# IN THE INDUSTRIAL COURT OF ESWATINI

**HELD AT MBABANE** Case No. 473/13

In the matter between:

**Lucky Muzi Matsenjwa** **Applicant**

**and**

**Medecins Sans Frontiers** **Respondent**

**Neutral Citation:** *Lucky Muzi Matsenjwa v Medecins Sans Frontiers,* [473/13] [2018] SZIC 69

**Coram:** *L. Msimango – Acting Judge*
*(Sitting with P.S Mamba and E.L.B Dlamini – Nominated Members of the Court)*

Heard: 30th April 2018

Delivered: 12th July 2018

**SUMMARY: The power of the employer to discipline an employee after resignation. The Applicant tendered his resignation in the face of a disciplinary hearing. Employer refused to accept resignation and proceeded to discipline Applicant. The Applicant has now brought an application for unfair dismissal based on the argument that by continuing with the disciplinary hearing the resignation fell away, hence the Applicant was unfairly dismissed.**

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## JUDGEMENT

1. The Applicant was employed by the Respondent on the 15th December 2007, he worked continuously until the termination of his contract of employment on the 24th July 2012, after being charged on two counts of gross negligence and insubordination.

2. In his statement of claim the Applicant stated that his dismissal by the Respondent was unlawful, wrongful, illegal and unreasonable and void of procedural aspect of fairness, substantive fairness and unreasonable in all the circumstances in that:
   2.1 the Respondent did not comply with the dictates of the Employment Act No. 5 of 1980 in particular section 36 read together with section 42 in arriving at the decision to terminate Applicant's services;
   2.2 The Respondent did not base the termination of the services upon any legal basis which would be found either in the contract of employment and or the Employment Act of 1980, as there was no evidence brought

by the Respondent that would have nailed the Applicant, hence the Respondent flowed the procedural aspect of the hearing;

2.3 The whole disciplinary hearing was a total miscarriage of justice and only aimed at denying the Applicant his terminal benefits;

2.4 The charges were vague and ambiguous.

3. In its reply the Respondent denies that the dismissal of the Applicant was unfair. The Respondent states that the dismissal of the Applicant was lawful and complied with the principles of fair dismissal and the Applicant is not entitled to any compensation and he was summarily dismissed for the following offences:

3.1 **Gross negligence:** in that during the month of May 2012, having been advised by the field supply officer to consider other suppliers of furniture for the Nhlangano project, the applicant negligently proceeded to authorize procurement of goods from a supplier with exorbitant prices and thereby placing the organization in financial risks in an amount in excess of E20 000.00. This was done without the knowledge of and/or without an explanation to the relevant authorities as to why the field supply officers proposal should not be considered;

3.2 **Insubordination:** in May 2012 the Applicant having been instructed not to purchase any supplies or material from Pharmisa (PTY) Ltd by his supervisor, the Logistic Co-ordinator, he attempted to make such procurement and disregarded the instructions of his supervisor and thereby committing the offence of insubordination.

4. The evidence led before the Court by Applicant, revealed that at the time of his dismissal he was employed as a supply officer. His duties amongst

others included making purchases for the company. He would receive order requests from the different departments, to assist him make sense of what needed to be purchased. For purchases above E1 500.00 (One Thousand Five Hundred Emalangeni) three (3) quotations needed to be made before a purchase was done.

5. Concerning the charge of gross negligence, the Applicant testified that he was not negligent when performing his duties, he always followed the necessary procedure for procurement, furthermore, the reason he did not do as instructed was that, the quotations by the other suppliers were inconsistent, specifically LESCO, who was recommended by his supervisor whose furniture was not up to standard and that they wanted payment up front before delivering the furniture, where as the other suppliers were not like that. That is why he ended up choosing Eyise to supply the furniture.

6. The 2nd charge, which is that of insubordination emanates from buying supplies and materials from a supplier that was blacklisted by the Respondent. The Applicant gave evidence that he was not aware that the company had been blacklisted as no one advised him to that effect. Furthermore, according to his knowledge if a company was blacklisted it would not appear on the Respondent's data base, however, this one did. It was again Applicant's evidence that some of his colleagues did business with the blacklisted company.

