IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 459/2020**

In the matter between:

NEDBANK SWAZILAND LIMITED Applicant

And

PHESHEYA NKAMBULE 1st Respondent
PRESIDENT OF THE INDUSTRIAL COURT 2nd Respondent
N.R. MANANA N.O. 3rd Respondent
M.P. DLAMINI N.O. 4th Respondent
THE ATTORNEY GENERAL 5th Respondent

Neutral Citation: *Nedbank Swaziland Limited and Phesheya Nkambule & 4 Others (459/2020) [2020] SZHC 220 (27th October 2020)*

CORAM: **Q.M. MABUZA PJ**

DATE HEARD: **24 July 2020**
DATE DELIVERED: **27 October 2020**

SUMMARY

Labour Law - *Employment relations – Application to review and set aside judgment of the Court a quo – Application dismissed with costs – Judgment and orders of the Court a quo confirmed.*

JUDGMENT

The Prayers

[1] Applicant seeks an order in the following terms:

(a) Reviewing and setting aside the judgment and order delivered by the Industrial Court on 6th March 2020 under case number 205/2020.

(b) Substituting for that order an order dismissing the application that came before the Industrial Court under that case number;

(c) Alternatively to prayer 2, remitting the matter to the Industrial Court for determination of the application afresh by differently constituted court, and having regard to the judgment of the High Court in this review;

(d) Ordering the First Respondent and (only in the event of their opposition) the other respondents to pay the cost of this application jointly and severally;

(e) Granting further or alternative relief.

[2] The application is opposed by the 1st Respondent.

The Parties

[3] The Applicant is Nedbank Swaziland Limited, a financial institution duly established in accordance with the company laws of the Kingdom of Eswatini, having its principal place of business at Nedbank Centre, Swazi Plaza, Mbabane, District of Hhohho. The Applicant was the Respondent in the proceedings in the court *a quo*.

[4] The First Respondent is Phesheya Nkambule an adult male of Ngculwini who is employed by the Applicant as Head of Retail Sales, c/o MLK Ndlangamandla Attorneys, Swazi Plaza, Mbabane. The First Respondent was the applicant in the proceedings in the court *a quo*.

[5] The Second Respondent is the President of the Industrial Court, cited herein as the judicial officer who presided over the application instituted by the First Respondent against the Applicant at the Industrial Court of Eswatini ("the court *a quo*").

[6] The Third and Fourth Respondents are honourable members of the Court, duly appointed in terms of the Industrial Relations Act 2000. The Third and Fourth Respondents sat and presided over the matter that is the subject of the present review application.

[7] The Fifth Respondent is the Attorney General, cited herein in his nominal capacity as legal representative of the Second, Third and Fourth Respondents c/o Justice Building, Mhlambanyatsi Road, Mbabane.

[8] No order is sought against the Second, Third, Fourth and Fifth Respondents other than the principal order of reviewing and setting aside their judgment as delivered on 6th March 2020.

Jurisdiction

[9] This Honourable Court has jurisdiction to hear and adjudicate upon this matter in terms of Rules 6 and 53 of the rules of the above Honourable

Court, as read with Section 19 (5) of the Industrial Relations Act (the **"Act"**), as amended. The relevant provision of the Act reads:

> "(5) *A decision or order of the Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law"*.

The matter in *casu*

[10] The 1st Respondent is alleged to have been implicated in the misappropriation of amounts in excess of E3 million from the Applicant. On the 24th December 2018 he was suspended on full pay by the Applicant. He earns an annual salary of E1 174 581-00. He was the Chief Financial Officer a position which placed him as second most senior employee.

[11] The suspension was in terms of Section 39 of the Employment Act No. 5 of 1980 which provides as follows:

> *"39. (1) An employer may suspend an employee from his or her employment without pay where the employer 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.*
> *(2) If the employee is suspended under subsection (1) (b), the suspension without pay shall not exceed a period of one month."*

[12] The 1st Respondent was suspended in terms of Section 39 (2) whereby his suspension without pay is limited to a period of one month. In this case after the one month suspension without pay, his suspension continued on full pay until the Applicant seeing no end to the matter and bleeding financially stopped paying him on the 1st June 2019. The benefits of Medical Aid and mobile phone were also terminated. This

was after calling upon him to furnish reasons why the terms of his suspension should not be varied from suspension with pay to suspension without pay until the finalisation of the disciplinary hearing.

