]

SWAZILAND HIGH COURT

HELD AT MBABANE Civil Case No.3127/2004

In the matter between

BERNARD DLAMINI Applicant

and

THE MUNICIPAL COUNCIL OF MBABANE Respondent

Coram ANNANDALE, ACJ

For Applicant Mr. Z.D. Jele
For Respondent Mr. B. Sigwane

JUDGMENT
3rd December, 2004

BACKGROUND

On a basis of urgency the applicant came to court, obtaining a *rule nisi* on the 12lh October 2004, under civil case number 3127/2004, in the following terms :-

"3. Declaring that the proceedings of the disciplinary hearing against applicant, that commenced on the 7lh October, 2004, are null and void.

4. Suspending the said disciplinary proceedings pending finalisation hereof.

5. Declaring the proceedings of the said tribunal irregular and ultra vires the legislation governing respondent.

6. Directing that any disciplinary hearing against applicant be conducted by the Board in accordance, with the Urban Government (staff) Regulations, 1968 (hereinafter referred to as "the Regulations").

7. Interdicting the respondent from carrying out the said disciplinary (sic) pending the implementation of the recommendations of the Commission of Enquiry into the affairs of the Municipal Council of Mbabane, 2002, under Section 107 of the Urban Government Act, 1968." (hereinafter referred to as "the Act".)

The following day well before the initial return date of the 22nd October, the court "dismissed" (or discharged) the *rule nisi,* with costs, in an *ex tempore* judgment.

In his *ex tempore* ruling, the Honourable Mr. Justice Maphalala said as follows, quoted from an (uncontested) transcript filed by the erstwhile respondent's attorney, Mr. Jele.

"Mr. Jele has raised a number of points of law *in limine* which are found in his notice to raise points of law but of relevance are two points, namely, that the Notice of Motion is defective and secondly, that the applicant has not

followed the provisions of Section 119 of the Urban Government Act No. 8 of 1969 and that the service was irregular in his case.... In reply Mr. Jele raised further points, that of lack of jurisdiction and that of failure to disclose all the relevant facts in the application...I am inclined to agree with Mr. Jele on his submissions that the *rule nisi* granted by this court on the 12th October 2004 ought to be discharged forthwith. Firstly the Notice of Motion is defective...Secondly, it would appear to me that the applicant has failed to comply with the provisions of the Urban Government Act. It would appear to me further, that Mr. Jele is correct in his submissions as regards the issues of jurisdiction and that of non-disclosure of material facts." (The order on costs then follows).

It was after this ruling of the 13th October 2004 that a further "urgent application" was brought before myself on the following day, the 14th October. It is between the same parties and it bore the same case number.

At that time, Mr. Sigwane appeared for the same applicant and advanced argument as to why the matter could not be taken to the same duty judge as the previous day, informing me that the *ex tempore* ruling centred around the defects in the previous notice, pertaining to times and dates for filing of opposing papers, also regarding the manner of service. He sought an order to:-

> "3) Suspend the disciplinary proceedings (against the applicant) pending finalisation hereof;

4) Call upon the respondent (Municipal Council of Mbabane) to show cause why an order in the following terms should not be made final:-

4(a) Declaring that the proceedings of the disciplinary hearing against applicant, that commenced on the 7m October 2004, and purportedly to be resumed on the 14Ih October 2004 at 09h00, are null and void.

4(b) Declaring the proceedings of the said tribunal irregular and *ultra vires* the legislation governing respondent; 4(c) Directing that any disciplinary hearing against applicant be conductedjby the Board in accordance with the Urban Government (staff) Regulations, 1968;

4(d) Interdicting the respondent from carrying out the said disciplinary (sic) pending the implementation of the recommendations of the Commission of Inquiry into the affairs of Municipal Council of Mbabane, 2002, under section 107 of the Urban Government Act, 1968;

and further or alternative relief." No

costs order was prayed for.