7. During cross examination it was put to the Applicant that, he terminated his employment with the Respondent by letter dated 12th June 2012. He was

invited to attend a disciplinary enquiry on the 20th June 2012, when the disciplinary hearing took place, the employment relationship was no longer in existence. However, the Applicant insisted that there was a relationship between him and the Respondent. The applicant based the argument on the effect that the Respondent refused to accept his letter of resignation.

8. Based on the Respondent's argument that there was no relationship between the parties at the time of the hearing, the Respondent opted not to call any witness but instead filed an Application for absolution from the instance, which we will now deal with.

9. The application for absolution has been moved by the Respondent on the basis that, the Applicant has failed to establish that at the time his services were terminated, he was an employee to whom section 35 of the employment Act applies.

10. The Applicant gave evidence under Oath that he tendered a resignation letter on the 12th June 2012 after having been invited to show cause why disciplinary proceedings should not be instituted against him in respect of procurement discrepancies. The resignation letter is at page 7 of the Respondent's bundle of documents.

11. On cross examination, the Applicant stated that he resigned because he believed that the working environment was no longer friendly. He further stated that he was not forced to resign. In terms of the letter of resignation

the termination of the employment relationship was effective from 12th June 2012 and was to serve a months' notice. The Applicant conceded that the resignation was in terms of Article 6 of Respondent's internal staff regulations which is at page 67 of the Respondent's Bundle of documents.

12. The Respondent argues that at the time the disciplinary tribunal was constituted, the employment relationship had already terminated at Applicant's instance. The fact that the Respondent rejected such resignation did not revive the employment relationship reason being that resignation is a unilateral act not subject to the employer's acceptance or rejection as the case may be, as such an employee who has tendered a resignation letter cannot be compelled to remain in employment.

13. Furthermore, the Respondent argues that it would be unreasonable to give evidence when the Applicant has failed to establish that, at the time his services were allegedly terminated by the Respondent, he still had an employment contract. It was unnecessary for the Respondent to hold a disciplinary hearing, because the Applicant had already terminated the employment relationship in terms of section 35 (d) of the Employment Act.

14. The Applicant argues that he was still an employee at the time of his dismissal as he was dismissed by the chairperson of the disciplinary hearing at the close of the hearing. It was argued further by the Applicant that at all material times, he presented himself for the disciplinary hearing as an employee of the Respondent and in terms of the disciplinary code and

procedure of the employer. The employer also paid his remuneration up to the day of the unfair dismissal and contract termination. As it can be seen on pages 32 and 33 of the book of pleadings.

15. It is Applicant's argument that it is trite law that when an employer institutes a disciplinary hearing against an employee and the employee resigns on notice, the employer has the power and right to discipline the employee during the notice period and the results therefore would be that the employee was dismissed as opposed to have resigned. The Applicant further explains that this means that once an employer so chooses to go the route of a disciplinary hearing as opposed to resignation, the resignation then falls away.

16. When an employee resigns he/she is exercising a contractual right to terminate the contract lawfully, from this it follows logically that there is no need for the employer to have to accept or refuse the resignation for it to take effect. Resignation is a unilateral act by the employee. This has been the view traditionally accepted by our Courts. The employee must evince a clear and unambiguous intention not to go on with the contract of employment by words or conduct that would lead a reasonable person to believe that the employee harbored such an intention.

17. In **Rosebank Television and Appliance Company (PTY) Ltd V Orbit Sales Corporation (PTY) Ltd 1969 (i) SA 200 (i)** the Court held that :

*"were a resignation to be valid only if it is accepted by an employer, the latter would in effect be entitled by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his/her will. This cannot be-it would reduce the employment relationship to a form of indentured labour."*

18. When some employees are faced with disciplinary action for an act of misconduct their immediate reaction is to resign before the hearing takes place. The issue usually hinges around two issues – does the employee have the right to resign, and if so, can he still refer a dispute of unfair dismissal to Courts after such resignation.

