IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 4372/2009

In the matter between:-

SWAZILAND TELEVISION AUTHORITY	**Applicant**

and

JUDGE NKOSINATHI NKONYANE N.O.	**1st Respondent**
ATTORNEY GENERAL	**2nd Respondent**
THANDI DLAMINI	**3rd Respondent**

Neutral citation:	*Swaziland Television Authority v Judge Nkosinathi Nkonyane N. O. and others* (4372/09) [2012] SZHC…(7th May 2012)
Coram:	HLOPHE J
Heard:	22/02/12
Delivered:	7th May 2012
For the Applicant:	Mr. M. J. Manzini
For the Respondents:	Mr. M. P. Simelane

JUDGMENT

[1] This is an application in terms of which the Applicant seeks an order of this court reviewing, correcting and setting aside a decision of the Industrial Court presided over by the 1st Respondent. The decision being challenged was made by the Industrial Court on the 7th December 2009 and was setting aside a certain recommendation made by the chairman of a disciplinary hearing set to preside over certain charges preferred against the 3rd Respondent by her employer, the current Applicant. The recommendation set aside by the court *a quo* was to the effect that the 3rd Respondent who had been a subject of the disciplinary inquiry be dismissed from her employ by the Applicant where she occupied the position of Finance Manager.

[2] In his founding affidavit the applicant's then Chief Executive Officer, Mr. Vukani Maziya, contended that the manner in which the court *a quo* came to the aforesaid decision was marred by gross irregularities in that the said court had decided the matter in the merits without having heard the Applicant thereat as only the points *in limine* had been argued without the merits having been so argued. This it was contended was a gross irregularity in that it violated the Applicant's right to be heard as enshrined in the Constitution as well as protected by the Common Law.

[3] The other irregularity complained of was that the court a quo had dealt with the matter irregularly in so far as it concerned itself with the correctness or otherwise of the decision of the chairman of the Disciplinary Hearing that made the decision then complained of instead of concerning itself with the procedure leading to the decision particularly as to whether or not there were any irregularities in the said process. It was contended owing to the approach adopted by the court *a quo*, it ended up substituting its decision for that of the chairman yet that is not legally competent to a reviewing court.

[4] I must clarify that the parties were agreed that in dealing with the matter leading to the setting aside of the decision of the chairman of the Disciplinary Hearing, the court *a quo* set as a review court.

[5] Motivating his argument that the court *a quo* had irregularly dealt with the matter by concerning itself with the correctness of the decision of the chairman as opposed to the existence or otherwise of irregularities in the procedure leading up to the decision concerned, the Applicant contended that the court a quo had itself acknowledged on two occasions that no irregularities on the germaine issue were ever committed by the chairman of the enquiry as can be seen in paragraph 6 of the ruling made on the 25th March 2009 as well as paragraph 13 of the Judgment delivered or handed down on the 7th December 2009.

[6] At paragraph 6 line 4 of the Ruling on the points *in limine* delivered on the 25th March 2009, the first Respondent stated the following:-

"For the court to set aside the recommendation of the Chairman, it must be shown that he did not properly exercise his mind on the question whether the hearing should proceed in the absence of the Applicant. From the evidence appearing on annexure "TD 4"on page 35/36 it appears there that the Chairman did in fact make enquires as to why the Applicant was not present. He satisfied himself that all means have been taken to notify her of the proceedings. The court will therefore uphold this point."

[7] The point being upheld here was that the application had no proper basis for a review. It was contended by the Applicant that the court having found as it did when it upheld the point *in limine*, that there was no basis for review in law, it then did not lie with it to later on set aside the decision of the chairman particularly as no new ground or basis was set out in the subsequent application, moved with the leave of court as shall be seen from the background to the application set out herein below.

[8] In paragraph 13 of the Judgment of the 7th December 2009, the court *a quo* had stated the following which indicated that the chairman's decision (which was eventually set aside) was not irregular and by extension that no basis existed therefore for the review of the decision:-

"There is no evidence of any suggestion that the chairperson misdirected himself in any manner in the way that he chaired the proceedings. The only reason that the court could order that another chairperson should chair the hearing would be that he has already heard the evidence against the Applicant."

