IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 06/2020

In the matter between:

LINDA NKAMBULE Applicant

And

ESWATINI NATIONAL TRUST COMMISSION 1st Respondent

CLIFF DLAMINI 2nd Respondent

Neutral citation: Linda Nkambule v Eswatini National Trust Commission *(06/2020)* [2020] *SZIC 07* (03 February 2020)

Coram: **NSIBANDE S. JP**

(Sitting with Nominated Members of the Court Mr. M. Dlamini and Mr. E.L.B Dlamini)

Heard: 22 January 2020

Delivered: 03 February 2020

JUDGMENT

[1] The applicant applied to the Court on a certificate of urgency for an order:

"1.1 That the Rules relating to motion proceedings of this Honourable Court be waived and matter (sic) be heard as one of urgency;

1.2 That the Applicant's non-compliance with the said rules be condoned by the above Honourable Court;

1.3 That the suspension of Applicant be declared as unlawful and therefore null and void;

1.4 That the Court interdicts and/or stays the impending hearing against the Applicant pending finalization of this matter with interim and immediate effect;

1.5 That the 2nd Respondent be and is hereby ordered to stop harassing and/or victimising the Applicant;

1.6 Granting the Applicant cost (sic) of suit at Attorney and Own Client Scale; and

1.7 Further and/or alternative relief."

[2] The Applicant, in his affidavit, states that his challenges with the Respondents arose around June 2019 when the 1st Respondent was engaged in a recruitment process for Accounts Officers. In a nutshell, the 2nd Respondent felt that the

process was not to his liking and called upon Applicant and the others involved in the process to review a shortlist of candidates they had drawn up and to remove some of the candidates from it and hold the interviews. On 11th December the 2nd Respondent, directed the Applicant, in writing to call part of the shortlisted candidates (to the exclusion of others who were former temporary employees of the Respondent) for interviews on Friday 13th December 2019. He advised the Applicant that "*failure to carry out this assignment will be tantamount to gross insubordination and I will swiftly deal with and team thoroughly, and in accordance with the relevant SNTC (ENTC) policies."*

[3] It is common cause that no interviews took place on 13th December, the Applicant having addressed a memo to the 2nd Respondent on 12th December complaining about the ill-treatment and humiliation he allegedly continued to suffer at the hands of the 2nd Respondent. The 2nd Respondent, on 3rd January 2020 instructed that the interviews take place within the first week of January without fail. He indicated that, this was his final instruction.

[4] On the 6th January 2020 and in writing, the 2nd Respondent called upon the Applicant to show cause why he should not be charged with misconduct, insubordination and gross insubordination for the following actions:

"1. Failure to obey sound and legitimate written instructions from the office of the CEO on several occasions regarding the recruitment of Accounts officers during the period of December 2019 and January 2020;

2. *Failure to obey sound and legitimate written instructions from the Office of the CEO on several occasions regarding drafting of charges for disciplinary hearings in 2019; and*

3. *Your unpalatable Memos to the CEO."*

The Applicant prepared and submitted a detailed response to the 2nd Respondent's correspondence.

[5] Despite the detailed response, the Applicant was suspended from duty on 7th January 2020 and by letter of the same date, advised that he would be appearing before a disciplinary enquiry on 5th February 2020 to face charges of Gross Insubordination and Gross Insolence.

[6] He has approached the Court complaining that his suspension is unlawful and has been implemented much against the internal policies of 1st Respondent.

[7] The crux of the Applicant's submission rests on article 3.6 of the 1st Respondent disciplinary code, it being alleged that this article was breached by the Respondents.

Article 3.6 reads thus:

"It is the duty of every manager to consult with the human resource department (administration) when contemplating disciplinary action and it is the duty of a senior officer the human resources department to:

(a) Advise on questions of policy, rights and interpretation;

(b) Assist in investigation of cases upon request.

(c)… in

(d)… "

It was the Applicant's contention that his suspension came about without the human resource department being consulted.

[8] It was further submitted on behalf of the Applicant, that article 4.1 of the code was also breached because the Human Resources department was consulted.

Article 4.1. reads –

"4.1. When formal disciplinary action is considered necessary, the delegated authority should ensure that the following points are covered;

(a) Before any formal disciplinary action is taken, the circumstances of the misconduct are thoroughly investigated and statements giving full details of the misconduct are prepared;

(b) The Human Resources (administration) department is consulted.

[9] It was submitted further that article 4.3 of the code was also breached in that the Respondents have not indicated why they considered it undesirable for the Applicant to remain at work pending the hearing as per the requirements of the article. The article reads as follows:

"4.3 Suspension on full pay may be implemented:

(a) by management when it considers it undesirable that the employee remains at work during investigation of an incident and pending appropriate disciplinary action the length of which should be determined by Management (kept to a maximum of one month).

(b) when the continued presence of the employee on site(premises) may be embarrassing to the employee or to the Commission….

(c) suspension should only take place after consultation with the human resource department."

[10] In response to the Respondents' submission that 2nd Respondent had the requisite authority to suspend the Applicant, the applicant's attorney submitted that the

Applicant's suspension had at all times been said to be in terms of the policies of the SNTC/ENTC as indicted in annexure "LN2" where the 2nd Respondent state that, *"I will swiftly deal with you and your team thoroughly, **and in accordance with the relevant SNTC (ENTC) policies.**"*

It was the Applicant's submission therefore that the Respondent's reliance on **Regulation 57** of the **National Trust Commission regulations,1972** for the suspension constituted an unfair deviation from the Respondent's disciplinary code and that in terms of the judgement in **Fakudze v The Swaziland Revenue Authority and Others ICA Case No.8/2017** such deviation was not lawful. This was because applicant had not been consulted on the deviation nor were there any exceptional circumstances that called for the code to be deviated from.

