



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

**Civil Case No. 1108/2014**

**In the matter between**

**DUMISA ZWANE**

**APPLICANT**

**And**

<b>JUDGE OF THE INDUSTRIAL COURT</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>PHUMELELE THWALA N.O.</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>SIPHO MAMBA N.O.</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>EZULWINI MUNICIPALITY</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>COUNCILLOR BONGILE MBINGO</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>COUNCILLOR SIBUSISO MABUZA</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>ZONKE MAGAGULA N.O.</b>	<b>7<sup>TH</sup> RESPONDENT</b>
<b>REGISTRAR OF THE INDUSTRIAL</b>	
<b>COURT</b>	<b>8<sup>TH</sup> RESPONDENT</b>
<b>ATTORNEY GENERAL</b>	<b>9<sup>TH</sup> RESPONDENT</b>

Neutral citation *Dumisa Zwane vs Judge of the Industrial Court and 8 Others*  
(1108/2014)[2014]383 28 October 2014

**Coram:** Ota J.

**Heard:** 9 October 2014

**Delivered:** 28 October 2014

**Summary:** Civil Procedure: review proceedings; internal disciplinary proceedings of a Municipal Council; allegation of tainted charges; guiding principles on review of pending disciplinary proceedings; employer's prerogative to discipline its employees considered; application for review dismissed.

## JUDGMENT

### OTA J.

#### [1] INTRODUCTION

In this application launched under the premises of urgency, the Applicant seeks the following reliefs:-

- “1. Dispensing with the Rules of this Honourable court as related to form or procedures, service and time limits and enrolling this matter on the basis of urgency.**
- 2. Condoning the Applicant’s non compliance with the Rules of this Honourable court and allowing this matter to be heard as urgent.**
- 3. Reviewing and setting aside the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the Industrial Court proceedings under Case Number 30/2014 of the 11 August 2014 in respect of the Final Order dismissing the Applicant’s application.**
- 4. Pending finalization of these review proceedings, the 4<sup>th</sup> Respondent and 7<sup>th</sup> Respondent be hereby interdicted from proceeding with the disciplinary hearing against the Applicant.**
- 5. Directing the Respondents to pay the Applicant’s costs of this application in the event that they oppose this application.**
- 6. Granting the Applicant any further or alternative relief.”**

[2] **PARTIES**

The parties herein are described as follows:-

- “1 The Applicant is an adult Swazi male employed by the 4<sup>th</sup> Respondent as Inspector of works.**
- 2 The 1<sup>st</sup> Respondent is the Judge of the Industrial Court of Swaziland, who made the decision which is the subject matter of the Review Proceedings, cited herein in his official capacity as such and who was sitting together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as members of the court.**
- 3 The 2<sup>nd</sup> Respondent is Phumelele Thwala, an adult female Member of the Industrial Court of Swaziland, who was sitting together with the 1<sup>st</sup> Respondent, cited herein in her official capacity as such.**
- 4 The 3<sup>rd</sup> Respondent is Siphso Mamba, an adult male Member of the Industrial Court of Swaziland, who was sitting together with the 1<sup>st</sup> Respondent, cited herein in her official capacity as such.**
- 5 The 4<sup>th</sup> Respondent is Ezulwini Municipality, a statutory institution established in terms of Part 11 of the Urban Government Act of 1968, with power to sue and to be sued and whose offices are situate at Lot**

**1, Mpumalanga Crescent, Mountain View, Ezulwini, District of Hhohho.**

- 7 The 5<sup>th</sup> Respondent is Councillor Bongive Mbingo, a Swazi female adult whose full and further particulars are unknown to me. She is cited herein in her capacity as the member of the Sub-Committee appointed by the 1<sup>st</sup> Respondent's Council to investigate and / or look into issues relating to the disciplinary hearing of the Applicant.**
- 8 The 6<sup>th</sup> Respondent is Councillor Sibusiso Mabuza, Swazi male adult whose full and further particulars are unknown to me, save to state that he is a member of the Committee appointed by the 1<sup>st</sup> Respondent's Council to investigate and / or look into issues relating to the disciplinary hearing against the Applicant.**
- 9 The 7<sup>th</sup> Respondent is Zonke Magagula, an admitted attorney of the High Court of Swaziland who has been cited herein in his capacity as the Chairman appointed by the Committee of Council handling the disciplinary hearing against the Applicant.**
- 10 The 8<sup>th</sup> Respondent is the Registrar of the Industrial Court of Swaziland, cited herein in his official capacity as such and whose principal place of business is in The Industrial Court of Swaziland, The 8<sup>th</sup> Floor, Justice Building, Mhlambanyatsi Road, Mbabane, Hhohho District.”**

[3] The application is founded on an affidavit sworn to by the Applicant to which is exhibited several annexures. The Applicant also swore to a replying affidavit.

