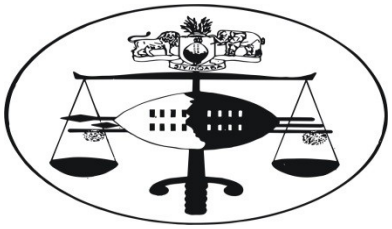

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGMENT**

Case No 373/2020

In the matter between:

**MAUREEN NKAMBULE** Applicant

And

**ESWATINI ELECTRICITY COMPANY** Respondent

**Neutral citation:** Maureen Nkambule v Eswatini Electricity Company [2021] [373/20) (11 March 2021)

**Coram:** **NGCAMPHALALA AJ**
*(Sitting with N. Dlamini and D.P.M. Mmango, Nominated Members of the Court*

**Date Heard:** 11 January 2021

**Date Delivered:** 11 March 2021

**Summary:** *The Applicant instituted the present application on an urgent basis seeking that her suspension be declared unlawful and unfair and set aside. Applicant contends that she was not afforded an opportunity to make oral*

*submissions before contemplated suspension. Respondent contents that Applicant waived right to make submissions- dispute of fact arises from matter and it should be referred to oral evidence.*

**Held –** *The matter can be determined on the papers as they stand. Application for referral to oral evidence dismissed. Suspension set aside.*

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**JUDGMENT**

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[1] The Applicant is an employee of the 1nd Respondent currently on suspension pending finalization of her Disciplinary hearing.

[2] The 1st Respondent is Eswatini Electricity Company, a public enterprise duly registered in terms of the laws of Eswatini, having its principal place of business at Luvatsi House, Mhlambanyatsi Road, Mbabane, Eswatini.

[3] In the present application, the Applicant seeks an order declaring the decision by the Respondent to suspend her, pending the finalization of her disciplinary hearing, to be declared irregular, invalid and set aside.

**BRIEF BACKGROUND**

[5] In her founding affidavit, the Applicant states that she is employed by the Respondent, and is further the Secretary General of the Swaziland Electricity Supply Maintenance and Allied Workers Union (SESMAWU), a trade Union duly registered, and recognized by the Respondent in terms of the laws of the kingdom of Eswatini.

[6] It is the Applicants submission that on the 28th February 2019, SESMAWU embarked on a work stoppage, which resulted in the Applicant and several other members being charged for allegedly inciting a work stoppage or strike action. The Applicant was in particular charged for communicating with the media on issues of negotiations between the Respondent and SESMAWU, and further inciting a strike action. Despite the Applicant being charged she was not suspended from work

[7] The first hearing was scheduled for the 13th May 2019, and commenced on the day and was adjourned to the 22nd May 2019. Due to an application that was then instituted at the High Court, the Applicant's hearing was delayed. That matter was eventually resolved after the parties entered into a plea bargain.

[8] It is the Applicant's submission that after a year and three months, following the adjournment of the matter, which delay had been caused by Covid-19 pandemic and an injury on her leg, the Applicant received correspondence from the Respondent dated the 4th August 2020. The correspondence stated that following the conclusion of the disciplinary hearing of the other employees, Applicant's hearing would resume on the 14th August 2020.

[9] On the 2nd December 2020 at 12:52, when the Applicant had resumed her duties, she received correspondence from the General Manager Corporate Services, with the title *"Notice of Contemplated Suspension"* calling upon the Applicant to show cause on/or before close of business on the 5th December 2020, why she should not be placed on suspension pending the outcome of the disciplinary hearing. Another email was received by the Applicant on the same day, 2nd December 2020 at 12:59 this time from the Employee Relation Manager, Churchboy Mfanawelsontfo Dlamini, advising the Applicant that she should show cause on/or before close of business on the 4th December 2020, why she should not be suspended.

[10] On the afternoon of the 2nd December 2020, another email was received by the Applicant at 1:11pm, again from the Employee Relations Manager, where he was recalling the previous correspondence, it read;

**"NOTICE OF CONTEMPLATED SUSPENSION''**

*"Churchboy Mfanawelsontfo Dlamini would like to recall the message, "NOTICE OF CONTEMPLATED SUSPENSION''.*

It is the Applicants submission that no other correspondence was received from the Respondent, and as such she did not make any representation, regarding her suspension. On the 4th December 2020 at 18:34hrs, it came as a surprise to her when she received correspondence from the Employment Relations Manager that read;

**"NOTICE OF CONTEMPLATED SUSPENSION''**

*"I am confirming that l have not received any correspondence from yourself with regard to the letter that was sent to you on Wednesday 2nd December 2020, at 12:59 which required you to make representation by close of business 4th December 2020."*

[11] The Applicant in response to this correspondence, advised the Respondent's Employee Relations Manager, that the notice requiring her to show cause had been withdrawn, and or recalled and no further communication had been received by her. In the same correspondence the Applicant proceeded to advise the Respondent that she had legally valid reasons, why she should not be suspended. Further that she was entitled to sufficient time to show cause why she should not be suspended.

