

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 100/03

In the matter between:

NIKIWE VALLET NKAMBULE

APPLICANT

and

SWAZILAND NATIONAL HOUSING BOARD

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: S. DLAMINI

FOR RESPONDENT

: Z. JELE

JUDGEMENT

20/06/03

The Applicant has brought an urgent application seeking for an order in the following terms:

- (a) That the rules relating to service and time limits be and are hereby dispensed with and hearing this matter as one of urgency,
- (b) That an order be and is hereby issued calling upon the Respondent to declare Applicant's present employment status;
- (c) That an order be and is hereby issued directing the Respondent to pay forthwith to Applicant all arrear monthly wages for the months of May, June, July, August, September, October, November, December 2002 and January, February, March, April 2003 in the sum of E35,352.12.

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- (d) Costs of suit.

The facts of the case as deposed to in the Founding Affidavit of the Applicant Nikiwe Vallet Nkambule are as follows:

That she was employed as a cashier by the Respondent Swaziland National Housing Board on or about the 8th May 2001 and held the position up to the 1st August 2002 when she was dismissed for alleged misconduct in that she had misappropriated E10,787.00 received from tenants. On the 6th August 2002 she appealed the decision.

At the time of termination she earned E3,213.92 per month. She reported the dispute to the Labour department on the 21st January 2003 which then referred the matter to CMAC. The report of dispute was accompanied by a copy of the appeal letter to the employer. The employer had not responded to the same.

On the 17th March 2003 on the day of conciliation the Respondent requested that she withdrew the dispute from CMAC since her dismissal had been quashed due to certain irregularities in the disciplinary hearing. However on the 5th April 2003 the Respondent preferred 18 new charges against the Applicant and she was invited to a disciplinary hearing on the 7th April, 2003.

The Respondent has responded to the Applicant's case through its Managing Director Mr. Thomas Dlamini who deposes as follows:

That the Applicant was suspended without pay on the 24th April, 2002 and received notification of charges leveled against her on the 14th June 2002. That on the 20th June 2002 the Applicant wrote to seek a postponement of hearing as she was due to sit examinations.

That the hearing was consequently postponed to the 27th June 2002 and the suspension was extended to the 19th July 2002. The hearing commenced on the 27th June 2002 and was concluded on the 16th June 2002.

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The findings are set out in paragraph 10 of the Affidavit of Mr. Dlamini.

According to Mr. Dlamini the Applicant had pleaded guilty to misappropriation of E5,300 and no further evidence was led but in mitigation and in the appeal, the Applicant insisted that the plea was misunderstood as she had admitted E5,300 had gone missing but had denied misappropriating the amount.

Mr. Dlamini who chaired the appeal decided to refer the matter to a rehearing in view of the submissions by the Applicant but denies that he had quashed the conviction. The reference was further for the reason that she had not been represented at the inquiry contrary to her entitlement in terms of the disciplinary code of the Respondent.

On the second count of 'cash rolling' she was found guilty and given a final written warning and on the third count she was found guilty of gross negligence and also given a final warning. He upheld the findings of guilty and referred the matter back to the chairman of the enquiry for appropriate sentence since it was according to him not proper to give her two final written warnings.

He denied he varied the findings of the disciplinary tribunal especially as concerns the first count. As for the fourth count, she was found guilty of admitting failure to report a loss and was given a written warning. The view of Mr. Dlamini was that she had in respect of this charge been found guilty for wrong reasons.

The issue for determination is whether the chairman of the appeal did quash the finding of dismissal by referring the matter back for retrial with the necessary consequence that the Applicant was an employee entitled to a salary pending rehearing of the matter.

It is common cause that upon reference of the matter for rehearing, fresh charges were preferred against the Applicant as seen from 'NVN4' to the Application. Indeed there were eight fresh counts which were served on the Applicant on the 5th April 2003.

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The inescapable conclusion is that she was still an employee of the Respondent until the fresh charges were heard and determined.

On the 17th April, 2003 alternative charges were further served on the Applicant via annexure 'NVNC' to the application. On the 22nd April 2003 by the letter annexure 'NVND', she was informed the following:

"Please be informed that your suspension without pay still stands pending the finalization of the disciplinary enquiry against you."

The letter was written by the Chief Accountant.

It is inescapable given the foregoing that the Applicant was still an employee of the Respondent until this time. It is also common cause that she had been under suspension without pay since the 24th April, 2002.

Section 39 (1) of the Employment Act No. 5 of 1980 (as amended) 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.

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

Section 39 (2) on the other hand reads:

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

From a reading of these provisions, where an employer suspends an employee who is not in custody pending preference and determination of disciplinary action against him, the employer is bound to keep him under suspension without pay for not more than one month.

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The provisions of subsection 39 (2) are peremptory and same are applicable to the Applicant herein.

The employer accordingly could only lawfully keep the Applicant under suspension without pay for a period of one month from the 24th April 2002.

The Respondent is thus bound to pay the full salary and other benefits due to her for the rest of the period she was under suspension until the date the disciplinary process was concluded leading to her dismissal.

The application therefore succeeds and the following order is made:

1. The Applicant is to be paid her full remuneration for the entire period she was kept under suspension save for the first one month.
2. The Respondent is to pay the costs of the suit.

The Members Agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT

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