The Applicant further submitted that where the Respondents were acting in terms of **Regulation 57** in suspending the Applicant, then the 2nd Respondent was obliged to act in terms of **Regulation 58** and the processes set out thereunder. In terms of **Regulation 58** disciplinary action ought to be taken after a due enquiry and the Applicant ought to have been given 14 days within which to submit any written representations, after receiving a letter advising him of the proposed disciplinary proceedings. It is common cause that the Applicant was given a day (if not less) to respond to the letter advising him of the disciplinary action and there was no enquiry held prior to the 2nd Respondent's letter advising him of the proposed disciplinary enquiry. It was submitted therefore that even if

the suspension could be said to be in terms of the **National Trust Commission Regulations, 1972** the failure of the Respondents to act in accordance with **Regulation 58** rendered the suspension unlawful.

[11] Regulation 57 reads as follows:-

"57(1) If the Chief Executive Officer considers that the interests of the Commission require that an officer, in respect of whom disciplinary or criminal proceedings have been, or are about to be instituted should cease to exercise the function of his office, the chief executive officer shall suspend such officer from duty and report the matter to the Commission.

The Respondent's submission was that the power to suspend employees in terms of **Regulation 57** do not require that the Chief Executive Officer consult with the Human Resources office. It was submitted that the Regulations, being part of the legislation establishing the Commission are binding on the employees of the Commission and are superior to any policy of the Commission.

[12] It was further submitted that the disciplinary code itself allowed for disciplinary cases to be treated differently if the background and circumstances called for it. The court was referred to clause 3.7 of the code which reads:-

"3.7 The background and circumstances in each disciplinary case may call for different treatment. ***The minimum requirement is that the employee must know that he/she has violated a rule****…."*

The Respondents submitted that the background and circumstances of this matter called upon the Chief Executive Officer not to consult with the Human Resources office for the simple reason that it was the Human Resources Officer facing the contemplated disciplinary action; that it would have been absurd and illogical to do so the Applicant being the most senior officer in that department.

[13] The Applicant in its papers has questioned the 2nd Respondent's authority to institute disciplinary proceedings outside the disciplinary code and in terms of the Regulation. This position appears to us to be ill-conceived. It is trite that a disciplinary code is subordinate to legislation and that where the provisions of the disciplinary code conflict with those of the law the provision of law should prevail. [See in this regard **Waligo v National Emergency Response on HIV and AIDS and Sikhumbuzo Simelane IC Case No. 147/2017 (c)**]. In this matter, **Regulation 57 of the National Trust Commission Regulations 1972** is clear and unambiguous. The Chief Executive Officer is cloaked with the authority to suspend any officer in respect of whom disciplinary charges are to be or have been instituted, if he considers it to be in the interests of the Commission.

[14] Furthermore, the disciplinary code, itself gives the Respondents the discretion to deviate from the code where the background and circumstances deem it necessary. In the circumstances of this matter it is not unreasonable that the human resources office would not be consulted since it was the Human Resource Officer who was sought to be disciplined. It would have been absurd for the CEO to seek support from the human resources office in order to suspend and/or start the disciplinary process involving the de facto head of that office, the Human Resources Officer.

[15] Having noted that the Applicant's case is based on the Respondent's failure to follow articles 3.6 of the disciplinary code together with the other articles, it is our view that having failed to establish the breach of these articles when considered against article 3.7 of the code, the application must fail. We note that the Applicant complained that the provisions of **Regulation 58** were not followed. This was in response to the Respondent's answer that Applicant had been suspended in terms of **Regulation 57**. In his papers, the Applicant does not complain that he was not given enough time to respond to the letter informing him of the intended disciplinary process. That was not his case. Such case is not supported by the papers filed in Court. He chose to base his case on the allegation that the 2nd Respondent decided to institute proceedings without

consulting the Human Resources Office. In contravention of the disciplinary code. As Human Resources Officer these regulations are assumed to be known to Applicant. The Court having found that the CEO has the authority to suspend as set but in **Regulation 57**, that is the end of the matter. The application must fail.

[16] The Court wishes to comment on the manner in which the Applicant conducted its litigation. The application was launched on a certificate of urgency on 13th January 2020 and set down for hearing on 14th January 2020. The Respondents were not given any real time to file opposing papers despite that Applicant's disciplinary hearing was set for 5th February 2020. This abridgement of the rules as to service and time frames is totally unreasonable and unacceptable particularly in these circumstances. We note that a number of litigants have taken to litigating in this manner and unreasonable abridging the timeframes, disadvantaging the opposing litigant. We have considered granting costs against the Applicant in this matter. However, it is clear that it is the legal practitioners that draft and register these applications with unreasonable time lines, even for urgent applications. We will not grant costs against this Applicant but will consider doing so in the future.

[17] The Court makes the following order:

(a) the application is dismissed

(b) there is no order as to costs.

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicant: Mr. S. Dlamini (Dlamini Nkambule Mahlangu Attorneys)

For the Respondent: Mr. F.M. Tengbeh (S.V. Mdladla & Associates)