The relief sought is substantially the same the second time round and the applicant's attorney, Mr. Sigwane, persuaded me to order that the disciplinary proceedings be suspended pending finalisation of the application but without also ordering the further relief in the form of a *rule nisi.* Directions regarding filing of opposing papers *etcetera* were also made.

Again, before the expiry of the latter periods, the respondent's attorney, Mr. Jele, appeared the very next day, which resulted in a consent order to firstly speed up the periods of time and to have argument heard on the 20th October 2004, with interim costs to be paid by the applicant, including costs resulting from the delay in the disciplinary hearing to be carried by applicant, which included costs of having to bring a South African witness back to Swaziland, should the enquiry continue.

On the 2011 October when the time came to hear formal argument, the applicant's attorney, Mr. Sig^wane, was absent. With regard to the chequered and complicated history of the matter, it having been agreed to hear it then, the respondent's attorney, Mr. Jele, started to argue as to why the application should be dismissed on the merits.

Mr. Sigwane arrived later, at 10h40 , and was eventually also heard.

From the onset, I made it clear that there is no possibility to prepare this judgment soon, due to quite a number of factors that militated against a timeous outcome, hence the delay herewith.

The matter to be decided is thus the "second" application of Dlamini, dated the 13th October 2004, not the initial application of the 11th October.

THE APPLICANT'S CASE

Briefly, the applicant says that he is a building technician, employed by the Mbabane Municipal Council. On the 4lh October 2004 he was served with a

notice to inform him of a number of disciplinary charges which was to be heard on the 7th October.

The notice itself is incorporated in his papers and enumerates some serious allegations against him, charges of dishonest acts, gross misconduct, conflict of interest, corruption and such like. It states that the Director of Public Works will preside as chairman and it further informs him of his rights -*inter alia* to be represented by an employee of the Council, to have adequate notice of the hearing, to call witnesses and so forth.

He further states that he attended the hearing on the 7th October and requested a postponement until the 15th to prepare his defence but that the postponement was only until the following day, the 8th, although he has it that in terms of the regulations he is entitled to a minimum period of 14 days to prepare his defence.

He nevertheless duly attended on the 8th, but with his attorney, not a fellow employee, to represent him. He says that his attorney would not be given audience and was ordered to vacate the room, since he was not a Council employee. No confirmatory affidavit of his attorney was filed.

He continues to state that he has no willing or able colleague to represent him, nor any union to do so.

Due to the above, he is apprehensive of the hearing being "...a mere formality or guise calculated to validate a predetermined decision to dismiss (him)."

He contends that only the Municipal Board may institute disciplinary proceedings, as per regulation 23 of the Urban Government (staff) Regulations, 1968. He further contends that the tribunal is constituted of management only, against the provisions of the Act and subsidiary legislation and further that he was not given the opportunity to make submissions, giving his side of the story.

Based on his view of the Act and some ministerial directives regarding implementation of recommendations of a commission of enquiry into the affairs of the Mbabane Municipal Council in 2002, with the Council still to determine its policy for presenting ventures which may give rise to conflict of interest by its employees, the applicant has it that the Council is estopped from dealing with the charges against him until such time that it has implemented the commission's recommendations.

He then proceeds to state his reasons for urgency, namely that he has no other remedy apart from a nullification of the hearing and an order to adopt the recommendations of the Commission. Also, that the hearing itself was *ultra vires* the powers of management, that he will suffer irreparable harm and prejudice unless helped, as the offences are punishable with summary dismissal. He says that the Council will suffer no prejudice if the sought relief is ordered, since implementation of the commission's recommendations "will enhance the smooth operation of the respondent" and that the Board can still hear his case, as it is empowered to do, hence the balance of convenience in his favour.

In short, he complains of an impingement and violation of his rights to a fair hearing, a disregard of his claimed rights to legal representation and his fear of victimisation and a desire of management officials to have him dismissed.