[12] It is Applicant's argument that the Respondent did not respond to the correspondence addressed to it. Instead on the 8th December 2020, she received correspondence, suspending her from work. The Applicant contents firstly that the Respondents disciplinary code and procedure was breached by the Respondent, in particular Article nine and two when suspending her without prior notice, and without affording her an opportunity to make representation, hence the present application.

[13] On the other hand, the respondent opposed this assertion, and raised a point *in limine*, relating to the material dispute of facts relating to the correspondence leading to the Applicants suspension. This has led to versions relating to the contemplated suspension. The Respondent

submitted that at no particular point in time did the Employer Relations Manager suspend and/or recall the notice. It was Respondent's contention that an email was sent on the 2nd December 2020, at 12:52pm which was a Notice of Contemplated Suspension, which required the Applicant to respond to it on the 5th December 2020. The correspondence required the Applicant to make written representation on why she should not be suspended.

[14] The Respondent upon realizing that the 5th December 2020 fell on a Saturday, sent a corrected version to the Applicant at 12:59 on the same day. This correspondence required the Applicant to file written representation on the 4th December 2020, now a Friday instead of Saturday.

At 1:11pm the Respondent's Employee Relations Manager again sent another email, which is now the centre of the current application. This correspondence it is submitted by the Respondent sought to recall the correspondence sent at 12:52 and not the correspondence sent at 12:59. The correspondence reads;

**"NOTICE OF CONTEMPLATED SUSPENSION''**

*Churchboy Mfanawelsontfo Dlamini would like to recall the message "Notice of Contemplated Suspension."*

The correspondence does not state whether it was recalling the notice sent at 12:52 or 12:59. The Respondent argued that the best way to resolve the issue of whether the letter was withdrawn is through oral evidence of the respective deponents to the affidavit especial Churchboy Mfanawelsontfo Dlamini.

**ANALYSIS OF FACTS AND APPLICABLE LAW**

[15] The position of law regarding disputed facts as demonstrated by jurisprudence, both within and outside this jurisdiction, is that motion proceedings are inappropriate for the purpose of deciding real and substantial disputes of fact, which properly fall for decision by action proceedings.

[16] In honour of this trite principal of law, the learned author **Herbestein and Van Winsen in the text, The Civil Practise of the Supreme Court of South Africa (4th Edition) page 234** declared as follows:-

> *"it is clearly undesirable in cases which facts relied upon are disputed to endeavor to settle the dispute of facts on an affidavit, for the ascertainment of the true facts is effected by the trial Judge on consideration not only of probability, which ought not to arise in motion proceedings but also credibility of witnesses giving evidence viva voce. In that event, it is more satisfactory that evidence should be led and that the Court should have the opportunity of seeing and coming to a conclusion".*

[17] This law has been given full judicial effect in the jurisdiction, the principle was stated in **Didabantfu Khumalo v The Attorney General Civil App. No. 31/2010**; and **Hlobsile Maseko (nee Sukati) and others v Sellinah Maseko (nee Mabuza) and Others, No. 3815/2010**.

[18] It is thus judicially settled that where the material facts upon which the claim between the parties is founded are disputed the motion proceedings is inappropriate. The test however is that the affidavit in opposition must demonstrate a real, genuine and *bona fide* dispute of fact for the opposition to be availed of this relief. It is thus incumbent upon the Court to scrutinize the affidavit filed, to see if a real dispute exists, which cannot be resolved

without *viva voce* evidence. To this end case law evolved certain parameters to aid the Court in coming to a conclusion that real disputes of facts exist.

[19] In **Wightman t/a JW Construction v Headfour (Pty) Ltd & Another 2008, (3) S.A 371(SCA) at para 13** the Court held as follows:

*"A real genuine and bona fide dispute of fact can exist only where the Court is satisfied that the party who purported to raise the dispute has in affidavit seriously and unambiously addressed the facts said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. "*

[20] The dispute existing between the parties regarding the legality of Applicant's suspension is centered around the correspondence of the 2nd December 2020, the bone of contention being, whether the email of the 2nd December 2020, issued at 1:11pm was recalling the notice of contemplated suspension issued at 12:52 or 12:59. The email issued at1:11pm in itself does not stipulate whether it was recalling the email sent at 12:52 or 12:59, and any reasonable person would have come to the conclusion that the Respondent was recalling the last email it sent at 12:59.