[9] It was contended that having found that the chairman had not misdirected himself in anyway, the matter, being review proceedings, had come to an end and it was not open to the court to continue to probe the matter so as

to come to a different conclusion. The point is that the above except from paragraph 6 of the Judgment, particularly the second part of it, indicates a fixation by the court to have the matter reverted back to the Disciplinary Committee, with or without a legal basis, which it is contended is not proper in review proceedings which have nothing to do with the correctness of a decision. See in this regard ***The University of Swaziland v The President of the Industrial Court of Swaziland and another High Court civil case no. 3060/2001 (unreported)*** where the learned Sapire CJ, (as he then was) put the position as follows:-

> *"It is not for this court on review to consider the correctness of his decision on whether he properly came to that conclusion on the facts before him."*

It shall be noted for the sake of completeness that the applicant is not left remediless if the decision of the chairman was indeed incorrect as that shall be properly redressed by the Industrial Court after the 3rd Respondent shall have complied with Part VIII of the Industrial Relations Act 2000 as amended, like all matters for redress that come before it.

[10] So that this Judgment is properly contextualized it is important in my view that I set out a brief summary of the background as I understand it, from the papers filed of record.

[11] The Applicant preferred disciplinary charges against one of its senior employees, the Finance Manager, who is the 3rd Respondent herein. On the face of them the charges are serious and could be dismissible in line with sections 36 and 42 of the Employment Act if proved.

[12] The record reveals that the hearing of the charges aforesaid was postponed on several occasions following the non availability of the third Respondent. On all these occasions it was contended by the Applicant that she had been served with the disciplinary notice but she would not attend the hearing on the dates set necessitating that the matter be postponed to some other day to accommodate her and further that service be once again effected.

[13] The facts of the matter reveal that on one of the occasions she had reported to work in line with the disciplinary notice but had decided to return at the gate when she was required by the security guard to sign a document confirming she had entered the Applicant's premises. This appears to have been a routine security requirement. The matter ended up being postponed to some other date to accommodate her.

[14] On the subsequent occasion, a return of service by a Deputy Sheriff indicates that she had not heeded the Deputy Sheriff's attempt to serve her with the disciplinary notice but had driven off resulting in the Deputy Sheriff pushing the said notice under the door of her house in Manzini. Notwithstanding this, she did not attend the disciplinary inquiry set.

[15] On the subsequent occasion, she is alleged to have not opened the door when the Deputy Sheriff came to her house to serve her with the disciplinary notice but had instead peeped at the Deputy Sheriff through the window resulting once again in the notice being "served" on her through being pushed beneath the door of her said house.

[16] It is alleged that she refused to pick up her cell phone when subsequently called. In fact the service referred to in the foregoing paragraph was carried out simultaneously with service on her of the Disciplinary notice being done on her by registered post allegedly sent to two postal addresses supplied by her and found in her file. These notices were apparently received by the addressee as they were never returned to the sender.

[17] On the date to which the hearing had lastly been postponed, being the date on which the 3rd Respondent was allegedly notified in the manner set out in the two foregoing paragraphs above, the chairman decided to proceed with the inquiry in her absence after having himself called her on her cell phone which she did not take.

[18] The outcome of the inquiry was to recommend that the 3rd Respondent be dismissed. It however took time to implement the said recommendation understandably because owing to the seniority of the person being disciplined, it had to be approved by the Minister concerned in terms of the Public Enterprises Unit Act of 1989, before it could take effect.

[19] The current 3rd Respondent eventually launched an application against the current Applicant where she asked *inter alia* for an order setting aside the recommendation of the chairman. This application resulted in the ruling of the 25th March 2009 referred to above and in terms of which the application was dismissed on two points in limine raised being upheld. These were the point that no basis for the application

(being review proceedings) had been disclosed as well as that the reliefs sought were contradictory. The 3rd Respondent was however given leave to attend to her papers and reinstitute the proceedings if advised. This application is a sequel to the reinstituted proceedings after the 3rd Respondent corrected the apparent contradiction in the prayers sought. This application was triggered by the first Respondent's judgment to that application, in which he set aside the recommendation of the chairperson of the disciplinary inquiry.