THE RESPONDENT'S CASE, *IN LIMINE*

In limine, the Acting C.E.O. of the Municipal Council of Mbabane has it that Section 8(1) of the Industrial Relations Act, 2000 (Act 1 of 2000) (the "I.R.A.") deprives the High Court of jurisdiction to hear the matter. Also, that to again approach this court for the relief notwithstanding the ruling of Maphalala J on the 13th October "...regarding the issue of jurisdiction which constitutes an abuse of the court process".

Pie further refers to "an identical application between the same parties in 2001, which was dismissed by the High Court "on the grounds that (it) did not have jurisdiction over the matter." This, he says, was then accepted as correct by the applicant, as he took his matter to the Industrial Court, stating that the previous day, his application "was dismissed with costs for the sole reason (that) the jurisdiction in such matters best (sic) exclusively with (Industrial) Court."

It is this change of heart of the applicant that the respondent now says to be an abuse of the process of court and "downright callous", so much so that on the application should be dismissed with costs on a punitive scale.

The applicant, understandably so, vigorously opposes these aspects, stating that he had no choice but to go to the Industrial Court as his "application was

mew motu and erroneously summarily dismissed by the court without hearing of any argument on the merits thereof." He further says that the High Court has unlimited original jurisdiction and that Section 8(1) of the I.R.A. of 2000 ousts the jurisdiction of the Industrial Court in the matter raised in his application. He adds that his present application is founded on a different set of facts, circumstances and jurisprudence.

JURISDICTION

The question as to which court has jurisdiction in a matter like the present has vexed many a litigant, attorney and the courts at diverse times in the past, yet the answer is straight forward and simple.

The Industrial Court has its own jurisdiction limited to matters that are properly before it - that is matters which are explicitly, by statute, required to be determined by the Industrial Court. The Industrial Relations Act (IRA) provides for conciliation of disputes, the central role player being the Labour Commissioner. It is he, when the process fails, refers the unresolved dispute to the Industrial Court for adjudication, the disputes generally known as industrial or trade disputes.

The Industrial Court is the last part of call, so to speak, in the determination of such disputes, referred to it by the commissioner. Agreements of resolved disputes may be made orders of the court when taken there. The I.R.A. lays down extensive procedures which are to be followed before matters are referred to the court.

It is then when matters are properly before the Industrial Court.

This is the essence of the *ratio decidendi* in the unreported judgment of Dunn AJ in Donald C. Mills-Odoi v Elmond Computer systems (Pty) Ltd, Civil Case No. 441/87, which is in line with the decision of the Court of appeal of Botswana in Botswana Railways Organisation v J Sebogo and 198 Others, Civil Appeal No. 51 of 1995.

Both these decisions were cited with approval by the Swaziland Court of Appeal in Sibongile Nxumalo and three others vs Attorney General and two others, unreported Civil appeals 25, 30, 28 and 29 of 1996.

The current Industrial Relations Act of 2000 has Section 8(1) which is of the same genetic origins, by way of speech, as Section 5(1) of its predecessor, the 1996 Act.

Section 5(1) of the 1996 Act reads:-

> "The court shall have exclusive jurisdiction to hear, determine and grant appropriate relief in respect of any matter properly brought before it, including an application, claim or complaint or infringement of any of the provisions of this Act, an Employment Act, a Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer's associations and an industry union, between an employer's association, an industry staff association, a federation and member thereof.

The latter day version hereof, contained in Section 8(1) of the Industrial Relations Act of 2000 reads:

> "The court shall, subject to Section 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer's association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof." »

The references to Sections 17 and 65 are irrelevant for the present purpose. The determining words still remain to be that exclusive jurisdiction vests in the Industrial Court, "...in respect of any matter which may arise at common law between an employer and employee...".

I am mindful of the various approaches to the interpretation of legislation and the proper function of the courts when doing so, also when it comes to determine whether jurisdiction is ousted or not. A sane and proper approach was adumbrated by Lord Diplock of the House of Lords in an unanimous decision in Duport Steels Ltd vs Sirs (1980) 1 All ER 529 at 541:

> "...Parliament makes the laws, the judiciary interprets them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or lacuna in the existing law the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention, what that intention was, and

> the statutory words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in the industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount."

