IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO.450/2014

In the matter between:-

SIKHUMBUZO DLAMINI Applicant

And

GMR FREIGHTS (PTY) LTD Respondent

Neutral citation: Sikhumbuzo Dlamini vs GMR Freights (PTY) Ltd (450/2014) [2016] SZIC 06 (2016)

Coram: D. MAZIBUKO

(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Heard: 15th October 2015

Delivered: 12th February 2016

Summary: Labour Law: Indefinite suspension of an employee from work- without pay. Suspension had lasted 19 months at the time of hearing. Employer failed to give employee a chance to make representations before suspension order was made.

Held: Suspension is irregular as it fails to comply with Section 39(1) and (2) of the Employment Act.

Held further: Suspension is irregular as it is in breach of the audi alteram partem rule.

Held further: Suspension is set aside. Applicant entitled to reinstatement and reimbursement of lost salary.

JUDGMENT

1. The Respondent is GMR Freight (Pty) Ltd a limited liability company operating as such in Mbabane town, Swaziland. The Applicant is Sikhumbuzo Dlamini an adult male employee of the Respondent.

2. The Applicant was employed by the Respondent in June 2005 as a casual employee. In the year 2009 the Applicant was engaged as a permanent employee. At the time of instituting this claim the Applicant earned a

salary of E2,100.00 (Two Thousand One Hundred Emalangeni) per month.

3. On the 26th June 2014 the Respondent wrote to the Applicant a letter in which the Applicant was accused of failing to account to the Respondent for monies collected from various customers of the Respondent. The sum involved was E3, 356. 04 (Three Thousand Three Hundred and Fifty Six Emalangeni Four Cents). The Respondent's letter is marked annexure 'SK1'. The Applicant was given one (1) day to reply to that accusation. The Respondent further threatened inter alia, to suspend the Applicant from work without pay if there is a *prima facie* case of misconduct against him.

4. The Applicant replied to the Respondent by letter. That letter is marked annexure 'SK2'. The Applicant admitted the accusation as contained in annexure SK1. However, the Applicant challenged the Respondent's proposition to suspend him from work without pay. Inter alia, the Applicant mentioned that he had financial commitments that demanded of him to earn a salary every monthly. He added that without a salary he would not be able to maintain his family. He pleaded for the Respondent to relent from the threat aforementioned. What the Applicant was

pleading for was that- the threat of suspension without pay be abandoned and that he be permitted to continue working whilst he refunded the Respondent in instalments- the amount owing.

5. On the 30th June 2014 the Applicant signed a document marked SK3, in which he authorized the Respondent to withhold payment of his salary for June 2014 as part payment of the debt that the Applicant owed the Respondent -as admitted in annexure SK2.

6. On the 30th June 2014 the Respondent charged the Applicant with misconduct and further suspended the Applicant from work without pay. The Applicant was suspended pending further investigations of allegation of misconduct. The suspension as well as the list of charges is contained in a letter marked SK4. Annexure SK4 reads thus:

> *"27th JUNE 2014*
>
> *Mr. Sikhumbuzo Dlamini*
>
> *Sidwashini Industrial Site*
>
> *Mbabane*
>
> *Swaziland*
>
> ***RE: Letter of Suspension***

Dear Mr. Sikhumbuzo Dlamini

It has been alleged that you collected funds from clients for payment of VAT on behalf of the company and used said funds for your own personal use. Your conduct was in direct violation of the GMR Freights Swaziland (PTY) LTD DISCIPLINARY CODE AND PROCEDURE.

As such charges categorized as a GRADE THREE OFFENCE – GROSS MISCONDUCT OF THE DISCIPLINARY CODE AND PROCEDURE, have been levied against you for breach of clauses inclusive but not limited to the following;

- *5.3.7 – stealing property belonging to either an employee or to the Company, or to a customer*
- *5.3.7 – stealing property belonging to either an employee or to the Company, or to a customer[sic]*
- *5.3.9 – Dishonesty*
- *5.3.37 - Corruption, bribery, including attempts at bribery and acceptance of a bribe, theft, fraud, dishonesty and making confidential information known.*
- *5.3.42 – self enrichment; enriching oneself to the detriment of the company, its interests or clients.*

You are hereby suspended without pay as of 30/06/2014 pending further investigations of the allegations against you.

A copy of this letter will be placed in your personnel file. You have the right to respond in writing to this information or rebut this suspension. If you choose to respond, you have until 30/06/2014. Your response, if any, will be included in the file. It will be assumed that you have waived the right to respond if you do not take advantage of the mentioned above.

