INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO. 1/2018**

In the matter between:

CAPITAL CATERERS SWAZILAND (PTY) LTD **APPELLANT**

And

LINDA McCREESH **RESPONDET**

Neutral Citation: **Capital Caterers Swaziland (Pty) Ltd vs Linda Mc Creesh (1/2018) [2018] SZICA 87**

CORAM: **J.S MAGAGULA AJA**

C.S MAPHANGA AJA

D. TSHABALALA AJA

DATE HEARD: **11th April 2018**

DATE DELIVERED: **3rd May 2018**

Summary: ***Employee's terms of suspension varied from one with full pay to one without pay – employee not given hearing before variation decision taken – purported giving of hearing after***

decision taken not sufficient – nature of dispute of fact referable to oral sufficient.

JS MAGAGULA AJA

[1] This is an appeal against a decision of the Industrial Court delivered on the 11th January 2018.

BACKGROUND

[2] The background facts of this case are that the Respondent herein, who was the applicant in the *court a quo* was an employee of the Appellant until the 15th December 2018 when she was dismissed from employment. Her dismissal was preceded by a disciplinary hearing which commenced with her suspension which was communicated to her by letter dated 2nd August 2017. The letter stated inter alia that her suspension was on full pay and it was to run from 2nd August until 31st August 2017. She was further informed in writing that she was being suspended pending ***"an investigation /disciplinary hearing''*** for charges of dishonesty and sabotage which were briefly elaborated.

[3] When the period of Respondent's suspension expired on the 31st August 2017, she was served with another letter of even date stating inter alia:

> ***" Your suspension on full pay has been extended until further notice."***

This letter also invited Respondent to avail herself on the 11th or 12th September 2017 pending a disciplinary hearing.

[4] On the 15th September, 2017 the Appellant addressed another letter to the Respondent which read in part:

> ***" FURTHER NOTIFICATION OF SUSPENSION***
>
> ***Please be informed that as per your letter dated 31st August 2017, your suspension is <u>without</u> pay.***
>
> ***Please refer to clause 39 (1) (b) part V of the Labour Act 5/1980."***

The Respondent then instructed her attorneys to challenge the variation of her suspension by the Appellant from one with full pay to one without pay. By letter dated 18th September 2017 Respondent's attorneys duly challenged the unilateral variation by the Appellant.

[5] On the 21st September 2017 the Appellant addressed another letter to the Respondent which read in part:

> ***" You are hereby called upon to make representations to Mr Gibs King …….. in writing on or before the 27th September 2017 as to why the terms of the notification of suspension of the 2nd of August 2017 should not be varied from one with pay to one without pay."***
>
> This letter evidently came about as a result of the challenge by Respondent's attorneys to the unilateral decision to vary the terms of suspension.

[6] On the 27th September , 2017 which was the deadline set by Appellant for the submission of the written representations by Respondent, the latter's attorneys addressed a letter to the Appellant

making representations on behalf of the Respondent as to why the intended variation could not be lawfully effected.

[7] On the 28th September 2017 the Appellant advised Respondent in writing that her suspension was varied from one with pay to one without pay for a period of 30 days commencing on the 27th September 2017.

[8] On the 14th December, 2017 the Respondent launched the application which gives rise to this appeal under certificate of urgency. The Respondent sought three substantive orders in the court a quo which ran from paragraph 3 to 5 of the notice of motion of motion and which were couched as follows:

> ***" 3. That the Respondent be and is hereby ordered to pay the Applicant her full salary and normal benefits for the months of October and November., 2017 on which the Applicant remained an employee of the Respondent.***
>
> ***4. That the Respondent be ordered to pay the Applicant's salary for six (6) days being arear or outstanding salary for the month of September 2017 unlawfully not paid or withheld by the Respondent.***
>
> ***5. That the Respondent be ordered to pay costs of this application at attorney and won client scale.''***

[9] The Application was supported by a founding affidavit which basically outlined the events as already alluded to above and annexed

the correspondence already referred to herein. The application was opposed by the Appellant herein by filing an opposing affidavit in which it raised three points of law and also responded to the merits. The points of law related to urgency, failure to exhaust internal remedies or refer the dispute to CMAC, disputes of fact and premature application.

[10] During the hearing of the matter in the court a quo it transpired that some of the prayers sought had been overtaken by events and there was no more need for the court to pronounce itself on them. The Respondent had already been dismissed and paid her salary for November and December 2017. The court set aside the variation of the suspension and directed that it should be suspension with pay. It also ordered that Respondent herein be paid her salary for October 2017, the outstanding six (6) days for September, 2017 and that Appellant pays the costs of the application.