The plain and simple meaning of the legislature was to endow the Industrial Court, exclusively so, with jurisdiction to hear industrial and labour issues, as is set out in Section 8(1).^

Equally clear, plain and simple is that the revisional jurisdiction of the High Court, to review administrative acts, remains unfettered. The ousting of the inherent jurisdiction to review administrative acts must be very explicitly clear in any legislation before it can be said to have been removed from the High Court. For the Industrial court to have exclusive jurisdiction in labour matters, however broadly it may be interpreted, does not also include jurisdiction to review administrative acts, or otherwise put, remove it from the High Court. Neither the "old" Industrial Relations Act, nor the present Act even remotely purports to do so, in my view.

The Sibongile Nxumalo appeal case (supra), concerned the jurisdiction of the High Court to hear claims for salaries allegedly unlawfully withheld -whether Section 5(1) of the 1996 I.R. Act ousted its jurisdiction or not. In the High Court, Sapire, ACJ, as he then was, held that the Industrial Court was vested with exclusive jurisdiction, "to the exclusion of all other courts", to deal with "what may loosely be referred to as 'labour matters' inelegantly

defined in the section, where labour law would be applied. Broadly speaking, labour law is to be understood as the common law of master and servant as expanded and otherwise modified by Industrial Legislation."

On appeal, Tebbutt JA with Kotze JP and Browde JA concurring, said that:

> "It is a well known principle that has been emphasised time and again not only in the courts of Southern Africa but also in courts in other parts of the world where the judicial function, power and independence is jealously guarded, that there is a strong presumption against legislative interference with the jurisdiction of the ordinary courts." (P.6) ^

After a meticulous and clearly understandable analysis of the law and applicable principles, the Appeal Court held that the position taken in the High Court, mentioned above, which excluded jurisdiction to hear matters arising from the common law of master and servant, was incorrect.

The court held that:-

> "(The Industrial Relations Act) ... confines the Industrial Court's jurisdiction solely to those matters set out in the Act, to those disputes which have run the gauntlet of the disputes procedure, and to those issues arising from the other legislation specifically set out in Section 5(1). Having regard to the principle that in order to oust the jurisdiction of the ordinary courts, it must be clear that the legislation intended to do so and that any enactment which seeks to do so must be given a strict and restricted construction, it is in my view, clear that save for the specific provisions mentioned, Section 5(1) does not disturb the common law of master and servant" (p. 15).

Nor does the present Section 8(1) of the Industrial Relations Act of 2000 oust the jurisdiction of the High Court, in the present matter, as is contended by the respondent. It is not in all matters that arise from an employment relationship that exclusive jurisdiction falls with the Industrial Court.

The respondent holds the dismissal of the application in 2001 by the High Court as an obstacle to the present matter, on the principle of *stare decisis.* No judgment of the court in the contentious matter is available. The applicant stated, as quoted above, that the court "*...mew moto ...* summarily dismissed" it, "without hearing any argument on the merits thereof." It is impossible to consider the reasons for dismissal of the application where no reasons for a judgment was given. To now want a repetition and worse, to hold that matter as a decision to be slavishly followed, cannot be countenanced. The *stare decisis* principle requires that it be known for which reasons a particular course was followed. That this cannot be so *in casu,* stands to reason - there are no known reasons why the 2001 application was dismissed, save that the apparent outcome was said to be due to a finding of the absence of jurisdiction. To simply follow suit blindly because this matter concerns an employment relationship is tantamount to abandon/ship before entering the water.

When the jurisdictional question is considered, 1 especially have regard to the reason why the applicant needs to litigate in the first place. The main relief that is sought is to require the respondent to conduct a disciplinary hearing in accordance with the empowering legislation that governs that matter. It is not a labour dispute as such but a call for help to have a fair hearing, an administrative action procedurally compliant with the regulations

made under the Urban Government Act. As pointed out above, the jurisdiction of the Industrial Court is narrowed down and limited by the Industrial Relations Act. In my view, the relief which is sought falls outside the ambit of the limited jurisdiction of the Industrial Court and fits squarely within the inherent and unlimited revisional jurisdiction of the High Court. To hold to the contrary would, in my view, be akin to 'not seeing the trees for the forest' - otherwise put, to forego the inherent jurisdiction of the High Court simply because the term "disciplinary enquiry" is elevated to the status of excluding jurisdiction.