[4] The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents (hereinafter called Respondents) alone, opposed this application with the answering affidavit of one Vusi Matsebula described in that process as the Town Clerk of the 4<sup>th</sup> Respondent.

[5] It is pertinent to note here that in the wake of these proceedings and pending its determination, the 4<sup>th</sup> Respondent undertook to stay the disciplinary proceedings which it instituted against the Applicant and which is the crux of this matter.

[6] **BACKGROUND**

It appears from the papers filed of record that this suit has its roots in an approval emanating from the 4<sup>th</sup> Respondent establishment for the additional construction of 4 units at plot 82 of Farm 51 Bhubhudla Estate, Matenga at Ezulwini. The Applicant alleges that the Chief Executive Officer of 4<sup>th</sup> Respondent, personally gave verbal permission to the property developer, one Nqaba Dlamini, to carry out this construction and personally endorsed his signature on the plans brought to him in relation thereto. This notwithstanding, further contended the Applicant, the Chief Executive Officer on 9 September 2013 turned around to suspend him for the said construction without affording him a right to be heard and also preferred charges against him for misconduct and dishonesty.

[7] The Applicant was subsequently invited to attend a disciplinary hearing which was to be chaired at the time by one Mr Manene Thwala. On 7 November 2013 and at the hearing, the Applicant applied for the chairperson, Mr Manene Thwala, to recuse himself from the proceedings, on the basis that the Chief Executive Officer was involved in his appointment despite the fact that he had a direct and personal interest in the outcome. Mr Thwala refused to recuse himself. Suffice it to

say that Mr Thwala was subsequently removed by the 4<sup>th</sup> Respondent. Thereafter, the Chief Executive Officer appointed Attorney Titus Mlangeni as the chairperson of the disciplinary proceedings who sought to preside as such on 19 December 2013. The Applicant took objection to Attorney Mlangeni as chairperson, which objection was dismissed.

[8] It was against the backdrop of these facts, that on 14 February 2014, the Applicant launched the first application before the Industrial Court in terms of which I deem expedient to set out in extenso, as follows:-

- “1. **The Municipality be and hereby restrained from implementing the new organizational structure without consulting the Applicant.**
2. **Setting aside the charges preferred against me and / or interdicting the 4<sup>th</sup> Respondent from proceeding with the disciplinary enquiry.**
- Alternatively**
3. **That Attorney Titus Mlangeni be removed as Chairperson of the disciplinary hearing.**
4. **The Municipality be and hereby ordered to appoint a Committee of Council to handle the disciplinary hearing of the Applicant;**
5. **The Committee of Council be and hereby ordered to appoint a new Chairperson of the disciplinary hearing of the Applicant;**
6. **The disciplinary hearing of the Applicant shall commence under the chairperson to be appointed in terms of prayer 5 above;**
7. **The Respondents in the event of any of them opposing this application be ordered to pay costs on the scale as between Attorney and Client.**
8. **Further and / or alternative relief.”** (underlining my own)

[9] The application was determined by the 1<sup>st</sup> Respondent, sitting with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. In its judgment rendered on 4 March 2014, the court issued the following order:-

- “1. The 2<sup>nd</sup> Respondent, Attorney Titus Mlangeni, be and is hereby removed as chairperson of the disciplinary hearing.
2. In his stead, Attorney Cyril Maphanga is hereby appointed as chairperson of the disciplinary hearing.
3. The Ezulwini Town Council is hereby ordered and mandated to appoint any of the CEOs of the country’s Municipalities or Town Council to act on the recommendations of Attorney Cyril Maphanga at the conclusion of the disciplinary hearing against the Applicant.
4. The Town Clerk of the 1<sup>st</sup> Respondent Mr Vusumutiwendvodza Matsebula, shall play no role whatsoever in the present disciplinary hearing against the employee, Mr Dumisa Zwane, except as a witness.
5. The disciplinary hearing against the Applicant employee should proceed without any further delay or within ten work days from today, the 4<sup>th</sup> March 2014.
6. The rest of the prayers of the Notice of Motion are dismissed.
7. The court made no order as to costs.” (underlining added)

