



## **IN THE HIGH COURT OF SWAZILAND**

### **JUDGMENT**

Case No. 1584/2012

In the matter between:

**SABELO MASUKU**

**Applicant**

**And**

**USUTHU STRIKE FORCE (PTY) LTD**

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

**NKOSINATHI NKONYANE N. O.**

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

**GILBERT NDZINISA N. O.**

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

**SIMON MVUBU**

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

**ATTORNEY GENERAL**

**5<sup>th</sup> Respondent**

**SIKHUMBUZO SIMELANE N. O.**

**6<sup>th</sup> Respondent**

**Neutral citation:** Sabelo Masuku v Usuthu Strike Force (Pty) Ltd & 5 Others  
(1898/2012) [2012] 07 SZHC (15<sup>th</sup> January 2013)

**Coram:** M. Dlamini J.

**Heard:** 10<sup>th</sup> December 2012

**Delivered:** 23<sup>rd</sup> January 2013

*Pending disciplinary hearing proceedings – application to review decision of chair on objection based on points in limine and further interdicting employer from proceeding with disciplinary hearing – circumstances warranting review court to interfere with chair’s decision – exceptional and compelling circumstances.*

Summary: This is a review application from the decision of 2<sup>nd</sup> respondent on the basis that he failed to apply his mind on an application to interdict the 1<sup>st</sup> respondent from continuing with disciplinary hearing against applicant and reviewing and setting aside the decision of the Chairman of the disciplinary hearing for dismissing applicant’s points of law.

Background:

[1] On 24<sup>th</sup> April 2012 applicant received correspondence from 1<sup>st</sup> respondent to the effect that following the directors’ resolution, his services were forthwith terminated. Applicant approached the court *a quo* to have the resolution set aside on the basis that the *audi alteram partem* principle had not been observed. The court granted applicant’s application.

[2] Subsequently, two charges of gross dishonesty were preferred against the applicant by 1<sup>st</sup> respondent. Both charges allege that applicant, without 1<sup>st</sup> respondent’s consent and permission, paid over to his personal account substantial amounts. The applicant was invited to appear before a disciplinary hearing together with Counsel of his choice. The hearing resumed and witnesses on behalf of the 1<sup>st</sup> respondent gave evidence. At the close of the 1<sup>st</sup> respondent’s case applicant raised points in *limine* to the effect that the two charges were stated and that as there was an agreement between applicant and 1<sup>st</sup> respondent to the effect that applicant should pay

the monies expended under count 1, 1<sup>st</sup> respondent ought to have cancelled the agreement, demanded payment instead of preferring charges against applicant.

[3] The Chair, 6<sup>th</sup> respondent, having heard the submission on behalf of applicant, dismissed the points in *limine* and ordered the applicant to answer to the charges. Applicant approached the Industrial Court under the certificate of urgency where 2<sup>nd</sup> respondent dismissed his application to have the 1<sup>st</sup> respondent interdicted from proceeding with the hearing and setting aside of his decision.

[4] The applicant has now lodged the present application.

#### Common Cause

[5] It is common cause that the disciplinary hearing is *lis pendis*.

#### Issue

[6] In dismissing applicant's application 2<sup>nd</sup> respondent stated at page 10 of the judgment:

*“The duty resting on the Chairman of a disciplinary enquiry to exercise his discretion ‘judiciously’ means that he is required to listen to the relevant evidence, weigh it to determine what is probable and reach a conclusion based on the facts and the law. The court cannot interfere with his decision where he has applied his mind to these matters, even if the court disagrees with his conclusion on the facts or the law. No more is required of the Chairman than*

*that he should properly apply his mind at all to one or more of the issues he commits a gross irregularity, because then he has failed entirely to perform the function which was required of him. He has failed to exercise his discretion judiciously. His decision will then be reviewable.*

*The court is in agreement with the above observation.”*

[7] The court then proceeded to interrogate the 6<sup>th</sup> respondent’s decision for irregularities then concluded at page 13:

*“It follows therefore that the applicant has failed to prove on a balance of probabilities that there is a basis for the court to interfere with the ongoing disciplinary process.”*

[8] The question for determination by this court is whether 2<sup>nd</sup> respondent failed to exercise his powers judiciously in deciding applicant’s application.