[20] It is important to note that before the current Applicant could file his answering affidavit to the application resulting in the Judgment being challenged herein, the recommendation by the chairperson was put into effect and the third Respondent was dismissed as recommended. It would appear that the court was of the view it should not have been put into effect because it was known that the said recommendation was being challenged. It is a fact however that no court order had been obtained interdicting the putting into effect of the chairperson's decision, and for my part I can only wonder how the decision which had always been awaited by the then applicant could justifiably lead to the current applicant being blamed for implementing same. In fact there is no reason why the then applicant had not sought an order staying the implementation of the recommendation in the interim, if she really believed there were basis for such an order. It was always known that the decision would be handed down anytime.

[21] Of course, as concerns the service of the notices by the Applicant on the third Respondent, same was denied. The chairman however found that same had been effected in the manner suggested above and had gone on

to listen to the evidence after which he had recommended she be dismissed.

[22] On this application it was disputed by the 3rd Respondent that the court *a quo* had not heard the merits of the application but had decided same merely on the points *in limine.*

[23] It was contended that the merits and the points in limine were closely intertwined such that the argument had covered both. It was further contended that it was indeed a fact that the 3rd Respondent had not been served with the disciplinary notices and as such it had been irregular for the disciplinary chairman to have continued with the disciplinary notice in such circumstances. It was stated that the Industrial Court was correct in the decision it arrived at, setting aside the chairman's recommendation and ordering that the Disciplinary Inquiry commences *denovo*. The 3rd Respondent further found nothing odd with the court *a quo* having continued to hear the application challenging the chairperson's recommendation notwithstanding her having already been dismissed, which means that the recommendation challenged had already been effected.

[24] I must say I find it strange that the *court a quo* proceeded with the matter to the extent of setting aside a recommendation by the chairperson and ordering the disciplinary hearing to commence *denovo* before a new chairman, in a matter where at that stage the 3rd Respondent had already been dismissed. Under normal circumstances, challenging a chairman's recommendation at that stage is often considered to be overtaken by events such that there has to exist special circumstances for the court to

deviate from such an entrenched practice. It does not seem these were considered by the court *a quo* other than to content itself with its observation the dismissal was effected when an application was already pending yet no law was being violated.

[25] The position is covered in numerous judgments of the Industrial court and the Industrial Court of Appeal that where a dismissal of an employee has already been effected, the proper course to follow is for such a matter to be treated like all matters in which the employee has been dismissed which is to follow the provisions of part VIII of the Industrial Relations Act 2000, as amended and as concerns the reporting and resolution of disputes. I would have thought that this was uppermost in the mind of the first Respondent as indicated by the following comment at paragraph 6 of the Judgment delivered on the 7th December 2009:-

> *"There is therefore a clear dispute of fact whether or not the applicant was notified of the subsequent date of hearing. This issue can only be resolved by the leading of oral evidence in an application for determination of an unresolved dispute."*

It can only be observed that the dispute concerned was never resolved as instead the court *a quo* later sought to find that the chairman should have found that service was not effected.

[26] I have alluded to the foregoing in an attempt to illustrate what I consider a misdirection by the court *a quo* on the decision it made. Otherwise it does not represent the thrust of my judgment bearing in mind that these

are review proceedings and therefore the consideration that I do not deal with the correctness or otherwise of the decision as opposed to whether or not there were irregularities in the process leading to the decision being challenged.

[27] It cannot be denied that when the matter was argued before court only the points *in limine* were dealt with. It may as well be that in the view of the Respondents, the points *in limine* argued tended to preempt the so called merits, but I cannot speculate on what the applicant would have submitted if the *court a quo* had only dismissed the points *in limine* and heard the parties in the merits.

[28] The significance of a fair hearing as part of what is referred to as Natural Justice, need not be emphasized herein as it has been a subject of numerous judgments of this court and the Supreme Court. It is in fact regarded as sacrosanct in our law. In his Book, Administrative Law 1984, Juta, Lawrence Baxter put the position as follows whilst discussing natural Justice (of which a fair hearing – *Andi Alteram Partem* – is a part) page 540;

> *"The principles of Natural Justice are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration, their enforcement serves as a lesson for future administrative action. <u>But more than that, and whatever the merits of any particular case, it is a denial of justice in itself for natural justice to be ignored</u>."(emphasis added).*

[29] In ***General Medical Council vs Spackman [1943] AC 624 at 644-645***, Lord Wright put the position as follows:-

> *"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision." (emphasis added).*

[30] As a fair hearing is part of the elements of natural justice, and it being clear that the Applicant was not heard in the merits as only the points *in limine* were argued I am of the considered view I cannot deviate from the foregoing precepts, but must set aside the decision without further ado.