[10] Aggrieved by the foregoing order and on 20 March 2014, the Applicant by Notice of Motion sought a review of same before the High Court, per **His Lordship MCB Maphalala J**, praying for the following reliefs:-

- “3 Reviewing and setting aside the decision of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the Industrial Court proceedings under Case Number 30/2014 of the 4<sup>th</sup> March 2014 only in respect of the Final order:
  - 3.1 Appointing Attorney Cyril Maphanga to be chairperson of the disciplinary hearing proceedings instituted by the 4<sup>th</sup> Respondent against the Applicant;

- 3.2 Mandating the 4<sup>th</sup> Respondent to appoint any of the CEOs of the country's Municipalities or Town Councils to act at the recommendation of Cyril Maphanga at the conclusion of the disciplinary hearing against the Applicant;
- 3.3 Directing for the re-hearing of the disciplinary hearing within ten (10) working days from the 4<sup>th</sup> March 2014;
- 3.4 Dismissing the Applicant's application calling upon the 1<sup>st</sup> Respondent to be restrained from implementing the new organizational structure.
4. Pending finalization of these review proceedings, the 4<sup>th</sup> Respondent and 6<sup>th</sup> Respondent be hereby interdicted from proceeding with the disciplinary hearing scheduled for the 17<sup>th</sup> March 2014.
5. Alternatively, directing that the matter be referred back to the Industrial Court of Swaziland to be heard and determined by another Judge of the Industrial Court of Swaziland and not the 1<sup>st</sup> Respondent.
6. Directing the Respondents to pay the Applicant's costs of this application in the event that they oppose this application.
7. Granting the Applicant any further or alternative relief"  
(emphasis added)

[11] In para [30] of the judgment handed down on 19 June 2014, **His Lordship MCB Maphalala J.** issued the following order:-

“[30] Accordingly, the following order is made

- (a) The decision of the court *a quo* made on the 4<sup>th</sup> March 2014, is reviewed and set aside with regard to the following orders:
  - (i) The appointment of Attorney Cyril Maphanga to be the chairperson of the disciplinary proceedings instituted by the fourth respondent against the applicant.
  - (ii) Mandating the fourth respondent to appoint any of the Chief executive officers of the country's municipalities to act on the recommendation of attorney Cyril Maphanga at the conclusion of the disciplinary hearing against the applicant.



(iii) **Directing the re-hearing of the disciplinary hearing within ten (10) working days from the 4<sup>th</sup> March 2014.**

(iv) **Dismissing the Applicant's application calling upon the first respondent to be restrained from implementing the new organizational structure.**

(b) **The fourth respondent is ordered to pay costs of suit.”**  
(emphasis added)

[12] It appears that after the above order was issued, the Committee of Council which was put in place following the order of the Industrial Court of 4 March 2014, appointed another chairperson, Attorney Zonke Magagula, to preside over the Applicant's disciplinary hearing. Thereafter, and still dissatisfied with the disciplinary hearing, the Applicant moved another application before the court *a quo*, seeking for the following order:-

**“4.2 Interdicting and restraining the Respondents from breaching the order of this court dated 4 March 2014.**

**4.3 Setting aside the charges preferred against the Applicant and / or interdicting the Respondents from proceeding with the disciplinary enquiry.”**

[13] The court *a quo* dismissed the foregoing application on 11 August 2014. It is this dismissal that has engendered the present review application, wherein the Applicant seeks the reliefs, hereinbefore setforth in para [ 1 ] above.

[14] **THE REVIEW**

Now, the power of the High Court to review the decisions of Magistrates Courts as well as other lower adjudicating authorities and tribunals, is statutorily derived from section 152 of the Constitution Act 2005.