[13] The period of suspension is meant to put into motion and to conclude the disciplinary processes within a reasonable time so that the employee is not deprived of his comfort zone and the employer is not deprived of unreasonable amounts of money in paying for no services received from the employee. During argument(s) on the 24/07/2020 I was informed that the disciplinary processes had not begun let alone been concluded that is, after a full year and almost 7 months.

[14] The 1st Respondent argues that it is his right and the Applicant is of the view that the 1st Respondent is abusing this right by employing delaying tactics in stalling the disciplinary process. The Applicant is also of the view that should the 1st Respondent be found guilty, he will be unable to repay the Applicant. The Applicant says that the delays in concluding the disciplinary processes is caused by the 1st Respondent.

[15] Giving a background of the facts, the Applicant says that this matter has its genesis in disciplinary proceedings that were instituted by the Applicant against the 1st Respondent in January 2019. The 1st Respondent had been placed on precautionary suspension on 24th December 2018 pending the finalisation of disciplinary proceedings against him.

[16] The timeline for the disciplinary hearing was that it was initially slated for 12th February 2019 but could not take off because the 1st Respondent raised some preliminary objections. The chairman dismissed these on the 26th February 2019 by way of an *ex-tempore* ruling. The Applicant states that these objections were spurious and dilatory, but the 1st Respondent denies this.

[17] The Applicant says that the 1st Respondent thereafter launched an urgent application at the Industrial Court (Case 63/2019) primarily and interdiction of the disciplinary proceedings pending him being furnished with certain documents amongst other relief. The Applicant says that these proceedings were simply intended to frustrate the early finalisation of the disciplinary hearing. The 1st Respondent denies that the launching of Case 63/2019 was to delay or to frustrate the disciplinary process.

[18] Case 63/2019 was subsequently removed from the Court roll after the Applicant had provided the documents sought and agreed on the removal of the chairman. The new hearing was then slated for 15th February 2019. At this hearing the 1st Respondent again raised preliminary points which were dismissed. He launched another application at the Industrial Court (141/2019) wherein he sought that the chairman be compelled to provide written reasons for the ruling. The 1st Respondent's response is that he sought the investigation report which contained particulars which led to his accusation and the formulation of the charges against him as well as the reasons for the ruling that being his legal right.

[19] Having received the written reasons, the 1st Respondent instituted a third application at the High Court (No. 851/2019) on 27th May 2019. This was finalised on 9th December 2019. The High Court dismissed this application with costs. The Applicant says that this application was spurious but the 1st Respondent denies this and says that the application was dismissed on a point of law on jurisdiction and not on the merits.

[20] While awaiting the High Court decision, the Applicant says that new allegations of serious misconduct against the 1st Respondent surfaced. Disciplinary proceedings were instituted against him in relation to the new allegations. The 1st Respondent launched another application at

the High Court seeking to interdict those disciplinary proceedings. The matter is still pending with the Court having dismissed Applicant's preliminary point on lack of jurisdiction. The 1st Respondent's response is that he is not aware of any investigation process that led to the new hearing. He approached the High Court to seek redress against victimisation by being subjected to two parallel disciplinary hearings at the same time as well as criminal charges which were preferred against him.

[21] It is firstly the Applicant's concern that the courts have intervened in incomplete disciplinary hearings without due consideration of the impact and consequences. And secondly that the finalisation of the matters in casu have taken an unduly long period. The first matter took 7 months to complete and the second matter is still incomplete.

[22] Whilst I empathize with both concerns, regrettably I cannot assist the Applicant.

