**IN THE INDUSTRIAL COURT OF SWAZILAND**
**JUDGEMENT**

**CASE NO. 173/2012**

In the matter between:-

**PURENE NDIMANDE** **APPLICANT**

And

**CERAMIC TILE MARKET SWAZILAND** **1ST RESPONDENT**

**MR SIKHUMBUZO SIMELANE** **2ND RESPONDENT**

**Neutral Citation** : *Purene Ndimande V Ceramic Tile Market Swaziland and Another (173/2012) [2012] SZIC 173 (06 June 2012)*

**Coram** : **DLAMINI AJ,**
*(Sitting with D. Nhlengetfwa & P. Mamba- Nominated Members of the Court)*

**Heard** : **24 May 2012**

**Delivered** : **06 June 2012**

***Summary:*** ***Labour law – Industrial relations – Applicant seeks to interdict incomplete disciplinary hearing –***

***She further seeks to review and set aside decision to suspend her without pay and the Chairpersons ruling on her preliminary point challenging the suspension - Court will intervene only in exceptional circumstances – Employer has to give employee reasons for varying initial suspension 'with pay' to 'without pay' after allowing her opportunity to make representations.***

[1] This matter served before this Court on a certificate of urgency. The Applicant seeks orders as follows;

- Declaring the suspension of the Applicant by the 1st respondent without a pre-suspension hearing wrongful and unlawful.
- Setting aside the ruling by the 2nd Respondent on a preliminary point raised at the hearing regarding the suspension of the Applicant.
- Interdicting the 2nd Respondent from proceeding with the disciplinary hearing pending the finalization on this application.
- Alternatively; that the disciplinary hearing be declared null and void by reason that she would suffer double jeopardy if it is allowed to proceed.
- Costs of suite on an attorney/client scale.

[2] The matter was first mentioned before this Court on the 18th May 2012, and following application by the Applicant's representative we issued an interim order, the effect of which was that the matter was enrolled as urgent and further interdicted the hearing until finalization of the application. The 1st Respondent's Attorney then filed a rescission application since the interim order was granted in

their absence. The rescission application was filed together with the 1st Respondents papers in opposition to the main application.

[3] The Applicant states as follows in her founding affidavit: she is employed by the 1st Respondent in the capacity of Sales Supervisor and Cashier. Following the disappearance of money for sales at her workplace investigations were instituted. The investigations culminated in her and two of her colleagues undergoing a lie detector test. On the 17th March 2012 the Managing Director of the 1st Respondent removed the Applicant from her position and substituted her with another employee. Then on the 05th April 2012, she was issued with a suspension letter. Her suspension was without pay. On the same day, she wrote to the Managing Director challenging the suspension without pay since same had been effected without affording her a hearing. In the interim she had also been served with a notice to attend a disciplinary hearing scheduled for the 11th April 2012.

[4] On the 11th April 2012, she received correspondence from the Managing Director, this time advising her that her management had reviewed her suspension without pay to one with full pay, pending the finalization of the hearing. The letter further pointed out that management was 'reserving the right to vary the suspension with pay to one without pay, if needs be, and after following due process'.

[5] When the hearing started the Applicant, through her representative, raised preliminary points which were however dismissed by the Chairperson of the hearing, the 2nd Respondent in these proceedings, and the hearing proceeded. As the hearing proceeded the Applicant was again served yet another

correspondence from the company advising that the company was contemplating varying her suspension with full pay to 'suspension without pay'. She was therefore requested to make written representations on why the company should not suspend her without pay pending finalization of the disciplinary hearing (for a period not exceeding one month). Interestingly the salutation at the end of this letter indicated that it was from the present attorney of the Respondent company – Mr. Ndumiso Mthethwa. The Applicant's representative questioned the propriety of the same Mthethwa also representing the company in court and in our view there is nothing to preclude him. Perhaps if he were chairing the hearing then it would be ethically improper.

