



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGMENT**

Case NO. 180/13

In the matter between:

**NOMCEBO MABUZA**

**Applicant**

And

**THE PRINCIPAL SECRETARY  
MINISTRY OF NATURAL RESOURCES & ENERGY**

**1<sup>st</sup> Respondent**

**CIVIL SERVICE COMMISSION**

**2<sup>nd</sup> Respondent**

**SWAZILAND GOVERNMENT**

**3<sup>rd</sup> Respondent**

**ATTORNEY GENERAL**

**4<sup>th</sup> Respondent**

**Neutral citation:** *Nomcebo Mabuza v The Principal Secretary Ministry of Natural Resources & Energy & Three Others (180/13) [2014] SZIC 05 (February 2014)*

**Coram:** NKONYANE J,  
*(Sitting with G. Ndzinisa & S. Mvubu:  
Nominated Members of the Court)*

**Heard submissions : 05 DECEMBER 2013**

**Judgment delivered: 14 FEBRUARY 2014**

**Summary:**

**The Applicant is a civil servant. She is presently not at work as she claims that she was suspended by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent denied that the Applicant was suspended by him or at all. The Applicant instituted proceedings to set aside the alleged suspension and also for payment of arrear salaries from August 2010.**

**Held—As the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have already initiated disciplinary proceedings against the Applicant, the court must allow that process to run its course and not deal with issues that are yet to be decided by the disciplinary committee chairperson.**

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**JUDGMENT  
14.02.2014**

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[1] This application first appeared before the court on 07.06.13. It was brought to the court under a certificate of urgency. On this date however it was removed from the roll to take its normal course. The question of urgency is therefore no longer alive.

[2] The Applicant is a Civil Servant. She was first employed by the 3<sup>rd</sup> Respondent on 04<sup>th</sup> August 2003 as Typist 1 in the Deputy Prime Minister's Office. Her duty station was at Hhukwini Inkhundla. She served at Hhukwini Inkhundla until February 2009 when she was transferred to the Fire and Emergency Services Department. Whilst she was at Hhukwini Inkhundla, the Applicant enrolled with the University of Swaziland and was doing a Diploma in Law on a part time basis. It was a three-year programme. She successfully finished this programme and she got a direct transfer to the Bachelor of Laws (LLB) programme. Her immediate supervisor at Hhukwini Inkhundla gave her the permission to do the Diploma in Law as she attended on weekends. During the break and on vacations she would come to work.

[3] The LLB however was a full time programme. She entered into an arrangement with her immediate supervisor at Hhukwini Inkhundla interms of which she was allowed to pursue her studies at the University but would come back to work during the University break and during the vacations. During 2009 she was transferred to the Fire and Emergency Services Department. On arrival she notified her new immediate supervisor about the arrangement that she had with her previous immediate supervisor at Hhukwini Inkhundla. The new supervisor did not have a problem with the

- arrangement. The Applicant was permitted to attend classes at the University and to resume her duties during the break and vacations.
- [4] The Applicant did not have the permission of the Ministry of Public Service to go and study at the University on a full time basis. She had applied for for study leave with pay on 04<sup>th</sup> July 2007, (see: annexure “F” of the founding affidavit), but the Ministry of Public Service did not respond. She proceeded to the University well knowing that the Ministry of Public Service did not grant her the permission.
- [5] During 2009 when the Applicant was with the Fire and Emergency Services Department, the Principal Secretary again wrote to the Ministry of Public Service on her behalf requesting permission to go and pursue her studies at the University of Swaziland. The memorandum is dated 10<sup>th</sup> July 2009 and is annexure “G” of the Applicant’s founding affidavit.
- [6] Again, the Ministry of Public Service did not respond to this correspondence. It is common cause between the parties that that the Applicant enrolled for the LLB programme at the University of Swaziland and completed the programme, without direct permission of the Ministry of Public Service.
- [7] The Applicant is presently stationed at the Ministry of Natural Resources and Energy. After completion of her studies in June 2012, she reported for work

at her work station. She could not however resume her duties. In her founding affidavit she said she was informed by certain officers in that Ministry that the Principal Secretary instructed them to suspend her from executing her duties because there were issues pertaining to the study leave that were referred to the Civil Service Commission and the Ministry of Public Service and Information.