[23] The Applicant says that in between these court applications, there have been instances where the disciplinary hearing has been postponed at the instance of the First Respondent, either because he is reportedly ill; because he is unavailable (having to travel on some emergency to the Republic of South Africa) or when his legal representative has been unavailable. And that the medical s submitted by the First Respondent caused a sense of disquiet as their integrity was doubtful.

[24] The 1st Respondent's response is that the hearing was postponed only on two occasions at his instance. He was ill and he submitted a medical certificate to that effect, which Applicant's Head of Human Resources Mr. Edward Sithole, verified to be authentic and genuine, he did same by enquiring about 1st Respondent's ailments from his doctor at Medisun. During the second instance, he had taken his child for

review of an operation that had been performed at Nelspruit. There has never been any other instance. In both instances the postponements were granted by the chairperson pursuant to satisfying himself that the basis of seeking the postponements were genuine and valid.

[25] The Applicant in its reply has added a third postponement on account of unavailability of the 1st Respondent's Counsel. The Applicant further laments that the postponements had a debilitating effect, in that they were then almost methodically followed by the institution of the multiple legal proceedings.

[26] Unhappy with the suspension of his pay the 1st Respondent launched an urgent application in the Industrial Court for an order directing the Applicant to reinstate his salary and all benefits (cellphone and medical aid) and to pay his salary arrears which at that time stood at E293 647.74 (Emalangeni Two Hundred and Ninety Three Thousand, Six Hundred and Forty Seven, Seventy Four cents.)

[27] The Applicant opposed that application.

[28] The Industrial Court delivered its judgment on the 6 March 2020.

[29] In it the Court found for the 1st Respondent and ordered that the Applicant reinstate the Applicant's salary forthwith with effect from his July 2019 salary including all benefits due in terms of his contract of employment.

[30] It is that decision which the Applicant now seeks to have reviewed and set aside per notice of motion filed in this Court. The prayers sought are set out in paragraph (1) *supra*.

[31] According to the Applicant, its grounds of review are predicated on multiple premises which include:

"12.1 That the Court a quo committed a reviewable irregularity when it failed to give due weight to the principle that where a disciplinary process is interrupted and/or delayed by an employee, the employer in appropriate circumstances should not be liable to remunerate the employee. There is both a legal and factual basis to hold that an employee may not unduly benefit from his decision to interrupt the early finalisation of a disciplinary hearing.

12.2 The Court a quo failed to consider relevant factors that were presented to it when determining this matter.

12.2.1 First, they failed to consider the fact that the First Respondent had been engaged in a systematic and deliberate ploy to prolong the disciplinary hearing, by launching multiple applications at the Industrial Court as well as applications at the High Court.

12.2.2 Second, the Court failed to consider the import and impact of this litigation on disciplinary proceedings when juxtaposed with the obligation on the part of an employer to remunerate an employee indefinitely.

12.2.3 Third, that there's a good cause not to have a wholesale application of provisions of the Employment Act when dealing with senior management employees.

12.3 The Court a quo misconstrued its powers when it found that it could not interpret Section 39 (2) of the Employment Act in any other manner other than its literal wording.

In making this finding, the Court misconstrued the powers to it in terms of Section 4, 6 and 8 respectively of the Industrial

Relations Act. It failed to apply its mind to the need to further the objectives of the Industrial Relations Act (IRA).

12.4 The Court a quo ignored relevant considerations when it failed to make a determination on whether a rigid application of Section 39 (2) offends the principles of fairness that underpin employment contracts particularly when dealing with senior managerial employees. The Industrial Court is enjoined by Section 4 to uphold principles of fairness and equity in all labour relations".

[32] The summarised version is to be found at paragraph 52 of the Applicant's Heads of Argument. These are set out hereunder:

52.1 The Court failed to conduct an enquiry into the circumstances giving rise to the variation of the terms of the suspension from suspension with pay to without pay. In failing to do so, the Court ignored relevant considerations which were paramount in the exercise of its equitable jurisdiction.

52.2 The Court failed to conduct an enquiry as to the fairness of the migration of the terms of the suspension from suspension with pay to suspension without pay.

