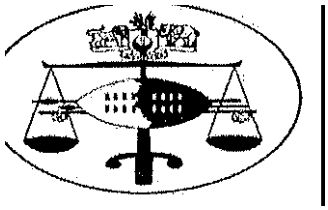

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 380/2020

In the matter between:

DUMISA MNISI Applicant

And

THE DIRECTOR OF VETERINARY SERVICES MINISTRY OF AGRICULTURE 1st Respondent

THE PRINCIPAL SECRETARY -MINISTRY OF AGRICULTURE 2nd Respondent

THE ACCOUNTANT GENERAL 3rd Respondent

THE ATTORNEY GENERAL 4th Respondent

Neutral Citation: Dumisa .Mnisi vs. The Director of Veterinary Services and 3 Others (380/2020) [2021] SZIC 25 (20 April 2021)

Coram: **V.Z. Dlamini -Acting Judge**
(Sitting with Ms. N. Dlamini and Mr. D. P.M. Mmango - Nominated Members of the Court)

Last Heard: 01 April 2021

Delivered: 20 April 2021

SUMMARY: *Applicant instituted an urgent application against the Respondents seeldng payment of arrear salaries for a period he never tendered service to the Respondents on the basis that his salary was stopped without affording him the right to be heard.*

HELD: *As the Applicant's reason for not tendering service was not attributable to the Respondents, the 'no work no pay' rule applied.*

HELD: *Further that on the facts of the case, the right to be heard before the decision to stop the Applicant's salary, was ousted.*

JUDGEMENT

INTRODUCTION

[1] The Applicant is an adult liSwati male ofKaShewula area in the Lubombo region and employed by the Eswatini Government under the Ministry of Agriculture as Cordon Guard. He is stationed at Lomahasha area in the Lubombo region.

[2] The pt Respondent is the Director of Veterinary Services, the Head of the Veterinary department in the Ministry of Agriculture.

[3] The 2nd Respondent is the Principal Secretary, the Administrative Head in the Ministry of Agriculture.

[4] The 3rd Respondent is the Accountant General, the Head of the Treasury department within the Eswatini Government.

[5] The 4th Respondent is the Attorney General, the Legal Representative of all departments and organs of the Eswatini Government.

[6] The Applicant instituted an urgent application against the Respondents on the 16th December 2020 seeking the following orders:-

1. *Dispensing with the normal rules of this Honourable Court with respect to notice, service and time limits and allowing this application to proceed on an urgent basis;*

2. *Condoning Applicant's non-compliance with rules of this Honourable Court;*

3. *Directing that the provisions of Part VIII of the Industrial Relations Act No. I of 2000 (as amended) be dispensed with and permitting Applicant to make his application directly to this Honourable Court;*

4. *Directing the 3rct Respondent to cease withholding the Applicant's salary forthwith;*

5. *Directing that the 3rd Respondent pays to the Applicant the sum of· EJ93, 200.00 (One Hundred and Ninety Three Thousand and Two*

Hundred Emalangeni) being the total sum of the salary the Applicant ought to have been paid between February 2018 to date;

6. *Directing the Respondents to pay costs of suit.*

BACKGROUND

[7] The facts of this case are somewhat concise. In 2015, the Applicant was an-ested and charged with offences under the **Game Act** and was admitted to bail by the Simunye Magistrates Court after spending five (5) days in custody. Then while attending a normal remand hearing on the 17th December 2017 in the aforesaid Court, Simunye Police re-an-ested and charged him with the same offence and an additional charge of murder of a Game Ranger.

[8] The Applicant filed an application to be admitted to bail at the High Court, but his application was dismissed. Dissatisfied with the decision of the High Court, the Applicant subsequently appealed to the Supreme Court. The appeal was heard on the 8th August 2018 and judgment delivered on the 30th November 2018 setting aside the decision of the High Couii and remitting the matter to the High Couii for consideration of the bail conditions. On the 24th December 2018, he was admitted to bail by the High Court.

[9] In January 2019, the Applicant reported to work and rendered services from that period to the present day. While the Applicant was in custody, the Respondents stopped paying his salary in February 2018; his salary continued to be withheld even after returning to work and rendering services culminating in the Applicant instituting the present application.