I

The present matter is not one that has run the gauntlet of disputes procedure. Nor is it a matter as described in Section 8(1) of the Act, falling within the other legislative directives. The procedural correctness of a disciplinary enquiry, whether it is conducted within the prescriptive legislated enactment or whether it is done otherwise, certainly is a matter to be decided on by this court.

It is therefore, for the abovestated reasons, that the point *in limine* regarding jurisdiction stands to be dismissed.

The further point *in limine* that was argued by Mr. Jele is that the court should not interfere with internal disciplinary hearings. The argument is that it should best be left alone until finalised and only then, if so needed, can it be dealt with. Thus, should the constitution of the tribunal be improper, it can be reviewed, or if need be, a claim arising from unfair dismissal could be prosecuted.

As authority to justify such a position, the respondent relies on (the unreported) Industrial Appeal case of Swaziland Electricity Board versus Mashwama Michael Bongani and 2 others, case no. 21/2000, dated 19lh February 2001. That matter is quite distinguishable from the present. There, the gist of the matter was recorded thus:-

> "The essence of the respondent's case ... (is that they) ... contended that since the decision to institute disciplinary proceedings against them arose directly out of the investigations and allegations of the board of enquiry, it is extremely prejudicial and unfair to conduct a disciplinary enquiry whilst the procedures of the Board are themselves the subject of a commission of enquiry ... the relief claimed is essentially a temporary interdict preventing the appellant from continuing with the disciplinary enquiries until the commission of enquiry has made its report to the Minister." (p5).

Sapire JP went on to say:-

"In the present case the appellant (S.E.B.) clearly has a right and even a duty, where it suspects that an employees (sic) is guilty of serious misconduct, to hold a ' disciplinary enquiry. The source of information which gives rise to such suspicion is not material. In the present case, such flaws there may have been in "the procedures" of the board of enquiry, (as yet none have come to light) cannot nullify evidence of misconduct on the part of the respondents placed before the management of the appellant. Nor can such flaws taint the evidence so as to make it so unreliable as to make the need for a disciplinary enquiry unnecessary" (p 6).

The court also said that:

Cases of the likes of the S.E.B. appeal *supra* stand on a different footing as the present. There, it was held, correctly so with respect, that it is the decision to hold or not hold an enquiry, that is best left to management and not to be interfered with by the court. The reasons why an enquiry is to be held, the sourcing and presentation of evidence and the charges to be prosecuted remain within the domestic domain of management.

The Municipal Council also relies on the unreported decision of the Industrial Court in Nhlanhla N. Dlamini vs Swaziland Development and Savings Bank, Case No. 226/2002 dated 20 September 2002. the learned Court President therein stated at page 4 that:-

> "...I affirmed the court's reluctance to interfere with management's right to hold a disciplinary hearing. The court does not rule out such a possibility though such eventuality would be an extreme rarity where an employee is able to establish a competing right to that of the employer to hold a disciplinary hearing. Proof of extreme vexatious conduct on the part of the employer would suffice."

I respectfully fully agree with this position. Yet, it is not the issue at hand that a challenge is laid against the right to conduct a disciplinary enquiry.

The present matter differs significantly. The challenge is against the procedure adopted by the tribunal, whether it follows the legislated directives, the procedural legality of the tribunal and its composition. The applicant seeks the tribunal and the enquiry itself to be conducted within the provisions of the Urban Government (Staff) Regulations, 1968, promulgated

under the Urban Government Act. He has it that it would be *ultra vires* to do otherwise, in the manner described by him in his complaint.