[6] The Applicant responded to this letter through her representatives in a strongly worded letter dated the same date. Her representatives took exception at the harassment of their client and further demanded that their client be treated fairly. Indeed on 11 May 2012, the Applicant's suspension was varied from one 'with pay' to one without pay with effect from 07 May 2012 and for a period of one month from that date. It is for the afore stated reasons that the Applicant has now approached this Court seeking to assert her rights.

[7] As pointed out above, the 1st Respondent vehemently opposes the present application. Initially the 1st Respondent had filed a rescission application which was however to be abandoned when the matter was argued. In opposing the application the 1st Respondent has raised points of law as follows:

- That the matter is not urgent and,

- That the Applicant has failed to satisfy the requirements of a final interdict or alternatively a prima facie right.

[8] On the date set for arguments both the *points in limine* and the merits of the matter be argued simultaneously. Attorney Mthethwa argued that the urgency is self created especially in relation to prayers 2.1 and 2.2, on reason that the ruling by the 2nd Respondent was issued on the 20th April 2012, almost a month before the Applicant challenged same in this Court.

[9] On the suspension without pay Mthethwa's argument was to the effect that the 1st Respondent, as employer, is entitled to suspend the Applicant employee without pay in terms of section 39 of the Employment Act, 1980 (as amended), and for a period not exceeding one month. Counsel further submitted that an employer is entitled to vary a suspension 'with pay' to one 'without pay' if the employer is of the view that the disciplinary hearing may lead to a dismissal or if the employee is using delaying tactics in having the hearing concluded. 1st Respondent's counsel also argued that for this court to intervene at this stage the Applicant has to demonstrate and prove that her right to a fair hearing was being infringed. As such, she had failed to satisfy the requirements of an interdict.

[10] Mr. Dlamini, for the Applicant, submitted and argued that the main reason for bringing the present application on a certificate of urgency was the variation of the initial suspension with pay to one without pay. He went on to argue that the Applicant was not even given reasons for the variation of the suspension. Dlamini further submitted that the reason the Applicant sought to interdict the hearing was so that the Court could adjudicate on the variation of

the suspension. Otherwise the Applicant was very eager to get the hearing over and done with so that she could carry on with her life and remove the turmoil surrounding her.

[11] It is trite that the tenets of natural justice require that any employee who is subjected to a disciplinary process by an employer, rightfully exercising its prerogative, must be accorded a fair hearing in full compliance with these tenets. Whether it is at the pre-hearing inquest or later stages of the disciplinary process there is no excuse whatsoever for non- compliance with them. And ordinarily a court will not interfere with an employer's prerogative power of disciplinary control over an employee but in exceptional circumstances, where grave injustice might otherwise result or where justice might not by other means be obtained, a court will interfere with this prerogative.

[12] The question of whether a court intervenes or not depends on the facts and circumstances of each case. In the ***SAZIKAZI MABUZA V STANDARD BANK OF SWAZILAND LIMITED AND ANOTHER*** case (IC 311/2007), the court had this to say on this issue;

> ***"The attitude of the courts has long been that it is inappropriate to intervene in an employer's internal disciplinary proceedings until they have run their course, except in exceptional circumstances".(Court's emphasis).***

[13] The hearing of the Applicant herein has not run its course. The law is that this court will only intervene in an incomplete hearing only in exceptional circumstances – that is where grave injustice might result or where justice might not by other means be attained.

[14] In the present matter the only reason the Applicant approached this court in the manner she did was because her suspension with pay had been varied to without pay. Otherwise and according to her evidence and submissions by her representative, she was content with continuing with the hearing to finality. But for the variation she would not have challenged the Chairperson's ruling or sought to have the disciplinary hearing itself declared a nullity.