[15] The general rule is that a review is directed at the method of adjudication and not its result. An exception to this general rule is where the result of the decision sought to be reviewed is so perverse that it is indicative of a flawed method of adjudication, in that the judicial officer acting *bona fide* failed to direct his mind to the issue before him and so prevents the aggrieved party from having his or her case fully determined. See **Goldfield Investments Limited and Another v City Council of Johannesburg and Another 1938, T.P.D. 531.**

[16] It is also trite, that other grounds upon which the decision of lower courts and tribunals can be reviewed are:-

1. Absence of jurisdiction on the part of the court.
2. *Mala fides* e.g. interest in the cause, bias, malice or corruption on the part of the presiding officer.
3. Gross irregularity in the proceedings.
4. The admission of inadmissible or incomplete evidence or the rejection of admissible or competent evidence.

[17] The Applicant contends in his founding affidavit, as well as via the submissions of learned counsel Mr Magagula, that the court *a quo* misdirected itself and committed an irregularity by holding that the disciplinary enquiry proceeds on the same charges which were preferred by the Chief Executive Officer. This, it is contended, contradicts the court *a quo*'s earlier finding, in its decision on 4 March 2014, that the disciplinary proceedings were tainted by the involvement of the Chief Executive Officer. In this regard the court *a quo* held.

**“the disciplinary process was to that extent tainted by his involvement in initiating the charges, giving evidence, appointing a chairperson and further awaiting to implement the decision of the chairperson.”**

[18] The Applicant further contended that the above finding of the court *a quo* was confirmed by **M C B Maphalala J** in the review decision of the High Court rendered on 14 August 2014. It follows, so continued the argument, that a combined effect of the two decisions required the Committee of Council, not just to simply rubberstamp the pending charges initiated by the Chief Executive Officer, but to rather apply its mind and make its own determination whether to prefer the same charges, so as to comply with the requirements of a procedurally and substantively fair process.

[19] The court *a quo* however failed to set aside the disciplinary hearing on grounds that the charges were tainted and instead placed emphasis on the employer's prerogative to discipline its employees and thereby ignored the peremptory

requirement that this prerogative be exercised fairly and impartially in accordance with the rules of natural justice. By so doing, the Applicant further argued, the court *a quo* deviated from its earlier finding that the charges were tainted. This is more so having regard to the fact that the court *a quo* is a court of equity with a mandate to enhance equity at all times in the employment setting.

[20] By unnecessarily adhering to a fixed principle, namely, the employer's prerogative to discipline its employees, contended the Applicant, the court *a quo* failed to apply its mind to the issue before it, which was, whether on account of the taint in the charges, it should not set aside the disciplinary enquiry, at least, pending an investigation and determination by the Committee of Council. The assailed decision is ripe to be set aside in these circumstances.

[21] The Applicant relied on the following cases **United City Merchants (Investments) Ltd and Others v Royal Bank of Canada and Another (1982) 2 All ER at page 725. In Pinochet, in re [1999] UKHL1; [2000] 1 and Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A).**

[22] The Respondents and learned counsel for the Respondents Mr Mdladla, argued to the contrary. I will make references to the opposing contentions as the need arises.

[23] It is pertinent that we remind ourselves of the reliefs sought by the Applicant before the court *a quo* which bear repetition at this juncture

**“4.2 Interdicting and restraining the Respondents from breaching the order of this court dated 1 March 2014;**

**4.3 Setting aside the charges preferred against the Applicant and / or interdicting the Respondents from proceeding with the disciplinary enquiry.”**

[24] I agree entirely with the Respondents that the whole tenor of the application before the court *a quo* was that the 4<sup>th</sup> Respondent in proceeding with the disciplinary hearing based on the pending charges initiated by the Chief Executive Officer of the 4<sup>th</sup> Respondent, was in breach of order 4 of the court *a quo*'s ruling of 4 March 2014, to wit:-

**“The Town Clerk of the Ezulwini Town Council Mr Vusumutiwendvodza Matsebula, shall play no role whatsoever in the present disciplinary hearing against the employee, Mr Dumisa Zwane, except as a witness.”**

[25] It must be noted here that the Town Clerk of the Ezulwini Town Council referred above, is one and the same person as the Chief Executive Officer of the 4<sup>th</sup> Respondent. Order 4 above was apparently made by the court *a quo* on grounds of its finding that the Chief Executive Officer was tainted in the disciplinary hearing.