[22] It is Respondent's argument that the intention was only to recall the email sent at 12:52, however the email from the Employee Relations Manager does not state this. The Respondent did not submit any other evidence that indicated that the recalled email was that issued at 12:52. The Court has therefore relied on the evidence before it, which even if the Employee Relations Manager was to give viva vice evidence, he would rely on as documentary evidence.

[23] Further the Court does not consider this issue to be a material dispute of facts that cannot and should not be resolve the matter on the papers, as they stand, in light of the circumstances set out above and in so far as it may be

necessary. The Court is of the view that the dispute before it, can be resolved on the papers as they stand. The Court can see no reason why this issue cannot be properly ventilated with reference to the pleadings and relevant documentary evidence before it. It would serve no purpose and offend the spirit of the Industrial Relations Act to resolve disputes as expeditiously as possible, if the matter was taken to oral evidence, taking into account that the matter came on a certificate of urgency.

[24] For this reason, the application to have the dispute referred to oral evidence is dismissed.

[25] It is trite law that the prerogative to discipline an employee lies with the Employer, within our jurisdiction the suspension of an employee is governed by **Section 39 of The Employment Act 1980.** It gives the employer the prerogative to suspend its employees for acts committed under the provisions of the section. **Grogan in his book Workplace Law (8th Edition) at page 102**, says that suspensions can occur in two accepted forms, namely, as a *"holding operation pending further enquiry, or as a form of punitive disciplinary sanction."*

[26] From the submission made, the Applicant was charged on the 17th April 2019, but was not put on suspension. It is Respondent's argument that certain developments which compromised the pending disciplinary hearing arose, which indicated that the Applicant was causing disharmony at the workplace and putting the name of the Respondent into disrepute. This was as a result of correspondence which circulated with incorrect information about the Respondent being in bed with a Union known as **EESAWU**. The correspondence was addressed to **SESMAWU** members and was purportedly signed by the Applicant in her capacity as Secretary General on the 9th November 2020.

[27] The Applicant argued that even though her named appeared on the letter, however she was not the author of the letter, as it had been signed by someone acting in her position as she was away. It is evident that the decision to suspend the Applicant was intended for precautionary measures, therefore is a precautionary/and or holding suspension.

[28] In the judgment of **Madamela Ida v The department of Corporate Governance 2014 ZALCJHB**, the judge stated that;

*"At level of general principle precautionary suspension is a unilateral act by the employer which needs not be preceded by the application of the principles of* ***audi alteram partem****. It is only where specific rules which is often the case in the public centre, in the public sector, prescribe the application of the* ***audi alteram partem*** *prior to the suspension that must be applied. It is then applied not because of the general principle of the right to be heard, but because the employee has made its own rules, and must comply with them."*

[29] From the evidence it is not disputed that the Respondent's policy required that the Applicant be given an opportunity to make submission, before the Respondent could undertake whether to suspend or not suspend the Applicant. The issues in contention are whether the Respondent did or did not recall the letter of Contemplated Suspension dated the 2nd December 2020, and whether Applicant waived her right to make submissions or not.

[30] From the evidence before the Court, any reasonable man would have concluded that the correspondence dated the 2nd December 2020 sent 1:11pm, was revoking the last letter of contemplated suspension issued at 12:59. It cannot be reasonably said that correspondence sent at 1:11pm

would be recalling that sent at 12:52 and not 12:59. The onus was on the Respondent to state in its correspondence which notice it sought to recall taking into account that several correspondences had been exchanged by the parties on the day. Furthermore when the Respondent wrote to the Applicant indicating that they had not received her response, in term of their previous correspondence, the Applicant indicated that the last correspondence from the Respondent was recalling the intended suspension. They should have attended to this anomaly in the interest of fairness and justice, and afforded the Applicant the opportunity to make submission as it was apparent that there had been miscommunication between the parties. The Applicant should have been afforded an opportunity to state her case as is was evident that the correspondence sent at 1:11pm did not state whether it intended to recall the correspondence sent at 12:52 or 12:59 and any reasonable man would have come to the same conclusion as the Applicant.

[31] The Applicant should therefore have been afforded an opportunity by the Respondent to make submission or in the least should have considered the submission as set out in the letter dated 6th December 2020, but instead the Respondent suspended the Applicant. Even though the prerogative to

suspend falls solely within the ambit of the employer, when carry out this mandate, the employer should ensure that it does so in a fair and just manner. In the circumstances the Applicant should have been afforded the opportunity to make submission on her contemplated suspension.

[32] Therefore, the Court makes the following order:

**(1) The suspension of the Applicant is set aside;**

**(2) No Order as to Cost.**

The Members Agree.

**B. NGCAMPHALALA**
**ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

**For Applicant:** Mr. M. Hlophe (M. Hlophe & Associate)

**For Respondent:** Mr. B. Gamedze (Musa M. Sibandze Attorneys)