The relief sought is not, as it is contended by the Council, to interfere with its decision to hold an enquiry and the merits of reaching its decision, as was the case in S.E.B. vs Mashwama and Dlamini vs SDSB, *supra.*

This point *in limine* can therefore also not be the cause to derail the application, but it has a further impact, which is on the merits of a part of the application itself.

I

The applicant seeks in prayer 4(d) an interdict to prevent the Council from carrying out the hearing until such time that recommendations of a commission of enquiry has been implemented. This falls squarely within the ambit of what is stated above, namely a reluctance to interfere with the domestic decision of whether to conduct an enquiry or not. Although Mr. Sigwane abandoned his quest for this part of the relief during the hearing, it was for different reasons than those above. It is for the reasons above that prayer 4(d) of the application stands to be dismissed.

This also disposes of having to deal with Mr. Jele's argument regarding the requirements of an interdict, interim or final, in so far as it pertains to the interdict sought in prayer 4(d).

The remainder of the application now stands to be considered on the merits, i.e. whether a declaratory order should be made to declare the disciplinary hearing of the 7lh October 2004 null and void, to declare the proceedings of

the tribunal *ultra vires* and to direct that the hearing be conducted in accordance with the Regulations, or not.

The Respondent's case on the merits

The Municipal Council of Mbabane has it as a perspective of the whole matter that it has a recognition agreement with the Union of Swaziland Town Councils from which emerged an agreed variation of staff standing orders, a disciplinary code and a grievance procedure. It attached a letter from the former Minister of Housing and Urban Development dated the 2nd December 1997 (annexure ASM4) which reads in part:

> "The proposed staff standing orders submitted in terms of Section 51 read with Section 16 of the Urban Government Act 8 of 1969 are hereby approved as amended."

It is this negotiated disciplinary code and procedure which the council views as the applicable code governing discipline of the applicant, contrary to the view of the applicant who has it that regulation 23 (sic) (as stated by respondent) under the Urban Government Act is the applicable codified procedure.

Section 51 of the Urban Government Act, 1969 (Act 8 of 1969) is headed "Staff regulations and standing orders." It empowers the Minister to make "Staff Regulations" relating to *inter alia,* under subsection (l)(d), "*the regulation manner of and the procedure for inquiries into conduct.* "

Subsection 51(2)(f) requires of every Council to make "Staff Standing Orders" regarding the above in so far as they are not included in any regulations made by the Minister. Such orders are subject to the approval of the Minister.

The Urban Government (Staff) Regulations of 1968 provides for the Institution of disciplinary proceedings in regulation 21.

It provides that if after due enquiry it appears to a chief officer that an officer has committed (an) offence^) against discipline he shall inform the latter of the proceedings to be instituted, specify the charge(s) and invite written submissions within fourteen days.

It then provides for further procedures, thereafter, that when the chief officer decides that disciplinary action is called for, to request the Secretary to refer the case to the Board, to inquire into the matter itself or to instruct the Secretary or other competent officer to so inquire and report to the Board. At the inquiry, the officer against who the disciplinary action is instituted has the right to appear and to be heard and to cross examine witnesses. He may be represented by another officer or in exceptional circumstances by a lawyer. In the final analysis, it is the Board which is to decide on an acquittal or otherwise, then to either dismiss or impose other specified punishment.

Regulation 23 provides for a review of the Board's decision, by the Minister, by way of petition. It is incorrectly referred to by the respondent in its answering affidavit (paragraph 5) as being the regulation that applicant

relies on, and the applicant seemingly makes the same error in paragraph 9 of his founding affidavit.

Be that as it may, the respondent differs from the applicant as to which procedural regulations are to be used when an enquiry is to be held. The amended procedure, referred to by council, was not given to the court at the hearing, despite the council undertaking to do so. It however furnished *prima facie* proof of the existence such disciplinary code and procedure by way of the Minister's letter of approval, dated 2 December 1997. This is almost a decade after the Urban Government (Staff) Regulations of 1968, on which the applicant bases his case.