[26] I agree with the Respondents that the contention by the Applicant that the 4<sup>th</sup> Respondent breached order 4 above, necessitated that in deciding the issues before it, the court *a quo* also gave some interpretation of the said order 4.

[27] How the court *a quo* dealt with the issues arising before it is encapsulated in paras 5 to 10 of the assailed decision, in the following terms:-

- “5 In relation to the Order of this Court of the 05<sup>th</sup> march 2014, the decision of the Court was that the CEO ‘--- *shall play no role whatsoever in the present disciplinary hearing against the employee, Mr. Dumisa Zwane, except as a witness.*’ (Court’s emphasis). When the court issued this order it was cautious not to fall into the temptation tentacles of interfering with the prerogative of the employer to discipline its employees. The court points out that it never set aside the charges. As it is the charges still stand. That is why we said the CEO was to play no role in the present (or pending disciplinary hearing except as a witness. Otherwise what would the CEO be a witness to except for the disciplinary hearing in respect of the charges the Applicant is currently facing?
- 6 Indeed the Applicant is entitled to a fair hearing, under the chairmanship of an independent person whose independence and impartiality is beyond suspicion. (See the Graham Rudolph case). But the Applicant does not say that the impartiality of the new Chairperson appointed by the Committee is suspect. He only has a problem with the charges which he says are tainted because of the involvement of the CEO in their institution. However he has not challenged the investigation against him in these proceeding nor in the earlier proceedings of March 2014. And we reiterate that this court found no reason in March 2014, neither did the High Court under review, to interfere with the prerogative of the employer in disciplining its employee Dumisa Zwane. That is why the charges were never set aside. In fact, there is no allegation that the investigation against him was conducted in a procedurally unfair manner so as to warrant immediate interference by the court
- 7 An interesting fact the court brings to the fore is that in the application of March 2014, amongst the orders the Applicant sought was an order to set aside the charges against himself and/or interdicting the 1<sup>st</sup> Respondent employer from proceeding with the disciplinary enquiry. That prayer was dismissed by this court. As an alternative to this prayer, he sought for an order removing Attorney Titus Mlangeni from sitting as the Chairperson in his disciplinary hearing, and that in his stead the 1<sup>st</sup> Respondent’s Committee of Council appoints a new person to chair his hearing. (Court’s emphasis). From the underlined above, it is clear that the Applicant was saying as an alternative prayer he was seeking that the Committee should remove the Chairperson already appointed and that it (Committee) should instead appoint an independent

Chairperson. And that is exactly what has happened in the instance. As per his wish, a Committee has been appointed to handle his disciplinary enquiry. Over and above that, and again as per his wish, the committee he so much wanted has appointed an independent Chairperson to chair his hearing. This is exactly what he wanted. It would seem the Applicant still wants his cake despite having already eaten it. The conduct of the Applicant is nothing more than a delaying tactic meant to frustrate the disciplinary process instituted against him.

- 8 It is well known fact that there are various laws imposing all kinds of burdens and obligations upon employers in relation to their employees. And yet as a rule, this court has always, consistently so, upheld the employers' inherent prerogative to regulate their workplace. Under the doctrine of management prerogative every employer has the inherent right to regulate, according to their own discretion and judgment, all aspects of employment relating to employees' work, including hiring, work assignments, working methods, time, place and manner of work, supervision, transfer of employees, lay-off of employees, discipline and dismissal of employees. The only limitations to the exercise of prerogative by employers are those imposed by labour laws and the principles of equity and substantial (natural) justice.
- 9 The court quickly points out though that while the law imposes many obligations on the employer, nonetheless, it also protects the employer's right to expect from its employees not only good performance, adequate work, and diligence, but also good conduct and loyalty. In fact labour laws do not excuse employees from complying with valid company policies and reasonable regulations for their governance and guidance.
- 10 Having said this, it is a finding of this court therefore, that the employer in this matter has not in anyway breached the order of this court issued in March 2014. We find no merit in the present application by the Applicant in this matter. The court has accordingly come to the conclusion that the Applicant has failed to make out a case for it to intervene at this stage. Accordingly the court is inclined to dismiss the application with no order as to costs. And that is the order we make."