PRESENT APPEAL

[11] Being dissatisfied with the judgment of the court a quo the Appellant has launched this appeal upon four (4) grounds of appeal couched as follows:

> ***" 1. The court a quo erred in law and in fact in finding that there are no disputes of fact relating to the six (6) days salary claim for the month of September 2016;***
>
> ***2. The court a quo erred in law and in fact in finding that the Applicant was entitled to approach the court a quo to challenge the appellants decision of 28TH***

September 2017 varying the terms of suspension without having exhausted internal remedies;

3. The court a quo erred in law and in fact in finding that the Appellant had not withdrawn the letter of the 15th September 2017;

4. The court a quo erred in law and in fact in holding that the Appellant did not follow the procedure in varying the terms of suspension of the Respondent."

[12] In relation to the 1st ground of appeal, the Respondent stated in paragraph 21 of her founding affidavit:

" ….I received a salary for fourteen (14) days instead of 20 days for the month of September, 2017. The Respondent therefore owes me a salary for six (6) days for September 2017 which is due owing and payable. I submit that the Respondent has no lawful justification to withhold the remaining portion of my salary."

[13] In response to this allegation the Respondent states in paragraph 32 of its answering affidavit:

" It is further denied that the Applicant received a salary of fourteen (14) days instead of twenty (20) days for the month of September 2017 and it is humbly averred that she received her full salary after the necessary deductions, which included a repayment of a loan agreed upon."

[14] Annexed to the answering affidavit is what appears ***ex facie*** to be a pay advice slip for the Respondent indicating the pay date as 30th September, 2017. This document has a narration ***inter alia*** which reads: *" Normal Earnings* ***E18 265.50."***

Although it has a heading which reads " Rate Days/Qty," there is no entry under this heading. This document is therefore of no assistance in determining how many days the Respondent was paid for in September 2017. It therefore remains a dispute which cannot be determined on the papers whether Respondent was paid for fourteen (14) or twenty (20) days in September 2017.

[15] Dealing with this point the learned judge a quo states in paragraph 7 of his judgment:

> ***"Applicant claims six days unpaid salary in September 2017. In its own papers, the Respondent states that the Applicant was duly paid for the days between 15th of September and 28th September, 2017 hence it cannot be said that she was on suspension without pay on those days. There has been no explanation in the papers on how the other days 1st – 15th September 2017 were paid. This point cannot stand and is dismissed''.***

[16] In our view the learned judge clearly misdirected himself in this regard. Firstly the 1st to the 15th is fifteen (15) and not six (6) days. It is therefore difficult to see how the learned judge equates this period to the six (6) days for which respondent was claiming. Secondly as Mr Simelane contended, there was no dispute with respect to the period

from the 1st to the 15th September 2017. During this period the respondent was on suspension with pay. Problems arose on the 15th September when Appellant sought to vary the suspension from one with pay to one without pay. It is therefore not suprising that nothing was said concerning the period 1st to 15th September, 2017. There were no issues regarding that period.

[17] The question of the six (6) days salary remained a dispute and the question is how this dispute was supposed to be resolved. Did this dispute warrant that the matter be referred to the disputes procedure under Part VIII of the Act, or to trial or to oral evidence for determination of this specific issue in terms of rule 14 (13) (a)? That rule provides:

> ***" In dealing with an application provided for in this subrule, the court may make any competent order it deems fit, including an order –***
>
> ***a) Referring the matter to oral evidence for the determination of a specified dispute of fact;***
> ***b) Referring the matter to trial and directing that it be enrolled in the Trial Register ….."***

In our view the route to take would be determined by a consideration of the matter in its entirety. If the dispute was central to the determination of the whole case, this could mean that the matter ought to be referred to the Part VIII procedure or at least to trial. Also if there were many other disputes apart from this one, the matter could have had to be referred to the Part VIII procedure or to trial. However

if the dispute was the only one and, as it seems to be, relating to one crisp issue the point could be referred to oral evidence for determination of this specific issue.

In any event the guiding principle in deciding on the appropriate line of action to take is a just and expeditions finalization of the case. For instance in the South African case of NAIDOO vs PILLAY (AR 241/2016) [2017] ZAKZPHC 10 (13 March 2017) Seegobin J stated at paraphaph [7]

> ***"….The overriding consideration in the exercise of the discretion conferred by the sub – rules is to ensure a just and expeditious decision. In other words, in matters in which a genuine and bona fide dispute of fact arises, the court hearing the application must be persuaded that the hearing of evidence will be fair to the parties and will conduce to an effective and speedy resolution of the dispute and the overall application."***

[18] It would appear to us that this was the only real dispute of fact. The court could and should have referred the matter to oral evidence on this specified issue. It was not necessary to refer the matter to the Part VIII procedure only on account of this dispute.