Sincerely,

_____

Jabulane Magagula
Manager"

(Record page 13)

7. On a certain date (unknown to both parties) but before 21st August 2014, the Applicant was invited through a telephone call, to attend a disciplinary hearing scheduled for the 21st August 2014 in Mbabane town. At the time of the call the Applicant was at Mankayane town where he was then or temporarily, resident. It is not clear who made the call on behalf of the Respondent. The Applicant informed the Respondent's representative that he could not travel from Mankayane

to Mbabane to attend the disciplinary hearing because he had no money to pay for the trip. It is common cause that these two (2) towns are distant from each other and that the Applicant required transport to get to and from the venue designated for the disciplinary hearing. The issues so far are not in dispute. The Applicant added that he had not been paid since June 2014, he therefore had no money or means to undertake the trip to Mbabane.

8. The Respondent raised two (2) points *in limine* and further addressed the merits in its answering affidavit. The first point *in limine* reads thus: "*In Limine 1*

4. Reference is made to the initial Affidavit filed by the Applicant's [sic] on the 8th September 2014 and it is brought to the Honourable Court's attention that the Applicant, in that Affidavit, the Applicant did not make material disclosures to the Honorable Court and disowned a letter he had signed admitting to have taken the Respondent's monies for his own use. The letter is annexure "B" thereto.

5. The Applicant further did not disclose that he had admitted his dishonesty and written a letter to that effect which was then

provided to the Honourable Court by the Respondent as annexure "A" to Respondent's Answering Affidavit.

6. The Applicant in the current Application still under oath now changes his version and admits having effectively stolen monies from the respondent.

7. In the circumstances the Applicant's conduct bordered on perjury and approaches the Honourable Court with unclean hands."

(Record page 18)

9. The Respondent has filed comprehensive heads of argument. The Court appreciates the diligence shown by the Respondent's Counsel in this matter. In the heads of argument the Respondent has again dealt with the issue of 'unclean hands'. An extract from the heads reads thus at page 4:

"*10. Furthermore the Applicant has failed to make material disclosure to this Honourable Court and is attempting to manipulate the court in that; he has failed to inform the Honourable Court that he confessed to the Respondent of having stolen money for his own use. May I direct the Court to "annexures A and B" of the*

Respondent's Answering Affidavit in the earlier application.

11. It is from the above that we submit that the Applicant has approached this court with dirty hands. The Mulligan v Mulligan judgment is authority to this effect. We further submit that the Honourable Court should exercise its discretion against the applicants' manipulative conduct and dismiss the application."

9.1 The Respondent's argument is that in September 2014, in another matter, the current Applicant filed an urgent application against the current Respondent before this Court. The Applicant (in that matter) failed to prove urgency. That application was dismissed. That application shall be referred to as the 1st application and the present application as 2nd.

9.2 The following prayer appears in both applications:

"*1. Declaring the suspension of the Applicant without pay unlawful, and therefore null and void ab initio and the at [that] Applicant be reinstated to his employment with immediate effect."*

(Record page 1)

9.3 In the 1st application it is alleged that the Applicant failed to disclose to the Court that he had confessed to theft of the Respondent's money. For that reason it is alleged that the Applicant has approached the Court with dirty hands and consequently the 2nd application must be dismissed.

10. The 1st application was filed in Court in September 2014. The parties had to exchange Court papers and make preparation for arguments. The matter was argued on the 24th November 2014. A ruling was delivered on the 25th November 2014 and it was in favour of the Respondent. The Applicant had failed to prove urgency and the application was dismissed on that prayer. The merits of the application were not dealt with. The Applicant subsequently filed a fresh application (2nd application) on the 2nd April 2015. The 2nd application was filed in terms of rule 14 of the Industrial Court Rules. The 2nd application is currently before Court for determination.

11. In the 1st application, the Applicant did disclose that he intentionally used the Respondent's funds without authorization. This admission appears in annexure SD1 and reads thus:

> *"27/06/2014*
>
> *GMR Freights Swaziland*
> *P.O.Box 6488*
> *Plot 1003, Sidwashini Industrial Site*
> *Mbabane*
> *Swaziland*
> *H100*
>
> *RE: AUTHORIZATION OF STOP ORDER*
>
> *Dear Sir*
>
> *I, Sikhumbuzo Dlamini.*
>
> *Hereby, unreservedly authorize GMR FREIGHTS (SWAZILAND) (PTY) LTD, to withhold the payment of my June 2014 wages in lieu of part payment of company funds, intentionally and wilfully taken by myself for personal use.*
>
> *Signed : [Signature appended]*
>
> *Date : 30.06.2014"*

11.1 In the answering affidavit which the Respondent filed in the 1st application, the Respondent attached a copy of a letter marked annexure A, which allegedly was written by the Applicant. The letter is undated but deals with the same subject as in annexure SD1.