[28] Having carefully considered the totality of the papers serving before court, I find myself unable to agree with the Applicant that the court *a quo* committed an

irregularity or failed to apply its mind to the issues before it, in arriving at the assailed decision.

[29] I agree entirely with the Respondents that even though the court *a quo* had in its decision of 4 March 2014 found that the disciplinary process was to an extent tainted by the Chief Executive's involvement in initiating the charges, giving evidence, appointing a chairperson and further awaiting to implement the decision of the chairperson, the court however, failed to set aside the charges as it was prayed. This is evident from order 6 of the decision of 4 March 2014 which I have hereinbefore set forth in para [ 9 ] above. The mere fact that the Chief Executive Officer was by order 4 therein precluded from playing no role whatsoever in the pending disciplinary hearing against the Applicant except as a witness, does not translate to a setting aside of the charges.

[30] I think I agree with the court *a quo* in para 5 of the assailed decision, that the import of its order 4 of the decision of 4 March, is that the Chief Executive Officer should not play any role in the pending disciplinary proceedings, which disciplinary proceedings encompass the charges.

[31] In the wake of the decision of 4 March 2014, the Applicant had an option to either appeal or apply for a review of the order refusing to set aside the charges.



[32] The Applicant opted for an application reviewing the said decision only in respect of some of the final orders as specified in para [10] above. The application was determined by **MCB Maphalala J**, as I have hereinbefore demonstrated. It is important to note that the orders the Applicant sought to be reviewed and set aside did not include order 6 of the decision of 4 March 2014, wherein the court *a quo* dismissed the application for the charges to be set aside, and the disciplinary hearing interdicted.

[33] It is common cause that even though **His Lordship MCB Maphalala J**, also acknowledged that the Chief Executive Officer was tainted in the disciplinary process, he however failed to set aside the order of the court *a quo* of 4 March 2014 dismissing the Applicant's application for the setting aside of the charges or interdicting the disciplinary proceedings on the grounds of the said taint. The Applicant failed to appeal the decision of **MCB Maphalala J** on this issue.

[34] In these circumstances, I cannot fault the decision of the court *a quo* refusing to set aside the charges or interdicting the disciplinary proceedings.

[35] This is because order 6 of the decision of 4 March 2014 dismissing the application to set aside the charges and or interdicting the disciplinary proceedings and the order of **MCB Maphalala J** which did not set aside or review the dismissal of the application to set aside the charges and or interdict the disciplinary proceedings

are valid, subsisting and binding on all the parties including the court, until it is set aside or reviewed by a competent appellate or reviewing court. This is the entrenched position of the law, as I acknowledged with the following condign remarks in my decision in the case of **Clement Nhleko v M.H. Mdluli and Company and Sandile Dlamini, Civil Case No 1393/09.**

**“So long as the judgment is not appealed against, it is unquestionable valid and subsisting. This is so no matter how perverse it may be perceived. It is binding and must be obeyed by all including this court. This is because a court is powerless to assume that a subsisting order or judgment of another court can be ignored because the former, whether it is a superior court in the judicial hierarchy, presumes the order as made or the judgment as given by the latter to be manifestly invalid without a pronouncement to that effect by an appellate or reviewing court.”**

[36] More to the above, is, that having already considered and dismissed the application to set aside the charges on grounds of the said taint and or interdict the disciplinary hearing in its decision on 4 March 2014, the court *a quo* was estopped from reopening and redetermining the same issue, on the same grounds, as between the same parties or their successors in title and assigns, on authority of the well grounded principle of *res judicata*.

[37] Indeed, in paras 5, 6 and 7 of the assailed decision set forth in para 27 ante, the court *a quo* acknowledged the fact that its decision dismissing the application to set aside the charges and or interdicting the disciplinary hearing is valid and subsisting and that the charges still stand. I cannot therefore fault the courts

decision in these circumstances. It is clear that the court applied its mind to the issues before it.

[38] Similarly, the Applicant's contention that the court *a quo* committed an irregularity and failed to apply its mind to the issues before it, by unnecessarily adhering to the principle of the employer's prerogative to discipline its employees, is unsustainable.