#### Determination

[9] Section 19 (5) of the Industrial Relations Act 2000 as amended reads:

*“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.”*

[10] **Ota J. A.** in an *unanimous* decision in the case of **James Ncongwane v Swaziland Water Services Corporation (52/2012) [2012] SZSC 65** at

pages 16-17 tabulates instances of the common law ground for review as follows:

- “1. *Arbitrarily or capriciously, or*
2. *Mala fide, or*
3. *As a result of unwarranted adherence to a fixed principle or*
4. *The court misconceived its function or*
5. *The court took into account irrelevant consideration or ignored relevant ones or*
6. *The decision was so grossly unreasonable as to warrant the inference that the court had failed to apply its mind to the matter, or*
7. *An error of law may give rise to a good ground of review.*

*The list is not exhaustive. Each case must be dealt with accordingly to its own peculiarities.”*

[11] The issue in the court *a quo* as raised by respondent was whether the court could interfere with the pending disciplinary hearing in the absence of any compelling or exceptional circumstances.

[12] In **Wahlhaus v Additional Magistrate, Johannesburg 1959 (3) S.A. 113** at **120 Ogilvie Thompson J. A.** stated in relation to interlocutory matters.

*“While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the uninterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by*

*other means be attained. ....In general however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress by means of review or appeal will ordinarily be available.”*

[13] In our jurisdiction the position is as highlighted in **Sazikazi Mabuza v Standard Bank of Swaziland Limited and Errol Ndlovu N. O. case No. 311/2007 I.C.** at paragraph 45 where it was held.

*“The duty resting on the Chairman of a disciplinary enquiry to exercise his discretion ‘judiciously’ means that he is required to listen to the relevant evidence, weigh it to determine what is probable and reach a conclusion based on the facts and the law. The court cannot interfere with his decision where he has applied his mind to these matters, even if the court disagrees with his conclusion on the facts or the law. No more is required of the Chairman than that he should properly apply his mind at all to one or more of the issues he commits a gross irregularity, because then he has failed entirely to perform the function which was required of him. He has failed to exercise his discretion judiciously. His decision will then be reviewable.*

[14] The learned judge was fully alive to the **Sazikazi Mabuza’s dictum** as clearly demonstrated at page 10 of his judgment and where he concludes:

*“The court is in agreement with the above observation.”*

[15] Having the **Sazikazi Mabuza**'s *dictum* in mind, the court *a quo* proceeded to interrogate fully the question whether the chair had failed to properly apply his mind to the matter. It went on to consider the written ruling of the chair and cited as follows:

last paragraph page 60

*“[21] It was also argued that the 2<sup>nd</sup> respondent failed to apply his mind. The court is again unable to agree with the applicant. In paragraph 4 of the ruling the 2<sup>nd</sup> respondent held that:*

*“I have considered the arguments made by both parties and I make an ex tempore ruling which its reasons will be embodied at the end of the hearing and the ruling is as follows:”*

and concluded as appears at page 12 of the judgment:

*“[23] In paragraph 8.2 of the notice to raise points of law the applicant argued that:*

*“On count 2, there is no evidence to explain the delay except that the evidence of Clare Green is plainly false and is at variance with that of Mrs. Mhlanga.”*

[16] The learned judge in the court *a quo* in exercise of his duties did so diligently as he continued to address every point raised by the applicant as evident in pages 12 -13 of the judgment:

*“[22] In the notice to raise points of law, the applicant stated as follows in paragraph 8.1:*

*“in relation to count 1, the employer (through the evidence of Vusi Hlatshwako) has explained its delay in instituting the disciplinary enquiry. However, such explanation is not valid at law”*

*The 2<sup>nd</sup> respondent, who heard the evidence, however found the explanation to be valid. Whether the court agrees with him or not, it has no right to interfere with his finding in the absence of any proven irregularities that made him to arrive at that decision.*

*“[23] In paragraph 8.2 of the notice to raise points of law, the applicant argued that:*

*“On count 2, there is no evidence to explain the delay except that the evidence of Clare Green is plainly false and is at variance with that of Mrs. Mhlanga.”*

[17] He then concludes:

*“It follows therefore that the applicant has failed to prove on a balance of probabilities that there is a basis for the court to interfere with the ongoing disciplinary process. This point of law raised by the 1<sup>st</sup> respondent is therefore upheld.”*

[18] I am alive to my duty on review that I am to ascertain whether the court *a quo* did exercise its duties according to the **Takhona Dlamini v President of the Industrial Court and Another Case No. 23/1997** and not to reassess the final determination of the court *a quo*. It is my considered view as demonstrated above that the court *a quo* applied its mind to the issues, understood them and exercise its discretion judiciously in dismissing applicant's application.

[19] On the question of costs, the application was only defended by 1<sup>st</sup> respondent.

[20] Having found that 2<sup>nd</sup> respondent cannot be faulted as highlighted above, the following orders are entered:

1. Applicant's application is dismissed;
2. Applicant is ordered to pay 1<sup>st</sup> respondent costs.

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**M. DLAMINI**  
**JUDGE**

For applicant : M. P. Simelane  
For Respondents: N. D. Jele















