



**IN THE INDUSTRIAL COURT**

**OF ESWATINI**

**CASE NO.228/18**

In the matter between:-

**NONDUDUZO MABUZA**

**Applicant**

**AND**

**BUY CASH (PTY) LTD**

**Respondent**

**Neutral citation:**      *Nonduduzo Mabuza vs Buy Cash (Pty) Ltd*      228/18  
[2018] SZIC 88 (17 August 2018)

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

Heard submissions:      10/08/18

Ruling delivered:      17/08/18

SUMMARY---Labour Law---Suspension of employee without pay---Section 39 of the Employment Act---Employer entitled to suspend employee without pay pending disciplinary action for a period not exceeding one month---Applicability of the *audi alteram partem* maxim---Such suspension must be preceded by a hearing because it adversely affects the rights of the suspended employee---Failure to give the employee a hearing prior to the suspension without pay amounts to an irregularity and the suspension ought to be set aside.

## RULING

1. The Applicant filed the present application under a certificate of urgency for an order in the following terms;
  1. *That the rules of Court be dispensed with in so far as they relate to forms and service and time limits, and that the matter be heard as one of urgency.*
  2. *That the Applicant's suspension from the Respondent's employment be declared to unlawful and set aside in so far as it is without pay.*

3. *That the Respondent be ordered and direct to furnish to the Applicant or her attorneys a full particularized and detailed charge sheet in relation to the charges preferred against the Applicant by the Respondent.*
  4. *That pending finalization of these proceedings the Respondent be interdicted and restrained from proceeding with Applicant's disciplinary hearing scheduled for 15<sup>th</sup> August, 2018.*
  5. *Directing the Applicant be allowed legal representation at the disciplinary hearing scheduled for the 15<sup>th</sup> August, 2018.*
  6. *That the Respondent pay the costs of this application at a scale as between attorney and own client.*
  7. *Further and/or alternative relief."*
2. The application is supported by a founding affidavit duly deposed to by the Applicant. The Respondent has filed its answering affidavit in opposition to the application. The Applicant thereafter filed her replying affidavit.
  3. The Applicant is employed by the Respondent as a Cashier and is stationed at the Mandlangempisi branch of the Respondent. She earns a

salary of **E1, 600.00** per month. Her duties involve receiving money from customers, conducting reconciliation, doing cash book balancing for sales and receipts and banking the day's collection on the day that she would be operating the till or cash register because she alternates in this position with another co-worker by the name of Khosi Khumalo.

4. Only one of the two cashiers operates the cash register on any single day. According to the Respondent, the Applicant operated the till on 10<sup>th</sup> July 2018 and an amount of E10, 000.00 went missing. The Respondent also carried out further investigations and came to the conclusion that since March 2018 there has been manipulation of the refunds procedure. This led to the Respondent laying a charge of theft of over E150, 000.00 against the Applicant. The Applicant was investigated by the police but nothing was found in her possession connecting her to the charge.
5. On 18<sup>th</sup> July 2018 the Applicant was given a letter of suspension dated 17<sup>th</sup> July 2018. The Applicant was suspended without pay. She was informed that the disciplinary hearing would be on 15<sup>th</sup> August 2018. In terms of the suspension letter, the Applicant is facing allegations of *dishonesty, cash theft and fraud*. No further particulars as to how and when were the charges allegedly committed, hence the Applicant is

seeking the order directing the Respondent to furnish her with further particulars.

6. In its answering affidavit the Respondent stated that the Applicant would be served with a charge sheet on 01<sup>st</sup> August 2018 and that the Applicant will have enough time to prepare for the disciplinary hearing to be held on 15<sup>th</sup> August 2018.
7. When the matter was being argued in Court on 10<sup>th</sup> August 2018, it transpired that the Applicant has still not been served with the charges.

**8. LEGAL REPRESENTATION:**

The Applicant is facing a disciplinary process instituted by the employer. It is still an internal process. There is no general right to legal representation during an internal disciplinary hearing. If the accused employee wants to be represented by an attorney, the accused employee must make the application before the chairperson of the disciplinary hearing. The Applicant has not done that in this case. Such an application must be made before the chairperson, the Court has no right to pre-empt the chairperson's decision on the matter. (*See: Ndoda H.*

*Simelane V National Maize Corporation (Pty) Ltd, case number 453/06 (IC).*

**9. FURTHER PARTICULARS:-**

The Applicant in prayer 3 is seeking an order directing the Respondent to furnish her with further particulars. There was no evidence that the Applicant has requested the further particulars from the Respondent and the Respondent refused to furnish same. This prayer is therefore also prematurely before the Court. The Respondent's attorney has, in any event, informed the Court that they have no difficulty in doing that before the date of the hearing.