[8] The Applicant is presently still not at work. The Ministry of Natural Resources and Energy however denied that the Applicant was suspended by anyone. The evidence before the court revealed that the Ministry of Natural Resources and Energy has since initiated a disciplinary inquiry against the Applicant. The Applicant was accordingly served with an invitation to appear before a departmental preliminary investigation committee on 28<sup>th</sup> December 2012. She was called upon to appear before this committee on Monday 07<sup>th</sup> January 2013 at 09:00 A.M. (see: annexure “STM3”).

[9] In the meantime, the salary of the Applicant was stopped. In her papers the Applicant said that her salary was stopped in August 2010. This was denied by the 1<sup>st</sup> Respondent which stated that the salary was stopped on 23<sup>rd</sup> September 2010.

[10] To date no disciplinary hearing against the Applicant has been convened by the Civil Service Commission.

[11] The Applicant’s case before the court is that the Principal Secretary of the Ministry of Natural Resources and Energy acted *ultra vires* the provisions of **Section 187 of the Constitution of the Kingdom of Swaziland** in that he does not have the legal authority to suspend public servants including herself. She also complained that she was not given the opportunity to make

representation before the decision to suspend her without pay was made. She also stated in her papers that the suspension period is now more than six months and is therefore in contravention of **Section 194 (4) of the Constitution of the Kingdom of Swaziland.**

[12] The Applicant accordingly instituted the present legal proceedings and is seeking an order, *inter alia*;

“2. *Reviewing and setting aside the 1<sup>st</sup> Respondent’s decision to suspend the Applicant from her employ with the Ministry of Natural Resources and directing that the Applicant be re-instated to her position.*

3. *Reviewing and setting aside the 1<sup>st</sup> Respondent’s decision to stop payment of Applicant’s salary with effect from August 2010.*

4. *Directing the Respondent to pay the Applicant her arrear salaries calculated from August 2010 to date of the order.*

5. *Costs of application.*

6. *Further and or alternative relief.”*

[13] **SUSPENSION:-**

There was no documentary evidence of any suspension of the Applicant before the court. The 1<sup>st</sup> Respondent in his Answering Affidavit denied that the Applicant was suspended on 04<sup>th</sup> June 2012 or at all. It was therefore

encumbent upon the Applicant to produce such document in her replying affidavit. She failed to do that. In her Replying Affidavit the Applicant stated that she was verbally suspended by the Principal Secretary of the Ministry of Natural Resources and Energy, Mr. Thembinkosi Mamba who told her that the suspension was pending the outcome of the matter that had been referred to the Civil Service Commission.

- [14] The suspension and discipline of public servants is the preserve of the Civil Service Commission. This is in terms of **Section 187 (1) of the Constitution of the Kingdom of Swaziland Act No.1 of 2005** which provides that;

**“(1) Subject to the provisions of this Constitution or any other law, the power of appointment (including acting appointments, and confirmation of appointments) promotion, transfer, termination of appointment, dismissal and disciplinary control of public officers shall vest in the Civil Service Commission.”**

There is no evidence before the court that the Civil Service Commission ever suspended the Applicant at any time.

- [15] The Applicant must therefore be allowed to resume her duties immediately until such time that she is lawfully suspended by the Civil Service Commission should there be any need for that to be done.

- [16] **SUSPENSION WITHOUT PAY:-**

The employer has the right to suspend an employee as a holding operation pending disciplinary hearing. This is the right that the employer enjoys being in charge of the workplace. If the suspension is without pay, such shall not exceed a period of one month (See: **Section 39(1) and (2) of the employment Act No.5 of 1980** as amended).