52.3 The Court failed to apply principles of interpretation when it gave a literal interpretation to Section 39 (2) of the Act. In so doing, the Court committed an irregularity and thus denied the Applicant a fair hearing.

[33] I am unable to agree with Counsel for the Applicant. The Court *a quo* dealt with all the Applicant's concerns including what the Applicant now perceives as irregularities.

[34] I sympathize with the Applicant who is bleeding financially. I agree that there seems to be no provision that protects and cushions an employer when an employee employs delaying tactics during the determination of a disciplinary hearing. Even if this Court were to conduct the inquiries referred to and came to the conclusion that fault was to be attributed to the 1st Respondent then what?

[35] The Court *a quo* correctly pointed out that it could not change the law as this would be tantamount to judicial overreach into an area of the Legislature. Therefore pursuing either inquiry would have served no useful purpose because the end result would have been the same. It is the Legislature that should be approached to even the playing field in order to protect and give comfort to employers. In the present circumstances it cannot be the Court *a quo* nor even this Court.

[36] Dealing with the issues at hand the Court *a quo* penned the following in its judgment:

> *"[6] The Respondent opposes the application and, in its submission, set out that the Applicant had interfered with the Respondent's exercise of its disciplinary authority by filing numerous spurious applications before this Court and the High Court, the effect of which was to delay the finalisation of the disciplinary process against him. It states that in such circumstances where the employee in involved in a systematics and blatant trajectory to delay and frustrate the finalisation of the disciplinary hearing by involving various judicial interventions, then the duty of fairness which underpins employment relationships compels the Court not to countenance the employee's behaviour. It was the Respondent's submission that on a purposive interpretation of* ***Section 30 of The Employment Act No. 5 of 1980****. An employee without*

pay for a period in excess of one month where exceptional and compelling circumstances exist, in particular where the conduct of the employee is such that he had interfered with the prerogative of the employer to discipline.

[7] In support of its submission the Respondent referred the Court to ***Sections 4 and 8 (4) of The Industrial Relations Act 2000*** *(as amended). The South African cased of* ***Msipho and Plasma Cut (2005) 26 ILJ 2276 (BCA), SAPPI FORESTS v CCMA & Others Case No. DA 12/08 and SAEWA obo Members v Abedare Cables [2007] 2 BALR 106*** *were cited to support the notion that an employee on suspension with full pay is not entitled to his remuneration for the period in which a disciplinary hearing is postponed at his instance; that it would be unfair in such circumstances to hold the employer responsible for an employee's action.*

[8] ***Section 39 of The Employment Act*** *reads thus:*

"39. (1) An employer may suspend an employee from his or her employment without pay where the employer is –

(a) remanded in custody; or

(b) has or is suspect of having committed an act which if proven, would justify dismissal or disciplinary action.

(2) If the employee is suspended under subsection (1) (b), the suspension without pay shall not exceed a period of one month.

As indicated above, the Applicant accepted the suspension without pay but argues that the Respondent has imposed same beyond the month of June 2019 and that such action is contrary to the provisions of ***Section 39 (2)****. It appears to us that the matter turns on the interpretation of* ***Section 39 of The Act****.*

[9] We have considered the South African cases cited by the Respondent. We have however, not been able to find any legislation similar to Section 39 of our Employment Act. Instead, it appears that in terms of South African law an employer may suspend an employee without pay if the employee so agrees or legislation or a collective agreement authorises the suspension. Apart from the ***Sappi Forest*** *(supra) decision, the other two matters were decisions of arbitrators who held that an employer is entitled to withhold payment of salary of a suspended employee where that employee delays a disciplinary and for the period of the delay. The employee would not be entitled to salary during the period of the suspension. The period is not necessary an indefinite one. Again, as previously stated these decisions are not guided by legislation. The Sappi Forest decision seems to have been based on the provisions of a Collective Agreement that allowed suspension without pay that the contents and operation of which the employee had not disputed. Further it seemed the employee had been given an option to either attend a disciplinary hearing forthwith (while on full pay) or wait for his criminal case to be finalised (without being paid). He had chosen to await the outcome of his criminal*

case but then challenged the employer's decision not to pay him while awaiting same on the bases of a clause in the collective agreement.