[39] There is no doubt that the court can intervene in the process of a disciplinary enquiry. It is however the judicial position, that the constitutional protection of employment entrenched in section 32 (4) of the Constitution Act 2005, which protects employees from the ills stipulated therein, did not deprive employers of their common law right to discipline an employee using fair means and according to law. The attitude of the courts thus, is not to intervene in the employers internal disciplinary proceedings until they have run their course, except where compelling and exceptional circumstances exist warranting such interference.

[40] The chairperson of such a disciplinary enquiry and in whose hands lies the final decision, has quasi-judicial functions. He is by law presumed to be an independent and impartial umpire and to have the competence to determine any question in relation to the disciplinary enquiry, including the legality of the charges, until the contrary is proved. Since the question of the legality of the

charges lies with the chairperson after evidence has been led, the court will only intervene on the issue of the charges, in the face of compelling factors disabling the chairperson from adjudicating, such as *mala fides*, bias etc.

[41] Commenting on this principle in my decision in the case of **Abel Sibandze v Stanlib Swaziland (Pty) ltd and Another, Civil Appeal Case No. 5/2010 paras [64] and [65], (M M Ramodibedi and M M Sey concurring)**, I stated as follows:-

**“[64] It is worthy of note that over the decades this court has persistently and progressively held, that the chairperson of the disciplinary enquiry, has the jurisdiction to execute this function notwithstanding the factors that attend the charges or the enquiry itself. A case in point is the case of Bhekiwe Dlamini v Swaziland Water Services Corporation (supra), where the court declared as follows in paragraphs 11 and 13:-**

**‘(11) I fail to understand the resistance on the part of the appellant to submit to the hearing of the disciplinary hearing chaired by any person other than a member of the respondent—**

**(13) All the difficulties arising out of the charges intended to be preferred against the appellant, time limits and the procedure to be followed are issues that lie clearly within the ambit of the disciplinary hearing ----’**

**[65] Then there is also the case of Swaziland Post and Telecommunications Workers Union and Others v Swaziland Post and Telecommunications Corporation, Case No. 221/2009 paragraphs 7,8,9, where the court held as follows:-**

**‘(7) ---- the issue placed before the court ought to be placed before such chairperson for determination. It is such chairperson who will decide whether the charges should be declared invalid as well as whether the Applicants’ suspension will fall outside the disciplinary code and procedure and whether they should be set aside.**

- (8) **The court is loathe to usurp the discretion of the chairperson of these disciplinary enquiries particularly where they have not had the opportunity to exercise same. As was the case in Ndoda Simelane case (supra), the applicants appear to have “jumped the gun” by coming to court instead of attending the disciplinary hearings and requesting the chairperson to make a decision on question of the suspension and charges.**
- (9) **In the premises we are of the view that the Applicants ought to raise their complaint with the chairperson of their disciplinary enquiry ---’”**

See **Bhekiwe Dlamini v Swaziland Water Services Corporation, Case No 13/2007.**

[42] It is clear from the foregoing that it is not enough for the Applicant to allege that the charges emerged from tainted, spurious and disingenuous circumstances. He was required to show exceptional circumstances disabling the chairperson of the disciplinary proceedings from making a decision on the legality of the said charges.

[43] It appears that the Applicant has no complaints against the newly appointed chairperson. He has raised no issues about the chairperson appointed by the Committee of Council. This fact was acknowledged by the court *a quo* in paras 5, 6 and 7 of the assailed decision. There is obviously nothing urged disqualifying the chairperson appointed by the Committee of Council, upon the desire of the Applicant, from deciding the legality of the charges. The court *a quo* clearly

applied its mind to this fact as shown in paras 5, 6 and 7 of the impugned judgment, in reaching its decision.

[44] For the totality of the above stated reasons, it appears to me that the court *a quo* cannot be faulted in its process and reasoning in coming to the impugned decision. It clearly applied its mind to the issues before it and also committed no irregularity. The result of the decision cannot by any stretch of the imagination be viewed as perverse.

[45] This application is unmeritorious in these circumstances. It fails and is dismissed with costs.

**DELIVERED IN OPEN COURT IN MBABANE ON THIS  
THE -----DAY-----2014**

**OTA J.  
JUDGE OF THE HIGH COURT**

**For the Applicant: M. Magagula**

**For the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents: S. Mdladla**