11.2 The Applicant did not attach annexure A to his founding affidavit in the 1st application. The Respondent's argument is that, that omission was deliberate, the Applicant intended to mislead the Court. Therefore, the Applicant has approached the Court with 'unclean hands'. Since the 2nd application is between the same parties as in the 1st application and the cause of action as well as the prayers is similar to the 1st application, the Court should seize the moment and penalize the Applicant for approaching the Court with 'unclean hands'. The Court should dismiss the Applicant's application in order to mark its disapproval for his misconduct aforementioned.

11.3 The absence of annexure A from the founding affidavit in the 1st application would not have made any difference in determination of the real issue that was and still is before

Court. The Court is focused on the legality of the suspension and not on the events preceding it. The Court is not persuaded that failure on the Applicant's part to attach or mention annexure A was intended to mislead the Court.

12. The Court acknowledges the doctrine of 'clean hands' as a valid legal principle which should be enforced in an appropriate case. The Court is not persuaded that the doctrine applied in this instance. The Court is further not persuaded that the Applicant has committed perjury or attempted perjury as the Respondent had alleged. There is no evidence supporting the Respondent's accusation.

13. The Respondent referred the Court to the case of MULLINGAN VS MULINGAN 1925 WLD 104 and quoted the following extract in page 167.

> *"Before a person seeks to establish his rights in a Court of law he must approach the Court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the Court (whether criminal or civil) to be given effect to, he cannot ask the Court to set its machinery in motion to protect his*

civil rights and interests. Were it not so, such a person would be in a much more advantageous position than an ordinary applicant or even a peregrinus, who is obliged to give security. He would have all the advantages and be liable to none of the disadvantages of an ordinary litigant, because, if unsuccessful in his suit, his successful opponent would be unable to attach either his property, supposing he had any, or his person, in satisfaction of his claim for costs. Moreover, it is totally inconsistent with the whole spirit of our judicial system to take cognizance of matters conducted in secrecy…. Were the Court to entertain a suit at the instance of such a litigant it would be stultifying its ows processes and it would, moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets law and order in defiance."

This Court agrees with the principle as laid down in the Mulligan case. This principle is however not applicable in the matter before Court. The Applicant has not made it impossible for the processes of the Court to be given effect to, nor has he set the law and order in defiance. The Applicant's argument on the doctrine of 'clean hands' accordingly fails.

14. The second point *in limine* reads thus:

> "*In limine 2*
>
> *12. This Application is not properly before the Court. It has not been brought on the basis of Urgency nor has the dispute been reported to the CMAC.*
>
> *13. This Court therefore cannot take cognizance of this dispute.*
>
> *14. Wherefore I pray that Applicant's Application be dismissed."*
>
> (Record pages 19 – 20)

15. The Respondent's argument is that, this matter is not properly before Court in that it was not reported to CMAC for conciliation prior to it being filed in Court for adjudication, as required by the Industrial Relations Act No.1/2000 as amended (hereinafter referred to as the Act). By CMAC is meant the Conciliation, Mediation and Arbitration Commission established in terms of Section 62(1) as read with 64(1) (a) and (b) of the Act.

15.1 In Section 64(1) the Act provided as follows:

"64(1) The Commission shall -

(a) …

(b) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;

(c) Where a dispute referred to it remains unresolved after conciliation, arbitrate the dispute if -

(i) this Act requires arbitration;

(ii) this Act permits arbitration and both parties to the dispute have requested that the dispute be resolved through arbitration; or

(iii) the parties to a dispute in respect of which the Industrial Court has jurisdiction consent to arbitration under the auspices of the commission; and …"

15.2 Section 64(1) confers power on the Commission to attempt to resolve through conciliation any dispute that has been referred to it in terms of the Act. If conciliation fails, arbitration may be resorted to, provided it is agreed to by the parties and is legally permissible. Section 64(1) of the Act does not make it

mandatory for every dispute between employer and employee to be reported to CMAC for conciliation. However, once a dispute is reported to CMAC for conciliation, CMAC is enjoined to attempt to resolve that dispute in compliance with the provisions in the Act. The Act has left the door open for certain distinguishable matters to be reported direct in Court for adjudication without the need to submit them to CMAC for conciliation.