[10] The Respondent's attorney made an impassioned submission for the Court to adopt a purposive interpretation ***of Section 39 of The Employment Act*** *in terms of which, it was submitted, the purpose of the section was to ensure that an employer held and completed a disciplinary hearing within a reasonable time. It was submitted that the period given by the Act for suspension without pay ought to be read as allowing an employer to extend same where an employee is engaged in dilatory conduct that ensures that the hearing cannot be completed expeditiously.*

[11] Our Section 39 (2) is clear an employee who intends to invoke the provision of the section does not have unfettered powers. The suspension without pay cannot exceed a period of one month. There is no reason, in our view to go beyond the normal meaning of the section so as to give it any other interpretation. The Court's jurisdiction to promote harmonious Industrial Relations and to issue appropriate orders, does not give it power to issue orders that are outside the law. To interpret ***Section 39 (2)*** *in any other than that it limits suspension without pay to a period not exceeding one month would be judicial overreach into the area of the legislature. We are not entitled to do so.*

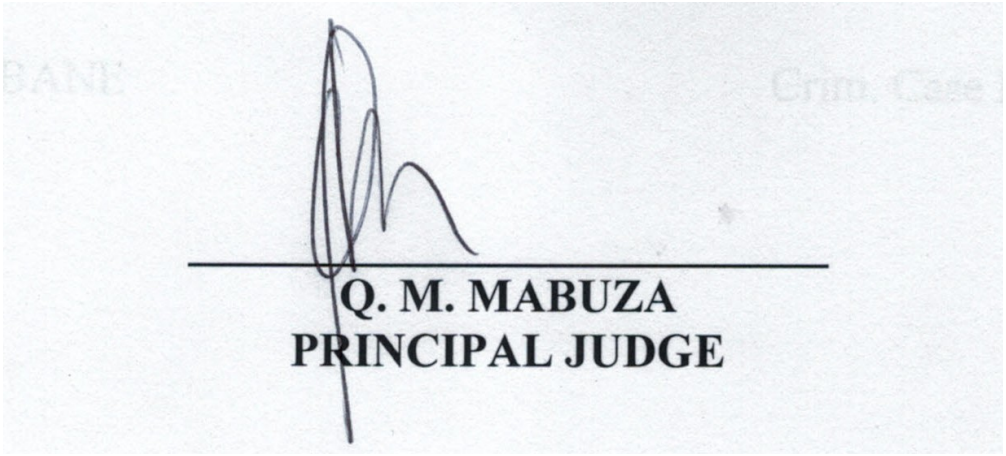
[12] In any event, even from the angle of fairness, as we were implored by the Respondent's attorney, the continued suspension of an employee does not have detrimental

effect for an employer only. An employee suspended on suspension of having committed a fraud, suffers from reputational damage from which he cannot recover easily. This particularly so where the employee is at Senior Managerial level. He cannot be equated to a man sitting at home on holiday. His professional growth is threatened and he suffers mental anguish brought about by the employer's accusation. It is in his interests also, that the disciplinary hearing be finalised timeously. As he fights for his career, he is entitled to protect his right to a fair hearing by challenging whatever actions by the employer he feels are denying him a fair hearing.

It seems to us that to withdraw the Applicant's salary by changing his terms of suspension to suspension without pay and indefinitely, is contrary to ***Section 39*** *of* ***The Employment Act*** *and amounts to the Applicant being penalised for challenging the fairness of the process the employer is taking him through".*

[37] I totally agree with the above and align myself therewith.

[38] In light of the aforesaid I am unable to grant the application and it is hereby dismissed with costs. The judgment and orders of the Court *a quo* are hereby confirmed.



For the Applicant: Mr. Z. D. Jele

For the 1st Respondent: Mr. M.L.K. Ndlangamandla