[10] On the date for arguments, the Court was advised by the Applicant's counsel Mr. Magagula that the Respondents had since paid the Applicant's aiTear salaries from January 2019 to date. Due to the non-appearance of the Respondents' counsel on the date for arguments, payment of the Applicant's anear salaries as submitted by his counsel was not confirmed by the Respondents, but that is of no moment because the aggrieved party brought this fact to the Court's attention, we will therefore take it as an established fact.

[11] Nevertheless, the payment of the Applicant's anear salary from January 2019 to date did not resolve the dispute. Mr. Magagula submitted that the Applicant insisted on an order directing the Respondents to pay his anear salary from February 2018 to December 2018 because his salary was stopped without affording him the right to be heard. Moreover, counsel contended that the

Applicant was not given notice that his salary would be interdicted nor was he subsequently informed of the reasons for stopping his salary.

[12] In spite of the non-appearance of the Respondents' counsel, we allowed Mr. Magagula to present his arguments because the Respondents' grounds for opposing the narrow order now sought by the Applicant was well covered in their Answering affidavit and Heads of Argument filed of record.

ANALYSIS

[13] While conceding that at common law, an employer was not required to pay the salary of an employee who has not rendered service, the Applicant's counsel submitted that in terms of **Section 39** of the **Employment Act No.5 of 1980,** the stoppage of a salary of an employee who is remanded in custody must be preceded by a suspension of that employee, failing which the salary stoppage would be rendered unlawful.

[14] In support of his proposition, Mr. Magagula referred to a number of authorities. First counsel quoted the learned author **John Grogan: Workplace Law, 10th edition at page 59,** who comments as follows:

"As long as employees tender service, they are entitled to be paid their earnings and other benefits as and when they are due under the applicable contract ....only non-performance by employees of their contractual obligations ....entitles the employer to withhold their earni·ngs."

[15] According to the Applicant's counsel, the above cited principle has been adopted in the statutes of Eswatini per **Section 39 (1)** and **(4)** of the **Employment Act No.5 of 1980,** which reads as follows:

"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 ...

(4) Where the employee is suspended because he was remanded in custody, and is subsequently acquitted of the charge and any other related charges for which he was place in custody, the suspension shall be lifted, and subject to subsection (5), the employer shall not be obliged to pay any wages to the employee for the period the employee was in custody.

(5) Where an employee is remanded in custody as a result of a complaint laid by his employer in relation to his employment naming him as an accused is subsequently acquitted of that charge or any related charges, the employer shall pay to the employee an amount equal to the remuneration he would have been paid during the period of suspension. "

[16] Mr. Magagula also contended that the aforementioned prov1s1ons were endorsed by the President of the Court in **Nkosingphile Simelane v Spectrum (Pty) Ltd t/a Master Hardware at paragraphs 17 and 18,** in the following remarks:

"It is logical that an employer should not be liable to remunerate an employee who has been remanded in custody and thereby precluded from rendering his/her services. This logic applies whether the offence for which he/she is in custody was committed against the employer, or has nothing to do with his/her employment. The legislation accordingly permits the employer to suspend the operation of the employment contract during the period that the employee is in custody. The employee is unable to render his services, and the employer is *excused from remunerating him/her.* "

[17] The Applicant's counsel also referred to the case of **Beretta v Rhodesia Railways 1947 (2) 1075,** where the Court rejected the employer's proposition that the employee's contract was automatically terminated by the latter's inability to render service due to being incarcerated. The Court held that at common law the contract of employment could only be terminated by the employer giving notice of such cancellation.

[18] Mr. Magagula further submitted that the interdiction of the Applicant's salary while in custody was also unlawful because **Section 33** of the **Constitution** of Eswatini protected a person's right to be heard by an administrative authority before an adverse decision was taken by it. Accordingly, the requirement of faiiness meant that due process had to be adhered to prior to any adverse decision being taken against the Applicant.

[19] The Applicant's counsel also referred the Court to the case of **Secretary to Cabinet v Ben Zwane SZSC Case No. 2/2000** where the Court held that the fundamental requirement of the *audi alteram partem* rule also applied in contracts of employment; consequently, an employer was prohibited from unilaterally suspending an employee without first affording him a hearing.

[20] Mr. Magagula conceded that in the case of **Henry Maswidi Magagula v Umbutf9 Swaziland Defence Force and Another (147/2017) [2019] SZHC 37** held that the respondent in that case was entitled to suspend the applicant's salary because the latter was no longer discharging any duty due to incarceration. Nonetheless, counsel argued that the **Henry Maswidi Magagula** decision (supra) did not resonate with the principles laid down by the Supreme Court in **Ben Zwane (supra)** and the Court in **Nkosingphile Simelane (supra).**

[21] The Applicant's counsel urged the Court to rather follow the case of **Laminate Profiles v Aubrey Mompei & 2 Others (LC) JR 1733/04** whose facts were said to be similar to the present case and legal reasoning in harmony with the legislative position that obtained locally. Mr. Magagula forcefully argued the **Henry Maswidi Magagula case (supra)** was therefore an outlier and should not be followed by the Court especially because it undermines the constitutionally entrenched right to administrative justice.

[22] Now, notwithstanding Mr. Magagula's spirited arguments, the Court finds no merit in the Applicant's claim for arrear salaries for the period he never tendered nor rendered service to the Respondents. Our finding is based on the reasons that follow below.

[23] There is nothing in **Section 39 (4)** of the **Employment Act** and **Nkosingphile Simelane case (supra)** that provide or lay down a principle that the salary of an employee who is unable to render service to an employer because he or she is remanded in custody can only be stopped after that employee is suspended following a prior hearing. The provisions of **Section 39 (4)** of the **Employment Act** are quoted at paragraph 15 above.

[24] There is a reason why the Judge President **PR Dunseith** (as he then was) in **Nkosingphile Simelane case (supra)** used the following underlined words: *": The legislation accordingly permits the employer to suspend the operation of the employment contract during the period that the employee is in custody. The employee is unable to render his services, and the employer is excused from remunerating him/her.* "

[25] In our view, there is a difference between suspending an employee from work · and suspending the operation of the employment contract. The former presupposes that the employee is suspended from work while able to tender his or her services, but in the latter, the operation of the contract of employment is suspended because the employee is unable to tender services for a reason that is known or unknown to the employer. In the

former instance, especially if the suspension is without pay, a pre-suspension hearing is a

requirement. **See Nkosingphile Simelane case (supra),** however, in the latter instance, a pre-suspension hearing may be impractical.

[26] In instances where the whereabouts of the employee are unlmown, it is not unreasonable to expect an employer to afford that employee the right to be heard before the stoppage of his or her salaiy for failure to render services. Even where the employee is remanded in custody and the correctional facility where he or she is kept is !mown by the employer, the right to a hearing before the stoppage of his or her salary is not a requirement because the corollary to that right is the right to earn that salary. If the employee has not tendered his or her services through no fault of the employer, it is unfair to expect the employer pay him or her.

[27] Similar questions were considered by the Court of Appeal of Lesotho and because of the import of the reasoning in that case to the present case, we have quoted extensively from that case.

[28] In the case of **Teaching Service Commission and 2 others v Moeketsi Makhobalo (C OF A) (CIV) 2/2015 [2015] LSCA 21,** the respondent argued that the *'no work no pay'* principle only applied after the affected person was afforded the opportunity to make representations in that regard.

The appellants

contended that the respondent did not prove that he tendered services or tendered to do so to be entitled to remuneration. Consequently, the appellants contended that the *audi alteram partem* rule was ousted in the circumstances of the case.

[29] At paragraph **18** of the **Moeketsi Makhobalo case (supra),** the Court said the following:

> *" ...At common law, the duty to pay, and the commensurate right to remuneration arise, not from the actual performance of work, but, from the tendering of service .... "*

[30] Then at paragraphs **24 and 25 of Moeketsi Makhobalo case (supra),** the Court continued to opine as follows:

> *"I have no cavil with the proposition that the Code of Good Practice made under the Education Act entitles a teacher to audi before disciplinary measures can be brought against him or her. But that is not the end of the matter. The question is, do the facts of the case point to the respondent having forfeited the right to a prior hearing? Counsel for the appellants has cited the following passage from Hoexter at*

(362), with which I am in respectfid agreement: '[Plrocedural fairness

is a principle ofgood administration that requires sensitive rather than heavy-handed application. Context is all important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or nothing approach to fairness. An approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant." **[Our** emphasis].

[31] Lastly, the Court in **Moeketsi Makhobalo case (supra)** at paragraphs **28 to 30** remarked as follows:

"Where a review of administrative action is sought on the basis of denial of audi, it is important for the court to have regard to the context in which the decision was taken, and the role of the affected official. Not least because the common law in Lesotho is that the onus rests on the employee to show that he or she had earned the right to a salary ... Rather than constituting an absolute defence to the respondent's claim for arrear salary, the failure to tender services and the common law principle 'no work no pay' are in my view, the 'context' against which the court a quo ought to have considered the respondent's claim to audi based on the Code of

Good Practice. Courts must guard against an

inflexible and mechanical application of the audi principle which as Hoexter warns, can result in absurd results. The issue, I am satisfied, is not whether the TSC ought first to have afforded the appellant audi before withholding his salary as it did, but whether, on the facts of this case, audi was ousted. Such an approach has the merit that the Court considers not just the formality of an invitation to make representations, their consideration and then a decision thereon, but the entire circumstances under which the adverse decision was taken.
"

[32] The Court agrees with the above quoted principles enunciated in the case of **Moeketsi Makhobalo case (supra)** because they accord with the statutory and common law ofEswatini. The above principles have been applied by the Courts of this country in the following cases: **Henry Maswidi Magagula v Umbutfo Swaziland Defence Force and Another (147/2017) [2019] SZHC; Raymond Mhlanga v Swaziland Government & another Case No. 161/09 SZIC; Prof Annette Singleton Jackson v The University of Eswatini (354/2019) [2020] SZIC 164.**

[33] The authorities that Mr. Magagula urged the Court to follow are distinguishable because the cause of action was the dismissal of the

employees without affording them the right to be heard. Had that been the facts of the

present case, the Applicant's position would be different. This is because it is trite law in this jurisdiction that terminating the services of an employee who is suspected to have deserted without holding a disciplinary hearing may be held to be procedurally unfair should it turn out that the employee never dese1ted. For this principle see the case of **Alpheus Thobela Dlamini v Dalcrue Agricultural Holdings (Pty) Ltd SZIC Case No. 382/04,** which has been followed by the Court in several decisions.

[34] The Applicant's counsel argued that after discovering that the Applicant was at Big Bend Con-ectional facility, the Respondent should have sent an official to furnish him with a notice requiring him to show cause why his salary should not be stopped. In the first place, that is not an express or implied requirement· of **Section 39** of the **Employment Act.** Secondly, the stoppage of the Applicant's salary was for not any reason but his failure to tender services.

[35] The Applicant alleged that it was not his fault that he could not tender se1vices to the Respondents. Well, neither was it the Respondents' fault. It would be unfair and unconscionable to order an employer to pay an-ear salaries to an employee for a period the latter never tendered services through no fault of the former simply because the employee was not afforded the right

to be heard before the employer stopped his or her salary.

[36] **Section 39 (4)** and **(5)** of the **Employment Act** makes a distinction between suspensions without pay imposed on employees who are remanded in custody for charges arising from a complaint laid by his or her employer in relation to employment and charges unrelated to employment. In the former instance, once the employee is acquitted, the employer is obliged to pay the employee his or her arrear salmy, but there is no such requirement in the latter instance.

CONCLUSION

[37] For the above reasons, the Court will therefore dismiss the Applicant's claim for payment of arrear salaries for the period commencing February 2018 to December 2018, but uphold and endorse payment of his salary for the period starting from January 2019 to the pt April 2021, the date of argument of the matter.

[38] On the question of costs, our view is that even though the Applicant has been partially successful and his counsel insisted on pursuing a claim which had no basis, these cannot outweigh the fact that the Applicant was not paid for a period of twenty-six (26) months after returning to work and rendering services for the same period despite while reminding the Respondent several times that he was still not paid. The reason for the delay in reinstating the Applicant's salmy was not explained in the Answering

affidavit and due to

the non-appearance of the Respondents' counsel, the Respondents missed another opportunity to give an explanation to the Court. In the premise, the Court will award the Applicant costs of the application.

[39] In the result, the Court orders as follows:

[a] The Respondents are ordered to pay the Applicant his aiTear salary for the period commencing January 2019 to 31st March 2021 and in the event the Respondents have paid, the order shall not apply.

[b] The Applicant's claim for arrear salaries for the period commencing February 2018 to December 2018 is hereby dismissed.

[c] The Respondents are directed to pay the Applicant's costs at the ordinary scale.

The Members agree.

V.Z. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

For the Applicant: Mr.M. Magagula
(Zonke Magagula & Company)

For 1'1- 4th Respondents: Ms. Z. Nsimbini
(Attorney General's Chambers)