[19] On the second ground of appeal the Appellant contends that the Respondent should not have been allowed to approach the court a quo without first having exhausted internal remedies. This point was indeed raised in ***limine*** in the *court a quo*. In dealing with this point the court a quo states in paragraph 6 of its judgment:

" It seems to us that the Respondent's point is ill conceived. Respondent did not show what internal remedies existed within its establishment and that such remedies were known to the applicant. In the circumstances the Applicant is entitled to approach this court in terms of its jurisdiction set out in section 8 of the Industrial Relations Act 2000 (as amended)".

Section 8 of the said Act grants the Industrial Court wide and exclusive jurisdiction in matters relating to employment which includes jurisdiction to hear and determine any application brought to it. There is no requirement that it shall refer any matter back to the workplace for internal remedies to be exhausted before it hears it. It appears to us that it can do so at its discretion and where it is reasonable to do so, and indeed where such dispute resolution structure is shown to be in existence.

In ***casu*** it is not clear what was inappropriate or what injustice was occasioned by failure of the court a quo to refer the matter to be dealt with by internal structures. Worse still as the court a quo rightly observed it was not shown that any internal procedures for dealing with such matters existed.

We accordingly find that the court a quo correctly dismissed this point and the second ground of appeal must accordingly fail.

[20] On the third ground of appeal the Appellant contends that the court a quo erred in finding that the letter of 15th September 2017 was never withdrawn. In our view this ground of appeal lacks any basis since it is only a fact that the letter was never withdrawn. There is no record

of this letter being withdrawn. Even the letter of the 21st September 2017 which calls upon the Respondent to make representations does not say anything about withdrawal of the letter of 15th September 2017.

Even if it could be argued that this letter was withdrawn by implication, such argument would lack support since the effect of this letter was still confirmed in the letter of the 28th September, 2018. There is no basis therefore for inferring that this letter was ever withdrawn.

We accordingly find no merit in this ground of appeal.

[21] Under the fourth ground of appeal it is alleged that the court a quo erred in finding that the Appellant did not follow the procedure in varying the terms of suspension of the Respondent. This point was also canvassed in the court a quo and after outlining the chronology of events leading to the issuing of the final letter of suspension on the 28th September 2017, the court a quo states in paragraph 13 of its judgment;

> ***" As already alluded to above, it is trite that an employer who intends to vary the terms of an employee's suspension from paid to unpaid can do so upon fulfilling a fair procedure before doing so. To call upon an employee to make representation on a particular issue that will, if implemented have an adverse effect on that employee, requires more than just merely affording that employee an opportunity to speak on a decision already made. It envisages giving the employee***

the opportunity to express her views and make representation which the employer will seriously take into account.

It appears to us that the call to applicant to make representation was merely an attempt to regularize the variation of her terms of suspension communicated to her by letter of 15th September, 2017. The decision to change the terms of the suspension were [was] made then and were [was] in fact never withdrawn by the Respondent even after the applicant's attorney pointed out the irregularity of the change. No explanation was forthcoming from the respondents how the letter of 15th September came to be.

We find that the respondent fails to pass the test on procedural fairness as set out in the NERCHA case".

[22] We are in perfect agreement with the court a quo in this regard. The decision to vary the terms of Respondent's suspension was taken on the 15TH September 2017, before she was afforded any form of hearing in that regard. It was therefore procedurally unfair. The letter of the 21st September 2017 was merely aimed at giving an opportunity to speak on a decision that had already been taken. The representation she was called upon to make at this juncture could not have been meant to influence the decision that had already been taken. This ground of appeal must accordingly fail.

[23] For the foregoing reasons we find that Appellant succeeds on the first ground of appeal and that there is no merit in the other three grounds

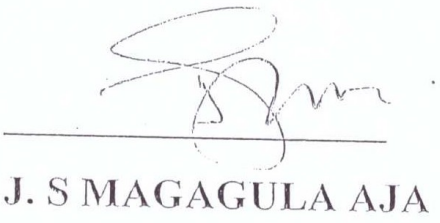
of appeal. The order made by the court a quo is therefore set aside and replaced with the following:

1. The variation of Respondent's suspension from being one with pay to one without pay is set aside.

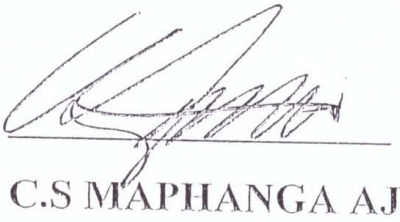
2. The Appellant is ordered to pay the Respondent's salary for October 2017.

3. The claim for six (6) days salary for September, 2017 is referred to oral evidence for determination of that specified issue by the *court a quo.*

4. The Appellant is to bear the costs of this appeal.



J. S MAGAGULA AJA



I agree

C.S MAPHANGA AJA

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D. TSHABALALA

For Appellant: **Mr K. Simelane**

For Respondent: **Mr M. Hlophe**