15.3 At the expiry of the time period allotted to CMAC to resolve the dispute, CMAC shall issue a certificate indicating whether or not the dispute has been resolved. Where the dispute has not been resolved, CMAC is obligated to issue a 'Certificate of Unresolved Dispute'. The aggrieved party may then apply to the Industrial Court for determination of the dispute. The aggrieved party would have to attach the 'Certificate of Unresolved Dispute' to his application. The above stated- is the general rule as provided for in Rule 14(6) (b).

16. The Act must be read in conjunction with the Industrial Court Rules. Currently the Industrial Court Rules of 2007, promulgated by Legal Notice No.165 of 2007 are applicable. Rule 14 has introduced an exception to the general rule. Rule 14 provides as follows:

> *"14. (1) Where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of notice of motion supported by affidavit.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) …*
>
> *(5) …*
>
> *(6) The applicant shall attach to the affidavit –*
>
> *(a) all material and relevant documents on which the applicant relies; and*
>
> *(b) [i] in the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission,*

[ii] unless the application is solely for the determination of a question of law."

16.1 It should be noted that the figures in square brackets and in Roman numerals [i] and [ii] are not in the rules, but have been provided by Court for ease of reference. In the Court's view it is easier to read rule 14(6) (b) when these two (2) clauses are rendered as separate units, since they represent two (2) alternative dispute resolution mechanisms.

16.2 Rule 14(6)(b) [ii] provides an option to a potential litigant who has an application that is solely for the determination of a question of law to either report a dispute to CMAC for resolution or to file an application direct with the Court for adjudication.

16.3 Sub-rule 14(6)(b) [ii] clearly provides an exception to the general rule that is stated in sub-rule 14(6)(b)[i]. The word 'unless' in sub-rule 14(6)(b)[ii] clearly indicates a lawful departure from the legal route that is provided for in sub rule 14 (6) (b) [i].

16.4 The current rules came into force on the 14th December 2007 which is the date the rules were published in the Government

Gazette No. 130 volume XLV. The predecessor to the current rules are the Industrial Court Rules of 1984, which were promulgated under Legal Notice No.8/1984. The 1984 rules were revoked by Legal notice 165/2007 and in the same Legal Notice the current rules were promulgated. The 1984 rules were preceded by the 1982 rules. The 1982 rules were revoked on the 27th January 1984, when the 1984 rules came into force. The relevance of the said rules will be dealt with later in this judgement.

17. The Respondent referred to several decided cases in support of the point raised *in limine* and urged the Court to follow the reasoning in those cases.

17.1 The Respondent referred to an extract in the case of SWAZILAND FRUIT CANNERS (PTY) LTD VS PHILLIP VILAKATI AND BERNARD DLAMINI SZICA case no. 2/1987 (unreported), and it reads thus;

"Not every party to an industrial dispute is entitled to have the dispute determined by the Industrial Court. Looking at the matter generally, the policy of the Industrial Relations

Act is that before a dispute can be ventilated before the Industrial Court it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. Where conciliation is successful machinery exists for the agreement arrived at to be made an order or award of Court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only then, may application be made to the Industrial Court for relief."

(At pages 1-2)

This case was decided on the 6th May 1988.

17.2 The Court was further referred to the case of PHYLYP NHLENGETHWA AND OTHERS VS SWAZILAND ELECTRICITY BOARD SZIC case no. 272/2002 (unreported) which reads thus:

> *"We must add that the 2000 Act has since created a further structure in terms of Section 62 (1) of the Act, known as the Conciliation, Mediation and Arbitration Commission (CMAC) which is an*

independent body with the task of resolving disputes of this nature by way of conciliation, mediation and arbitration.

The creation of this institution has increased the need for the Industrial Court, to enforce strict observance of the dispute resolution procedures under Part VIII of the Act because we now have a more suitable structure of expeditiously, conveniently and less expensively resolving industrial disputes which otherwise find their way unnecessarily to this court, and in the process aggravating the backlog the court has suffered for a long time."

(At page 10)

This case was decided on the 1st November 2002.

17.3 The Respondent further referred the Court to the case of ANDREW McCARTER VS HUB SUPERMARKET (PTY) LTD SZIC case no. 78/2005 (unreported). At page 8 the Court stated the following *ratio decidendi*.

"The principle of the common law referred to by Mr. Smith are trite. They do not however supercede the rules of this court. In terms of the rules of this court and in particular rule 3(2) states 'the court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VII of the Act.'