In his replying affidavit, the applicant disavows the 1997 regulations, as was apparently approved by the Minister. He states that there is no union activity at his workplace, wherefore, he submits, the collective agreement has ceased to operate and as such, it is no longer recognised in terms of the law. He requires "strict proof by the respondent to prove the amended 1997 regulations.

No basis is laid by the applicant as to why the negotiated collective agreement, which he acknowledges, would now cease to exist. Nor does he persuade me why a reverse onus vests in the council to prove the terms of the collective agreement.

The respondent raises a further pertinent issue. In his answering affidavit, the acting CEO of the Municipal Council refers to a judgment of the Industrial Court, delivered in February 2002, wherein a previous application

between the same parties in a similar issue was discussed. Similar relief was sought by the applicant to stop a different disciplinary enquiry against him, on the same grounds as presently. The respondent states that:

> "...When the matter came before the Industrial Court on the previous occasion, the Industrial Court did as a matter of fact find that the amended staff regulations which include the disciplinary code and procedure were in fact the ones that govern issues of employment including discipline at the respondent's undertaking. No appeal was ever filed against the decision of the Industrial Court and I am advised and humbly submit that even in this present application, the applicant has not made out a case which suggests that the decision of the Industrial Court was incorrect." (paras. 6 and 7*1)

In his founding affidavit, the applicant omitted any mention of the earlier judgment of the Industrial Court. The respondent filed a copy of that judgment. The applicant replies that the Industrial Court "...dismally misdirected itself. An appeal, at the time, was out of the question."

The applicant fails to even tender an effort in explanation as to why he did not inform this court, in the present application, of the reasons why he omitted any reference to the earlier pronouncement of the Industrial Court. He equally does not say why he did not appeal that decision, which directly applies to his present matter, in that it has already determined his position regarding the disciplinary procedures and code. All he says is that "(the) unlawful disciplinary proceedings would in the meantime be proceedings (sic) and my appeal would have been overtaken by events viz the tribunal would have long given its decision by the time the matter was enrolled in court."

This judgment he is dissatisfied with is dated the 15 February 2002. His present application was brought on the 13th October 2004, well over two years later. He cannot bring that judgment on review through the backdoor. Nor did he use the long period since then to appeal against it.

In the judgment of the Industrial Court, in case No. 284/2001 between the same litigants, the learned judge held thai it is the staff standing orders which included a disciplinary code and a grievance procedure, approved on the 2nd December 1997 by the Minister, which are applicable to an enquiry by the Council. It was further held that "...there (is) no basis upon which applicant can rely on Regulation 21(1) of the Urban Government (staff) Regulations, 1968. Clearly Section 51 specifically deals with staff regulations and standing orders of town councils and not town boards."

The judgment therein determined the exact same relief as presently sought, save that it concerned a disciplinary hearing set for the 11th October 2001, and not the 7th and 14th October 2004. Then, he wanted the enquiry to be held in compliance with regulation 21(1) of the regulations, now he wants it again so, to be in accordance with the Urban Government (Staff) regulations, 1968.

Both because of the judgment of the Industrial Court, which has not been overturned, and also because of the *prima facie* proof in the present application that the Minister did indeed approve the amendment of the orders in 1997, it seems to me that quite clearly, that it is those orders which

are to govern disciplinary proceedings by the council against the applicant, and not the initial orders of 1968.

The applicant's case is not based on a violation of the staff regulations as amended in 1997, but is against non compliance with the earlier regulations of 1968. If his case was an attack on the amended regulations of 1997, and if it was meritorious, it would then have been possible to consider the relief that he now seeks. But, as said, it is not the position. There is no indication or motivation that justifies an order to declare the present enquiry *ultra vires,* as it is not known whether, the proceedings are contrary to the applicable staff standing orders or not. Likewise, it is not shown that the proceedings should be declared null and void, due to non compliance with the 1968 orders, since it was overtaken in 1997 by an amended version thereof.

It is for these reasons that the application stands to be dismissed, with costs. Costs as tendered on the 15th October 2004 are confirmed.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE