the 1<sup>st</sup> Respondent.

[2] The Applicant is seeking an order in the following terms;

- “1. Dispensing with the normal and usual requirements set out in Rules of Court relating to notices and services of documents and that this matter be heard as one of urgency.

2. That a *Rule Nisi* do hereby issue calling upon the Respondents to show cause why an order in the following terms should not be made final, and on a date to be determined by the above Honourable Court.
  - 2.1 Directing the Respondents to uplift the suspension of the Applicant in accordance with Section 194 (4) of the Constitution of Swaziland.
  3. Costs of Application.
  4. Further and or alternative relief.”
- [3] The application is opposed by the 1<sup>st</sup> Respondent on whose behalf an Answering Affidavit was filed and deposed thereto by Allen McFadden, who stated therein that he is the Executive Secretary of the Civil Service Commission.
- [4] The Applicant thereafter filed his Replying Affidavit.
- [5] Both Counsel filed Heads of Argument and the matter was argued before the court on 15<sup>th</sup> June 2012.
- [6] The Respondents initially raised points of law relating to urgency. These points of law were however later abandoned, rightfully so, the court having

already opened its doors to the Applicant and allowed the filing of the Answering Affidavit and the Replying Affidavit

[7] **Background facts**

The Applicant is a Civil Servant. He was first employed by the Swaziland Government in 1998 as a Herdsman under the Ministry of Agriculture and was stationed at Lavumisa Ranch.

[8] In 2004 he was promoted to the position of Farm Foreman at Mpala Ranch. In November 2009 he was arrested and charged with stock theft. The criminal trial has, however, not been concluded two years seven months later.

[9] The Applicant was on 15<sup>th</sup> December 2009, suspended on half pay by the Civil Service Commission. The letter of suspension is specific that the Applicant was being suspended on half pay pending the finalization of the criminal case.

[10] The Applicant is therefore still under suspension with half pay as the criminal case has not yet been finalized. The Applicant has thus come to the Industrial Court to seek its intervention.

[11] **Applicant's Arguments in Court**

The Applicant's argument before the court was that he is a public officer and has been placed on suspension for a period well over six months and that this is in violation of **Section 194 (4) of the Constitution of the Kingdom of Swaziland** which provides that the matter of public officer who has been suspended shall be finalized within six months failing which the suspension shall be lifted.

[12] **Respondents Argument in Court**

On behalf of the Respondents it was argued that:-

12.1 **Section 194 (4)** is not applicable in the present case as the Applicant's matter is not pending before the Civil Service Commission but it is pending before the Magistrate's Court.

12.2 There is therefore no matter before the Civil Service Commission to finalize. The Civil Servant Commission can only finalize a matter of a Civil Servant who has been

suspended as a holding operation pending disciplinary enquiry. For these submissions the Respondents' counsel relied on the **High Court case of Siphon Eric Thwala v. The Civil Service Commission and 2 Others, Civil Case No. 2691/2007 (unreported).**

[13] **Analysis of the Facts and the Law Applicable:**

The Applicant has approached the Industrial Court in his capacity as the employee of the 1<sup>st</sup> Respondent. The Applicant was first employed by the 1<sup>st</sup> Respondent in 1998. He is still under the employment of the 1<sup>st</sup> Respondent, though this has been punctuated by the current suspension on half pay.

[14] It is the employer's right and prerogative to discipline or suspend its employee. Normally, a suspension may take one of two forms; it may be imposed by the employer as a holding operation pending disciplinary action or it may be imposed as a form of disciplinary penalty.

**(See: John Grogan: Workplace Law eighth edition at page 102).**

[15] In the present application there was no evidence, nor was it suggested during the submissions that the employer, 1<sup>st</sup> Respondent, intends to take any disciplinary action against the Applicant. The suspension is therefore clearly not a holding operation that is necessary for good administration at the 1<sup>st</sup> Respondent's workplace pending the disciplinary hearing of the suspended employee.

[16] Secondly; the present suspension was not imposed on the Applicant as a form of a disciplinary penalty. This was clear from the fact that the Applicant had not been subjected to a disciplinary hearing process before the suspension was imposed. The suspension of the Applicant therefore is neither a holding operation nor a disciplinary penalty.

[17] Seeing that the suspension of the Applicant did not fit in any of the normal categories of suspension mentioned above, the Respondents' Counsel told the court that the Applicant was suspended in terms of **Regulation 39 (1) of the Civil Service Board (General) Regulations of 1973**. Regulation 39(1) provides that;

**“ Interdiction.**

**If the Minister considers that the interests of the service require that an officer should cease forthwith to exercise the powers and functions of his office, he may interdict him from the exercise of those powers and functions; if disciplinary**

**proceedings are being taken or are about to be taken or if criminal proceedings are being instituted against him.”**

Regulation 38(3) provides that;

**“If criminal proceedings are instituted against an officer in any court, disciplinary proceedings upon any grounds involved in the criminal charge shall not be taken pending the result of criminal proceedings.”**

[18] As already pointed out, there was no evidence before the court, nor was it suggested that the 1<sup>st</sup> Respondent intends to institute a disciplinary hearing against the Applicant. The letter of suspension Annexure “A” of the Applicant’s Founding Affidavit, is clear that the Applicant was suspended pending the finalization of the criminal trial.

[19] From a labour law perspective however, the unfairness of these regulations is that the period of the interdiction or suspension of the public officer is dependant upon an unknown future event which is outside the control of the employer. It is clearly unfair and unjust to suspend an employee for an indefinite period. The powers of the employer have however now been fettered by the Constitution.



[20] In terms of **Section 194(4) of the Constitution of the Kingdom of Swaziland.**

**“The matter of a public officer who has been suspended shall be finalized within six months failing which the suspension shall be lifted.”**

[21] The Constitution has therefore come to the rescue of public officers who are put on suspension for indefinite periods. It now limits the period of suspension of a public officer to six months and if the matter for which the public officer was suspended is not finalized within the six months period, the suspension shall be lifted.

[22] It is important to observe the following from the provisions of **Section 194 (4) of the Constitution:**

**22.1 The “matter” is not specified. It follows therefore that it could be any matter; criminal, civil or disciplinary matter.**

**22.2 If the framers of the Constitution wanted to limit the ‘matter’ to a specific matter, they would undoubtedly have said so.**

22.3 The use of the word **“shall”** means that it is imperative that the matter be finalized within the six months period.

22.4 The use of the words **“failing which the suspension ‘shall’ be lifted”**, means that it is imperative that the suspension be lifted if the matter has not been finalized within six months.

[23] It is also important to observe further, the following aspects:

23.1 The Applicant in the present application is not seeking an order that the Civil Service Commission stops or causes the criminal trial of the Applicant to be finalized. That is clearly beyond the jurisdiction of the Civil Service Commission and that is not the case of the Applicant before the court.

23.2 The Applicant was suspended by the Civil Service Commission and is asking the court to direct the Civil Service Commission to uplift the suspension because six months have elapsed and the matter for which he was suspended has not been finalized.

23.3 After the lifting of the suspension, the criminal trial will continue as normal, and the Applicant has a duty

**to avail himself for the trial. There is no order sought against the Director of Public Prosecutions or the Magistrate's Court that is handling the criminal trial.**

[24] The argument by the Respondents' Counsel was premised on the unfortunate misunderstanding of the Applicant's prayers before the court. The Applicant is not asking the Civil Service Commission to stop or conclude the pending criminal trial. The Respondents' Counsel also put too much reliance on the High Court case of **Sipho Eric Thwala v. The Civil Service commission and 2 Others (op.ct)** without distinguishing that case with the present application before the court. It is also not correct to say that there is no matter pending before the Civil Service Commission that it must finalize. The criminal matter is pending before the Magistrate's Court, but the disciplinary matter is pending before the Civil Service Commission. The Constitution of the Kingdom of Swaziland which is the supreme law of Swaziland and superior to the Civil Service Board (General) Regulations provides that the matter, in this case the disciplinary matter of the Applicant, should be finished within six months.

[25] In the case of **Nkosingiphile Simelane v. Spectrum (Pty) Ltd t/a Master Hardware, case No. 681/2006 (IC)** dealing with a similar question of

suspending an employee indefinitely pending the finalization of a criminal case, the court pointed out the following in paragraph 24:

**“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 (See Mpikheleli Sifani Shongwe v. Principal Secretary, Education and Others (IC case no. 207/2006); nor for that matter does the acquittal of the employee preclude the employer from taking disciplinary action against the employee.”**

[26] I fully align myself with the above observations by the Industrial Court.

[27] It is the judgement of the court therefore that the suspension of the Applicant is unfair and unreasonable and ought to be lifted forthwith for the following reasons:

**27.1 The suspension is for an indefinite period and is clearly unfair and unduly oppressive on the applicant and is not in accord with good industrial relations at the workplace.**

- 27.2 The suspension is unreasonable in that it is dependant on an unknown future event which the employer has no control over.
- 27.3 The Regulations are inferior to the Constitution. The Constitution which is the Supreme law of Swaziland, has put a limit to the period of suspension of a public officer. The provisions of the Constitution should therefore prevail.
- 27.4 The indefinite suspension is unreasonable because it is based on an unknown future event which will not even determine the future employment status of the Applicant. Whether the Applicant is eventually convicted by the criminal courts, the employer will still have to conduct its own enquiry and subject the Applicant to its own internal disciplinary hearing on the basis of which, if it finds the Applicant guilty of any misconduct, it will be only then that it may dismiss the Applicant.
- 27.5 There being in existence an employer–employee relationship between the Applicant and the 1<sup>st</sup> Respondent, the fate of the Applicant’s employment status will be determined by the employer, and not the criminal courts.

**27.6 By suspending the Applicant, the Civil Service Commission was exercising the inherent powers of disciplinary control that it has over the Applicant. The suspension of the Applicant set in motion the disciplinary process of the Applicant. This process has not been finalized as the Applicant is still on suspension. It is therefore incorrect to argue that there is no matter pending before the Civil Service Commission to finalize. The criminal process and the disciplinary process are capable of running parallel to each other.**

[28] Taking into account all the foregoing observations, the Counsels' submissions and all the circumstances of the case, the court will make a final order in terms of prayers 2.1 and 3 of the Notice of Motion.

[29] The members agree.

**NKONYANE J**

**For Applicant : Mr. M. Mkhwanazi  
(Mkhwanazi Attorneys)**

**For Respondents : Mr. M. Dlamini  
(Attorney-General's Chambers)**