[15] The established facts of this matter are that whilst the hearing against the Applicant was proceeding, the employer wrote to the employee seeking reasons why the suspension should not be varied to without pay. No reasons were forthcoming for the sudden change, and especially because when the initial suspension was varied to with pay, this was to be until finalization of the hearing against her. Nonetheless the Applicant's present representatives replied on her behalf stating that in their view this issue had been addressed and that what the Applicant had raised before should be suffice. The employer however went ahead and effected the variation.

[16] As pointed out, no reasons were given for the variation except for Mthethwa's arguments in court that the employer is empowered by section 39 of the Employment Act, 1980. But that is not enough. At the least, the Applicant employee was entitled to be informed of reasons why the suspension was now being varied. It is our view therefore that it was incumbent on the 1st Respondent to put forth reasons why it has decided vary the suspension and not just to rely on its right to suspend in terms of section 39. This we say especially since the initial variation was with full pay and until the disciplinary hearing had been finalized. If for instance new information had come to the employer's attention which

would fortify the case against the employee she was entitled to be informed of such and allowed to make representations on why her suspension should not be varied based on the reasons proffered by the employer.

[17] Even the court is not aware of the reasons that made the employer decide to alter the suspension. In its answering affidavit the employer through its Managing Director makes reference to results of a lie detector test, which however was not attached thereto. Even then, the evidence before this court is that the employer already had these results before it decided to prefer the charges against the employee and suspend her with full pay pending the finalization of the hearing against her. The employer could not then suddenly decide to alter the suspension relying on these results which it had all along and without giving reasons.

[18] It is not the duty of this Court to speculate as to the reason(s), if indeed there were any, why the employer in this matter decided to vary the suspension of the Applicant employee. This duty lies with the employer. And before this Court, we emphasize that it was incumbent on the 1st Respondent to place evidence which would establish on a balance of probabilities that the employer had valid and lawful reasons for varying the suspension. We have noted as well that the Applicant made representations through her representatives after receiving the letter calling upon her to do so. The employer, for some reason, decided to ignore such representation and proceeded to suspend her as if she had failed to do so. Clearly this amounts to an unfair labour practice which this court cannot condone.

[18] On the ruling of the 2nd Respondent the principle is that: for this court to intervene at this stage, it has to be satisfied that the chairperson of the inquiry did not exercise the discretion bestowed on him judiciously. It is without doubt that the duty resting on the chairperson of a disciplinary inquiry to exercise his discretion 'judiciously' means that he is at law required to listen to the relevant evidence, weigh it to determine what is probable and reach a conclusion based on the facts and the law. And where it can be proved that indeed the chairperson applied his mind to these matters, the court cannot interfere – even if it disagrees with his conclusions on the facts or the law. This court has considered the findings of the chairperson of the disciplinary inquiry and has noted that he has exercised his discretion judiciously. Whether or not this court agrees with his conclusion on the facts and the law is not relevant for this judgement, suffice to state that this court finds no *mala fides*, improper motive, arbitrariness or caprice against the 1st Respondent.

[19] It is therefore the finding of this court that the variation of the Applicant's suspension from 'with pay' to 'without pay' was an unfair labour practice and unlawful in the circumstances of this case. It is a further finding of this court that the Applicant has not made out a case on the basis of which it should intervene and interdict the incomplete hearing against herself.

[20] The Court accordingly makes orders as follows;

***a) The suspension without pay of the Applicant is hereby set aside and substituted with a suspension with full pay.***

***b) The 1st Respondent is directed to remunerate the Applicant for the period during which she was under the purported suspension without pay.***

***c) The rest of the Applicant's prayers in her notice of motion be and are hereby dismissed.***

***d) We make no order as to costs.***

The members agree.

**DELIVERED IN OPEN COURT ON THIS 06TH DAY OF JUNE 2012.**

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**T. A. DLAMINI**

**ACTING JUDGE – INDUSTRIAL COURT**

*For Applicant : Mr. A. Dlamini.*

*For 1st Respondent : Mr. N. Mthethwa.*
*For 2nd Respondent : No appearance*