**10. SUSPENSION WITHOUT PAY:**

The Applicant is presently under suspension without pay. It was not in dispute that when the Respondent placed the Applicant under suspension without pay, it did not give the Applicant an opportunity to be heard. The Respondent stated in paragraph 19 of its answering affidavit that there was no legal requirement that there should be a hearing before a suspension without pay is imposed.

11. In Court, the Respondent's attorney argued that the Applicant was suspended without pay in terms of Section 39 (1) (b) of the Employment Act No.5 of 1980 as amended. He argued further that, in terms of Section 39 (2) of the Act, there is no requirement that an accused employee be given a hearing before a suspension without pay is imposed.
  
12. The Court had the occasion to deal with this question in the case of **Nkosingiphile Simelane V Spectrum (PTY) LTD t/a Master Hardware**, case number **681/06 (IC)**. Although the facts in the Nkosingiphile Simelane case are distinguishable from the present application, the principle enunciated in that case is, however, applicable. Interestingly, the Respondent's attorney in the Nkosingiphile Simelane case raised similar arguments as raised by the Respondent's attorney in the present case, that;

*12.1 The Respondent effecting the suspension complied with Section 39 (1) (b) and (2) of the Employment Act, 1980;*

*12.2 At the date of the institution of the legal proceedings, the suspension without pay has not yet exceeded the period of one month provided for in Section 39 (2).*

13. The language of this section is indeed clear and unambiguous. It provides that an employer may suspend an employee without pay if the employee is suspected of having committed an act, which if proven, would justify dismissal or disciplinary action. The suspension without pay shall not exceed a period of one month.

14. The Court in the Nkosingiphile Simelane case (supra) interpreted the section and came to the conclusion that the principle of *audi alteram partem* was applicable. The Court stated the following in paragraph 27;

*‘This principle was described in the case of **South African Roads Board V Johannesburg City Council 1991 (4) SA 1 (A)** as follows;*

*‘A rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or whenever such an individual has a legitimate expectation entitling him to a hearing unless the statute expressly or by implication indicates the contrary.’*

15. The Court went further to analyze the applicability of this principle to private law and it came to the conclusion that the principle was



applicable even in private law. The Court held as follows in paragraph 28:

*“The audi principle is but one facet of the general requirement of natural justice that a person must be treated fairly. Since the Industrial Court has an equitable jurisdiction which requires it to promote fairness and equity in labour relations, the Court is required to apply the rules of natural justice, including the audi alteram partem rule.”*

16. This Court fully aligns itself with this position of the law.

17. The Court went on to state in paragraph 28 that;

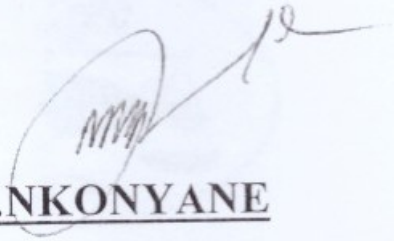
*“However one characterizes the rule, it is a fundamental requirement of fair labour practice that a person who may be adversely affected by a decision should have an opportunity to make representations on his own behalf.”*

In paragraph 29 the Court went to point out further that;

*“There is no doubt that a suspension without pay adversely affects the suspended employee and constitutes a serious disruption of his/her rights.”*

18. There is no doubt to the Court that the decision by the Respondent to suspend the Applicant without pay will cause a financial loss to her. The decision will clearly adversely affect the Applicant and will cause a serious disruption in her life. The Respondent was therefore, required to afford the Applicant an opportunity to be heard before the decision was taken. Failure to do that constituted an irregularity on the part of the Respondent.
  
19. It is not in dispute that an employer has the right to suspend an employee without pay for a period not exceeding a period of one month. Such a decision by the employer however, inevitably inflicts a financial loss on the employee. In simpler terms, such a decision has adverse effects on the employee. The employee should therefore be afforded the opportunity to make representations before the decision is taken by the employer.
  
20. Taking into account all the foregoing observations, the Court will make the following order;
  - a) The suspension of the Applicant without pay is set aside.
  - b) There is no order as to costs.

21. The members agree.



N.NKONYANE  
JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant

Mr. S.C. Simelane  
(S.C. Simelane in Association with  
N.E. Ginindza Attorneys)

For Respondents

Mr. M.C. Simelane  
(M.C. Simelane Attorneys)