[17] Suspension without pay has adverse economic effect on the employee. The employer must therefore observe the principle of Natural Justice, being, *audi alteram partem*, before he embarks on this drastic step. In the present case there was no evidence that the Applicant was ever invited to appear before the Civil Service Commission to make her representations before her salary was stopped. The 1<sup>st</sup> Respondent did not dispute that the Applicant's salary was stopped. The 1<sup>st</sup> Respondent only disputed the date when the salary was stopped. The Applicant said it was in August 2010, and the 1<sup>st</sup> Respondent said it was in September 2010. The 1<sup>st</sup> Respondent attached Annexure "STM4" which is a copy of the salary advice slip of the Applicant's for 23.08.2010. The 1<sup>st</sup> Respondent was therefore able to prove that the Applicant's salary was stopped effective from September 2010 and not August 2010.

[18] The evidence revealed that the salary of the Applicant was stopped by the Principal Secretary of the Ministry of Natural Resources by letter addressed to the Applicant dated 1<sup>st</sup> November, 2010. The letter appears as annexure "STM1" of the answering affidavit. Paragraph 2 thereof states that;

*"You are advised that disciplinary action in terms of Regulation 41 of the Civil Service (General) Regulations, 1963, is being contemplated. Be further advised that your salary and other emoluments have been suspended effective August, 2010 when you absconded from duty."*

There was no evidence that the Applicant was afforded an opportunity to make representations before this drastic decision of stopping her salary was taken by the Principal Secretary of Natural Resources and Energy. That decision was therefore irregularly made and it ought to be set aside by the court. The question, however, whether the Applicant should also be paid her arrear salary calculated from August 2010 is yet to be probed during the disciplinary hearing.

- [19] It was not in dispute before the court that the disciplinary process has already been initiated against the Applicant. It is in that forum that the Applicant will absolve herself from the accusations that she proceeded to study without the approval of the Ministry of Public Service, and that she was unlawfully absent from duty from 09<sup>th</sup> August 2010 to date. The court must not interfere with the employer's prerogative to discipline its employee. The question whether the Applicant is entitled to be paid her arrear salaries from August 2010, in terms of prayer 4 of the application, is dependent upon the outcome of the disciplinary hearing. If she manages to prove on the charge of unlawful absence that she was lawfully away from duty, it would follow that she should be paid the arrear salaries. It is only after she has made a demand to the employer and the employer unreasonably refused to pay her that she could thereafter approach the court for an order compelling the employer to pay her the arrear salaries. The preliminary charges against the Applicant are contained in annexure "STM3" of the answering affidavit. They appear as follows;

- 1. The legality of your study leave with full pay with effect from August 2007 to August 2010.*

2. *The legitimacy of your absence from duty from 9<sup>th</sup> August 2010 to-date.”*

[20] It is clear therefore that if the Applicant successfully proves that she had a legitimate excuse to be absent from duty from 9<sup>th</sup> August 2010 to-date, she will be entitled to be paid her arrear salaries.

[21] The disciplinary process however has unduly delayed. The Applicant has already appeared before investigation committee on 07<sup>th</sup> January 2013. The matter must now proceed to the next stage before the Civil Service Commission. The court can only guess that the process may have delayed because of the intervention of the present legal proceedings. Whatever the reason for the delay, the court is of the view that the Civil Service Commission is by this time ready to deal with the matter. The court will therefore defer the passing of its judgment in terms of prayers in the notice of application pending the completion of the disciplinary enquiry.

[21] Taking into account all the above observations, the interests of justice and equity, the court will make the following orders;

- 1. The 1<sup>st</sup> Respondent is to allow the Applicant to resume her duties and the Applicant is to resume her duties immediately at the Ministry of Natural Resources and Energy.**
- 2. The 1<sup>st</sup> Respondent’s decision to stop the payment of the Applicant’s salary is reviewed and set aside as being irregular.**

3. If the employer decides to suspend the Applicant without pay, the Applicant must be invited to make her submissions before that decision is made.
4. The Civil Service Commission is given fifteen court days within which to commence the disciplinary process against the Applicant failing which it will be deemed to have waived its right to discipline the Applicant and the Applicant is entitled to thereafter set the matter down before the court giving the other party seven days' notice.
5. There is no order as to costs.

The members agree.

**N. NKONYANE  
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR. M. MKHWANAZI  
(MKHWANAZI ATTORNEYS)**

**FOR RESPONDENTS: MR. M. VILAKATI & MR. S. GWEBU  
(ATTORNEY-GENERAL'S CHAMBERS)**