19. The employee does have the right to resign and he can tender such resignation at any time, always provided of course, that his resignation does not place him in breach of contract thereof. This include notice period required before terminating the contract. If the employee changes his/her mind, there is no obligation on the employer to accept a withdrawal of notice. Some employees prefer to resign rather than go through disciplinary action, hence, employers are often faced with the predicament of whether or not to proceed with holding of a disciplinary hearing where an employee has tendered a resignation to avoid the disciplinary hearing.

20. An employer may only discipline an employee in their employment. Thus an employer may not proceed to discipline a person no longer in the company's employment. It is thus important to state that the termination is unilateral. It does not require consent. It is therefore essential to point out that acceptance of the resignation is not necessary. The notice of

termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employee's consent. This means that it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur to it nor is the employer entitled to refuse to accept a resignation or decline to act on it.

21. **In Mahamo Vs Nedbank Lesotho Ltd (2011) LSLAC 9**, Mosito AJ, stated that: "*an erstwhile employer had no right to proceed against an employee after she had resigned. This is because the employer had no power in law to discipline an erstwhile employee. The disciplinary power rests with the employer so long as the employment relationship subsists between the parties.*" In this case the employee had resigned from her employment with immediate effect on April 3, 2006. The Respondent wrote to her on April 4, 2006, indicating that the bank still considered her as an employee until her disciplinary case had been finalized. The employee did not attend the hearing which proceeded in her absence, she was found guilty and dismissed. On appeal, the Court held that having resigned prior to the purported disciplinary action that was undertaken after she had resigned, the purported dismissal was of no consequence.

22. The Applicant referred the Court to the **Case of Kalipa Mtati, Labour Court of South Africa, Johannesburg case No. J2277/16**. In this case it was held that where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect, the employee is no longer an employee of

that employer and that the employer does not have jurisdiction over the employee anymore.

23. In an indefinite contract, either party may terminate the contract on notice. A resignation in this context is simply the termination by the employee on notice. The common law rules relating to termination on notice by an employee can be summarized as follows: *"notice of termination must be unequivocal, once communicated, a notice of termination cannot be withdrawn unless agreed. Furthermore, termination on notice is a unilateral act, it does not require acceptance by the employer"*. If the employee having given notice does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay. If notice is given late, that notice is in breach of contract entitling the employer to either hold the employee to what is left of the contract or to cancel it summarily and sue for damages.

24. Once given the contractual terms dealing with the period of notice take effect. In SALSTAFF **obo Bezuidenhout V Metro Rail** (2002) 9 BALAR 926 (AMSSA) Grogan held that:

*"a resignation is a unilateral act by which an employee signifies that the contract will end at his election after the notice period stipulated in the contract or by law. While formally speaking a contract of employment only ends on expiry of the notice period, the act of resignation being a unilateral act which cannot be withdrawn without the consent of the employer, is in fact the act that terminates the contract. The mere fact that the employee is contractually obliged to work for the required notice period if the employer*

*requires him to do so does not alter the legal consequences of the resignation"*

25. The basic principle is that, the fact that an employee has given notice to terminate the employment contract does not take away the power of the employer to discipline him whilst serving the notice period. In other words if an employee is serving notice he or she is still subject to the authority and the power of the employer in as far as the employment relationship is concerned. Similarly, all the obligations that arise from the contract are still binding on the employer during the notice period and this includes the duty to pay the salary of the employee. If an employer takes disciplinary action against the employee and dismisses him or her before the end of the notice period the employment relationship would be terminated. In those circumstances the termination will not be due to the resignation of the employee but rather the dismissal.

26. It is common cause that on the 5th June 2012 the Applicant was served with a notice to attend a preliminary inquiry on the procurement discrepancies. The enquiry was scheduled for the 7th June 2012. However, on the said date it did not take off and it was postponed to the 8th June 2012. On the 12th June 2012 the applicant served the Respondent with a resignation letter, wherein he advised that he will serve a month's notice as per the contractual obligations. On the 13th June 2012 the Respondent wrote to the Applicant advising that the resignation was not accepted on the basis that there was an ongoing enquiry against the Applicant.

27. The notice period was to expire on the 12th July 2012. The hearing commenced on the 6th July 2012 and was finalized on the 20th July 2012. By the time the disciplinary hearing was finalized the notice served by the Applicant had come to an end. Hence there was no employment relationship, as it has been mentioned earlier on that once an employee tenders a letter of resignation to his employer, the contract of employment is terminated as the employer cannot refuse to accept his resignation. Furthermore, the letter of resignation informs the employer of the employee's intention to terminate the employment contract on a future date; a month perhaps. The employee remains in the employ of the employer until that date is reached. Accordingly after the notice has expired, there is no contract of employment between the parties, thus a decision to dismiss an employee thereafter is a nullity.

28. In all cases of unfair dismissal, the onus is on the employer to prove that the dismissal was fair and reasonable under the circumstances. The employee only has to show that at the time his/her services were terminated he/she was an employee to whom section 35 of the Employment Act, (as amended) is applicable. This observation has been confirmed by our Courts in a number of judgements amongst others being the case of **Lawrence Vusi Dlamini V. Swaziland Tyre Services (PTY) Ltd t/a Max T. Solutions (IC) Case No. 272/12** at paragraph 8, where the Court held that:

*"the legal requirements or burden of proof on the part of the Applicant is to prove that his services were terminated by the employer and that at the time of the termination of his services he was an employee to whom section 35 applied"*

29. Once the Applicant has shown that he was an employee in terms of section 35, the burden of proof in terms of section 42 (2) then shifts to the Respondent. The section reads as follows:

*"the services of an employee shall not be considered as having been fairly terminated unless the employer proves:*

*(a) that the reason for the termination was one permitted by section 36 and*

*(b) that taking into account all the circumstances of the case it was reasonable to terminate the services of the employee"*

This clearly demonstrates that the burden shifts to the Respondent. Hence the application for absolution from the instance by the Respondent.

30. In the case of **William Manana V Royal Swaziland Sugar Corporation (IC) Case No. 214/2007**, at paragraph 8 there at, the Court made the following remark with regards to an application of absolution from the instance:

*"in determining this absolution from the instance application as filed by the Respondent's counsel, the Court has to first consider whether the case discloses a cause of action against the employer. The Court has to determine whether there is evidence upon which a reasonable man might find for the Applicant after he has closed his case? In other words, the question to be probed is whether there is a prima facie case against the employer"*.

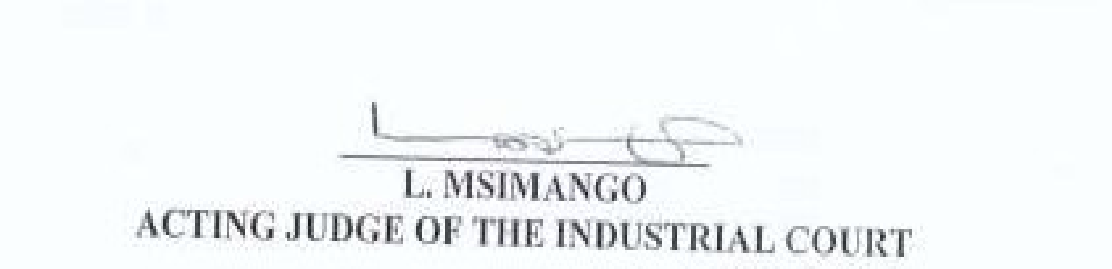
31. In the present case, the Applicant tendered his resignation on the 12th June 2012, after having been invited to show cause why disciplinary proceedings should not be instituted against him in respect of procurement discrepancies.

In terms of the letter the Applicant was to serve a month's notice as per contractual obligations. The fact that the Respondent rejected such resignation did not revive the employment relationship, as it has been stated earlier on that a resignation is a unilateral act not subject to the employer's acceptance or rejection as the case maybe. In other words, an employee who has tendered a resignation letter cannot be compelled to remain in employment.

32. The question whether the termination of the applicant's services was fair and reasonable does not arise in circumstances where the applicant has resigned and no cause for constructive dismissal has been pleaded or established.

33. In the premises the Application for absolution from the instance is granted. Each party is to bear its own costs.

The Members agree.

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