[31] The foregoing however, is not the only point on which the application has to succeed. I am in fact in agreement with the position as expressed by Mr. Manzini for the Applicant that it was irregular for the court a quo to consider the correctness of the decision of the chairman of the Disciplinary hearing when the matter before it, it was agreed, was a review. This in fact is the most important aspect of the applicant's case as pleaded and argued before me.

[32] Having found that the chairman of the disciplinary hearing had satisfied himself that all means had been taken to notify the 3rd Respondent of the proceedings and therefore did make the necessary enquiries in the ruling handed down on the 25th March 2009, it was no longer open to the court to consider the correctness or otherwise of the chairman's decision in the review proceedings before it.

[33] This view is further supported by the fact that the court *a quo* having found that the chairman had not misdirected himself in any manner in the way he chaired the proceedings, there was no basis in review proceedings for the court a quo to go further and enquire on the correctness or otherwise of the chairman's decision as it did. I have no doubt that when it did so, it committed a reviewable irregularity.

[34] It appears that the court was concerned more with the matter being heard by another chairperson without proper grounds having been laid for excluding the earlier chairperson who in my view cannot be faulted at all both for the decision he reached and the procedure leading thereto. In fact it may as well be that he exhibited excessive fairness if one considers the numerous postponements to accommodate the 3rd Respondent an employee on suspension who should always have remained within reach by her employer. It was however irregular for the court a quo to even contemplate another chairperson in a case where in its own words, the previous chairperson had not been shown to have misdirected himself or to have committed any irregularity.

[35] It is for the foregoing considerations that I have come to the conclusion that the decision of the court *a quo* cannot stand which means that it has to be reviewed corrected and set aside.

[36] The decision I have arrived at does not however bring about finality in the matter because the Applicant argued that owing to the manner in which the matter was decided by the Industrial Court, this court should

not revert the matter back to the Industrial Court for a decision but should decide the matter itself.

[37] The General rule is that in review proceedings the reviewing court should, after having satisfied itself that the decision ought to be reviewed and or set aside, revert it back to the court *a quo* after having set it aside. This general rule can be deviated from in cases where the justices of the matter dictates it be deviated from. This will happen for instance in a case where the result is a foregone conclusion and a reference back will merely be a waste of time. See in this regard ***Traube v Administrator, Transvaal and Others 1989 (2) SA 396 (T) at 408 A – E*** and ***Yates v University of Bophuthatswana and others 1994 (3) SA 815 (B) at 849 D –G.***

[38] The background to the matter I have chronicled above has equipped me with sufficient information firstly to appreciate the circumstances of the matter and secondly to conclude that the decision the court *a quo* would have to reach following the setting aside of its previous decision, is a foregone conclusion being that there are no sound legal basis to set aside the recommendation of the chairman of the disciplinary hearing in review proceedings and therefore that the 3rd Respondent's application before the court *a quo* resulting in the recommendation of the chairman being reviewed and set aside, ought to be reviewed, corrected and set aside with the result that the court *a quo's* decision ought to have read that the application before that court be dismissed.

[39] Having come to the conclusion I have and for the sake of clarity I make the following order:-

39.1 The decision of the court *a quo* setting aside the recommendation of the chairman of the disciplinary hearing and ordering that the disciplinary hearing of the 3rd Respondent begins *denovo* be and is hereby set aside.

39.2 The aforesaid decision of the court *a quo* is substituted with the following:-

38.2.1 The Applicant's application be and is hereby dismissed.

38.2.2 The dismissal of the 3rd Respondent stands.

39.3 The 3rd Respondent be and is hereby ordered to pay the costs of these proceedings.

Delivered in open court on this the …..day of May 2012.

N. J. HLOPHE

JUDGE