Part VII of the Act has reference to the repealed Industrial Relations Act No.4 of 1980 dealing with the procedure of bringing an application to court. The present section is Part VIII of the Industrial Relation Act No.1 of 2000. In terms of the provisions of Part VIII of the Act, a dispute is referred to the Court after it has been referred to the Labour Commissioner, transmitted to CMAC for arbitration and a certificate of unresolved dispute issued.

In the present case, there was no evidence that the issue of overpaid profit bonuses was reported to the Labour Commissioner and dealt with by a

CMAC Commissioner and a certificate of unresolved dispute issued."

This case was decided on the 30th September 2005.

17.4 In the matter of SWAZILAND MANUFACTURING AND ALLIED WORKERS' UNION VS SWAZILAND BOTTLING COMPANY SZIC case no. 179/1998 (unreported) the Court stated the following *ratio decidandi*:

"It is correct that we have a wide discretion to disregard technicalities in favour of substantive justice, however, we are bound by precedent from the superior courts and are obliged to follow them unless we can distinguish them on facts and/or establish that such judgement was given in ignorance of any relevant Law applicable to the case at hand. With respect to submissions by counsel, we find no reason to depart from the reasoning of Hannah C.J. in the Fruit Canners case referred to earlier.

The applicants have not advanced any good reason why this court should exempt them from the provisions of Part VIII of the Act."

(At page 4)

This case was decided about September 1998.

18. The common thread that runs through all the cases that the Respondent has cited is that they were decided before the Industrial Court Rules of 2007 were promulgated. These cases were decided in accordance with the provisions of either the 1984 or 1982 rules. The 1984 or 1982 rules did not have an equivalent of the current Rule 14(6) (b) [ii]. In terms of the previous rules, it was mandatory to have a dispute conciliated before the Labour Commissioner or at CMAC (as the case may be) before it was brought to Court for determination – including a dispute that had been filed solely for the determination of a question of law. An exception to the general rule was when a matter had been brought to Court under a certificate of urgency. In a case where urgency had been proved, the Applicant was permitted by Court to bypass the conciliation requirement and report a dispute direct in to Court for determination. The cases that have been cited by the Respondent illustrate this procedure.

18.1 In the matter of Swaziland Fruit Canners (supra), the Court stated as follows at pages 3-4:

"*Rule 3(2) provides:*

> *'The Court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VII of the Act.' And, therefore, where the proper observance of the provision of Part VII is called in question, the Industrial Court has to determine the matter before it can proceed to the merits of the dispute."*

18.2 In the matter of Swaziland Electricity Board (supra), the Court stated the following at pages 6-7.

> *"Before the Industrial Court, unlike at the High Court an Applicant bears a further onus of showing why, he did not follow the laid down dispute [resolution] procedures found in Part VIII of the Industrial Relation Act No.1 of 2000. In particular, Rule 3 of the Rules of the Industrial Court reads as follows:*

'3(2) the Court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VII of the Act.'

This rule is now to be read to refer to Part VIII of the Industrial Relations Act No.1 of 2000 and in particular the reporting procedure provided under section 76(1) of the Act.

Since the landmark decision by Hannah CJ as he then was in Swaziland Fruit Canners (Pty) Ltd v Phillip Vilakati and Another the Industrial Court has religiously enforced Rule 3 (2) as read with the Industrial Relations Act from its 1980 Edition to the 1996 and the present one … One of the very few exceptions to this rule is where a party is able to prove urgency as the Applicant in casu have embarked to do."

18.3 In the matter the of Swaziland Bottling Company (supra) the Court expressed the following dictum at page 4:

"With respect to submissions by counsel, we find no reason to depart from the reasoning of Hannah C.J. in the Fruit Canners case referred to earlier.'

18.4 The aforementioned cases were correctly decided in accordance with Rule 3(2) of the revoked rules as well as the Industrial Relations Act which has since been amended. The current rules do not have an equivalent of the previous Rule 3(2). The Court is now guided by the current Rule 14 (6) (b)[ii] which clearly has opened a door that was previously closed to a litigant whose application was solely for the determination of a question of law. The Court can no longer follow cases that were decided in accordance with the revoked Rule 3(2).

19. The question before Court is solely for the determination of a question of law; whether or not the suspension of the Applicant without pay is valid. It is not necessary to report this dispute to CMAC for conciliation before it is brought to Court for determination. The dispute is properly before Court on the strength of Rule 14 (6) (b) [ii].

Rule 14(6) (b) has been dealt with in various judgments of the Courts some of which are quoted below.

19.1 In the case of THE ATTORNEY GENERAL VS SIPHO DLAMINI AND THULANI MTSETFWA SZICA case no. 4/2013 (unreported) the Industrial Court of Appeal explained the principle as follows:

> "*It seems to us that the scenario in casu is also exactly what is contemplated by Rule 14(6) (a) and (b) of the Rules of the Industrial Court, which prescribes that where no dispute of fact is reasonably foreseeable, in the sense that the application is solely for the determination of a question of law, the procedure laid down in Part VIII of the Act can be dispensed with.*"
>
> (At page 33 paragraph 81)

19.2 In the matter of ISAAC DLAMINI VS THE CIVIL SERVICE COMMISSION AND 2 OTHERS SZIC case no.338/2012 (unreported)

the Industrial Court stated as follows on a similar point:

> "*There is no need for the Applicant to report a dispute at CMAC or to follow the dispute resolution mechanism that is provided for in Part VIII of the Act, since the Applicant's claim can be determined solely on a question of law.*"

(At page 14 paragraph 21.3)

19.3 The Applicant has complied with Rule 14(6)(b)[ii] in the manner he lodged his application. The application is legally compliant. The point *in limine* taken by the Respondent is misconceived and is accordingly dismissed.

20. The Respondent's answering affidavit is deposed to by a certain Anele Dlamini who stated that she is the Respondent's manageress and is authorized to represent the Respondent in opposing the Applicant's application. The Respondent has partially conceded the Applicant's claim when it stated the following on affidavit:

"The Applicant can rightly complain that his suspension without pay should not have exceeded the 27th July 2014, however he cannot complain about not having received payment after the 21st August 2014 when the Applicant was invited to appear at a disciplinary hearing and failed to avail himself. The Applicant's position is that he is perfectly willing to attend in Mbabane to consult with his Attorney but he is not willing to attend a disciplinary hearing and then the Applicant attempts to abuse the Honourable Court by trying to extract an advantage of continued payment, whilst he refuses to attend a disciplinary hearing. The Honourable Court cannot allow itself to be manipulated in this fashion and should direct that the Applicant is the architect of his own misfortune and that he should attend his disciplinary hearing."

(Record page 20 paragraph 21)

21. It is common cause that the Applicant was invited to attend a disciplinary hearing scheduled for the 21st August 2014. Both parties appear to have forgotten the exact date that telephonic message was conveyed to the Applicant. The Respondent has conceded that between the 27th July and 21st August 2014 it irregularly subjected the Applicant to loss of pay following a suspension without pay-order that the Respondent had imposed. What appears strange in the Respondent's conduct is that the Respondent has neither reimbursed nor tendered to reimburse the Applicant for the loss of salary which admittedly was irregularly imposed. When an employer realises that it had unlawfully deprived an employee certain due payment, logic and common sense dictate that the employer should correct that error by either making immediate payment or satisfactory arrangement to pay. An admission of liability coupled with a refusal to make due payment is a product of absurd thinking.

22. The Respondent's argument is that the Applicant's failure to attend a disciplinary hearing on the 21st August 2014 was deliberate and inexcusable. This accusation is made because on a certain date

(unknown to the Respondent) the Applicant consulted with his attorney in Mbabane town. This statement by Ms Anele Dlamini is speculative and is therefore inadmissible. Ms Anele Dlamini does not say that she saw the Applicant in Mbabane town, alternatively consulting with his attorney in Mbabane town, on the 21st August 2014. There is no evidence to the effect that the Applicant was ever in Mbabane town on the 21st August 2014.

23. Ms Anele Dlamini continued to state the following:

> *"I deny that the Applicant could not attend his disciplinary hearing due to lack of money and I submit that without making the employer aware of his availability, the Applicant is now able to engage an Attorney and travel to Mbabane to sign Affidavits."*
>
> (Record page 21 paragraph 22)

It appears there are three (3) issues which Ms Anele Dlamini raised in her statement. The Court will deal with these issues in reverse order.

23.1 The third item mentioned by Ms Anele Dlamini in her affidavit is that:

"the Applicant is now able to engage an Attorney and travel to Mbabane to sign an affidavit."

Since it is not stated which affidavit Ms Dlamini is referring to, it is fair to assume that she is referring to the founding affidavit. It is a fact that the Applicant did depose to the founding affidavit before a Commissioner of Oaths at Mbabane on the 2nd December 2014.

23.2 The Applicant's argument is that he could not attend the disciplinary hearing at Mbabane on the 21st August 2014 because he did not have funds to travel to and from Mbabane town from Mankayane town. That fact did not mean that the Applicant would never travel to Mbabane town any time after the 21st August 2014. The relevant date for the disciplinary hearing was the 21st August 2014. The fact that the Applicant deposed to an affidavit before a Commissioner of Oaths at Mbabane on the 2nd December 2014 did not mean that he therefore had the money to travel to Mbabane on the 21st August, 2014.

23.4 The second item mentioned in the answering affidavit is that the Applicant did not make his employer aware of his availability. The disciplinary hearing had been scheduled for the 21st August 2014, and no alternative date was given. The 2nd December 2014 had not been designated for a disciplinary hearing. The Applicant was available on the appointed day and willing to attend a disciplinary hearing, but for transport shortage. There was no order issued that; on any day that the Applicant finds means to travel to Mbabane after 21st August 2014, he should attend a disciplinary hearing. That order would, in any event, have been irregular.

23.4 On the 1st item mentioned Ms Dlamini states as follows:

> *"I deny that the Applicant could not attend his disciplinary hearing due to lack of money."*

Ms Dlamini does not state the basis of her denial. Furthermore she does not furnish evidence to prove that the Applicant had the necessary funds or means to

travel to and from Mbabane on the 21st August 2014. The denial has no substance. A bare denial is bad in law.

24. The Applicant had not been paid his salary since June 2014. An employee who depends on a salary and who has not been paid that salary for three (3) months may fail to travel in order to attend a disciplinary hearing that is scheduled to proceed in a distant town. The Applicant did notify the Respondent about his predicament namely the lack of funds. The Respondent had an option either to provide funds (salary) or transport that would enable the Applicant to travel to and from the hearing- venue. The Respondent has failed to explain the reason it failed to take the necessary steps to secure the attendance of the Applicant at a disciplinary hearing. The Respondent was in contact with the Applicant through telephone which could have facilitated transport arrangements.

25. The Employment Act No.5/1980 (as amended by Act No.5/1997) provides as follows on this subject particularly in Section 39:

"Suspension of employee

39(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 sub section 2(b) [1(b)] the suspension without pay shall not exceed a period of one month."

25.1 The Applicant was clearly suspended in terms of Section 39(1) (b). Section 39(2) has erroneously referred, in the text, to Section 2(b) instead of 1(b).

25.2 In terms of Section 39(2), the suspension shall not exceed a period of one (1) month. This provision is clearly mandatory.

25.3 According to Section 39(1) (b) of the Employment Act (as amended) the suspension of an employee without pay for a period in excess of one (1) month is unlawful and should be set aside.

26. The Applicant was suspended without pay with effect from 30th June 2014. A period of one (1) month from 30th June 2014 should end on the 30th July 2014. The Applicant was entitled to payment of a salary in June 2014, but it appears, he waived his payment in favour of the Respondent in terms of annexure SK3 (aforementioned). The validity of that waiver has not been put in issue in this case. Effectively the unlawful suspension of the Applicant without pay began 1st August 2014 to date. The Respondent's decision to unlawfully suspend the Applicant without pay has caused the Applicant a loss of pay for nineteen (19) months as at the 29th February 2016.

27. The prolonged deprivation of the Applicant's salary beyond 30th July, 2014 is irregular and should be set aside. The Applicant is entitled to be reimbursed that salary at the rate of E2, 100.00 (Two Thousand One Hundred Emalangeni) per month. The Applicant is accordingly entitled to reimbursement of E39, 900.00 (Thirty Nine thousand Nine Hundred Emalangeni) as at the 29th February 2016. There is no evidence or allegation of salary increment (between the period under consideration) to which the Applicant was entitled.

28. Section 39(1)(b) has been subject of decision by the Industrial Court. In the case of NKOSINGIPHILE SIMELANE VS SPECTRUM (PTY) LTD t/a MASTER HARDWARE, SZIC case no. 681/2006 (unreported), the Court dealt with a case of a suspension of an employee without pay which had been implemented in breach of Section 39(1) (b) of the Employment Act. The Court issued the following *ratio decidendi* which this Court agrees with.

28.1 "*32.3 Where the suspension is without pay in terms of Section 39(1)(b) and the disciplinary process is not completed within one month, payment of the employee's remuneration must be resumed.*"

(At page 13)

28.2 "*33.2 The suspension without pay in terms of Section 39(1) (b) for an indefinite period likely to exceed one month was unlawful.*"

(At page 14)

28.3 The principle that is expressed in the SPECTRUM case supports the finding of this Court- namely that the suspension

of the Applicant without pay for a period of nineteen (19) months is irregular and should be set aside.

29. The Applicant has further attacked the Respondent's decision to suspend him without pay on the basis that the Respondent's conduct was in breach of the *Audi alteram partem* rule. The Applicant's complaint is that he was not given a hearing before a decision was taken and implemented, which decision deprived him of his pay and denied him access to work.

29.1 The Applicant stated as follows in the founding affidavit:

> "*I was also not give an opportunity to present my side of the story before the suspension was meted out.*"
>
> (At page 6 paragraph 14)

29.2 The Respondent did not deny this allegation in its answering affidavit, but simply avoided the issue. The Respondent responded as follows to this accusation:

> " *Ad paragraph 14*
>
> *22. I deny that the Applicant could not attend his disciplinary hearing due to lack of money and*

I submit that without making the employer aware of his availability, the Applicant is now able to engage an Attorney and travel to Mbabane to sign Affidavits."

(Record page 21 paragraph 22)

29.3 A failure by a litigant to deny (in his own set of papers), a clear and unambiguous assertion made in the affidavit or pleading of the opposite party is an indirect admission of that assertion. The Respondent has not denied that it failed to give the Applicant a chance to make representations before it took and implemented a decision to suspend him without pay. That assertion is deemed to have been admitted. This principle is stated clearly in the High Court rule 18(5) as read with rule 22(3). The High Court rules are mutatis mutandis applicable at the Industrial Court. The two (2) sub rules complement each other and they read thus:

29.3.1 "*When in any pleading [or affidavit] a party denies an allegation of fact in the previous pleading [or affidavit] of the opposite party, he shall not do so*

evasively, but shall answer the point of substance."

(High Court Rule 18(5))

23.3.2 "*Every allegation of fact in the combined summons or declaration [or founding affidavit] which is not stated in the plea [or answering affidavit] to be denied or not to be admitted, shall be deemed to be admitted, and if any explanation or qualification of any denial is necessary, it shall be stated in the plea [or answering affidavit].*"

(Underlining added)

(High Court Rule 22(3))

30. The Audi rule has been defined as follows:

"*Audi Alteram Partem, hear the other side; a maxim of universal application in the administration of justice, according to which a man is entitled to have an opportunity of being heard before he is condemned in his person or property.*"

BELL W.H.: SOUTH AFRICAN LEGAL DICTIONARY, 2nd edition, Juta & Co., 1925 (ISBN not available) at pages 53-54.

30.1 In the SPECTRUM case the Court emphasized the importance of adherence to the Audi rule before a decision to suspend an employee without pay, is taken. An extract of the judgement provides the following:

> *"However one characterizes the [Audi] rule, it is a fundamental requirement of fair labour practice that a person who may be adversely affected by a decision should have an opportunity to make representations on his own behalf. There can be no doubt that a suspension without pay adversely affects the suspended employee and constitutes a serious disruption of his/her rights*"
>
> (At pages 11-12)

30.2 In the SPECTRUM case the Court declared the suspension of the Applicant (employee) without pay to be unlawful and proceeded to set it aside. The Court further directed that the employee's lost pay be restored, on the basis that:

"The Applicant was not given any opportunity to make representations concerning the suspension without pay."

(At page 14 paragraph 33.3)

30.3 The Applicant was adversely affected by the Respondent's decision to suspend him without pay. That decision denied the Applicant a right to earn a salary yet he tendered his services. Without a salary the Applicant could not discharge his financial obligations which includes paying his creditors, maintaining his disabled mother, himself and his own minor children.

31. The Respondent's decision to suspend the Applicant without pay is unlawful and should be set aside for being in breach of the *Audi alteram partem* rule and also for being in breach of Section 39(1)(b) as read with 39(2) of the Employment Act.

32. For reasons stated above the Court finds in favour of the Applicant. The Applicant has incurred costs in prosecuting his claim. He is entitled to be compensated for that expense.

Wherefore the Court orders as follows:

32.1 The Respondent's decision to suspend the Applicant without pay is set aside. The Applicant is reinstated at work.

32.2 The Respondent is ordered to reimburse the Applicant the sum

of E39, 900.00 (Thirty nine Thousand Nine Hundred Emalangeni) being loss of salary from 1st August 2014 to 29th February 2016.

32.3 The Respondent is ordered to reinstate the Applicant in its payroll with effect from 1st March 2016.

32.4 The costs of suit shall be borne by the Respondent.

Members agreed

_____

D.MAZIBUKO
INDUSTRIAL COURT JUDGE

Applicant's Attorney	Mr S. Gama Sigwane and Partners Attorneys
Respondent's Attorney	Mr B. Gamedze Musa Sibandze Attorneys