IN THE HIGH COURT OF ESWATINI

JUDGMENT

In the matter between:	Case No. 2391/20
NDUMISO NGOMA	Applicant
And	
THE PRESIDING JUDGE OF THE INDUSTRIAL COURT	1st Respondent
SWAZILAND BUILDING SOCIETY	2nd Respondent
DALTON NXUMALO N.O	3rd Respondent

Neutral citation	**:**	***Ndumiso Mngoma v The Presiding Judge of The Industrial Court and Others (2391/20) [2020] SZHC (……)***
Coram	**:**	**M. Dlamini J**
Heard	**:**	**19th December, 2020**
Delivered	**:**	**23rd December, 2020**

Review proceedings : ***[T]he courts have moved away from the traditional approach in the review proceedings which was that the court must look for procedural irregularities in the strict sensu of the word. For instance, on whether the court did consider a witness's evidence. The procedural irregularities envisaged in our modern day litigation is broad. A conclusion or decision must be based on justiciable grounds. If the conclusion or decision is based on grounds not supporting the conclusion, the review application stands to succeed. In our daily legal language, the court often state that the grounds supporting the decision should not be absurd. Where absurdity is evident, the courts leans in favour of the applicant. This is when the court views the decision as having been taken arbitrarily***. *[17]*

Judicious exercise of discretion ;There is no judicious exercise of discretion where the trier of fact fails to consider relevant factors and take into account irrelevant one as I have demonstrated above. For instance, not to consider the policy and the gravity of the formulated charges was a failure of exercising discretion judiciously as he ought to have done so in terms of our common law principle. *[23]*

Summary: Serving before me is a review application against the decision of **B. Magagula AJ** sitting in the Industrial court. The applicant's main bone of contention is the dismissal of his application for external representation by the Chair of the disciplinary hearing.

The Parties

[1] The applicant is an adult Liswati and a resident of Mbabane. The 1st respondent is described as the Presiding Judge over the applicant's matter in the Industrial Court. The 2nd respondent is a building society duly incorporated and registered in terms of the laws of the Kingdom. It is the employer of the applicant. The 3rd respondent is the Chair of the disciplinary hearing constituted by 2nd respondent against the applicant.

The Parties' contentions

The applicant

[2] The applicant has deposed that on 23rd November, 2020, it filed an application before the 1st respondent to set aside the 3rd respondent's decision declining him the right to external representation and that the disciplinary hearing commence *de novo*.

[3] The grounds for review were set out as hereunder and I also address each:

a) The 1st respondent considered his application when the pleadings had not closed as he had not filed a replying affidavit. I must quickly dispose of this averment as the

applicant's erstwhile attorney filed heads of arguments without filling a reply. By taking this step, he waived his right to file a reply. The pleading had therefore closed by the time the matter was heard. The honourable *Judge a quo* cannot be faulted in this regard.

b) The 3rd respondent failed to consider his representation to the effect that the external representative would motivate the application for external representation. Again here, the record of proceedings before the 3rd respondent is silent on such submission. This being a court of record cannot entertain such deposition.

c) The 3rd respondent failed to consider his application for external representation. It referred the matter to the Managing Director instead. My considered view is that at the end, the Chair did entertain applicant's application. What remains for me is to consider whether he applied his mind to the matter serving before him.

d) The 3rd respondent failed to consider the disciplinary code of the 2nd respondent to the effect that unionized employees were entitled to accredited union representation. Similarly as a non-unionized member by virtue of occupying the management position and therefore falling outside the bargaining unit, 3rd

respondent ought to have allowed his application for external representation. I shall deal with this point under adjudication.

e) The 3rd respondent order that he should represent himself was not competent as he did not apply for it. It further had the effect that he could not be represented even by an internal representation. This line of argument is with due respect somehow childish as personal representation was a natural consequence of dismissal of applicant's application to be represented by an outsider.

f) The 3rd respondent failed to consider that he had failed to secure even internal representation as all five internal representation that were approached declined his request for representation. The 3rd respondent observation to the effect that the refusal by internal representation presented a challenge which needed 2nd respondent serious redress, did not address his predicament and was of no legal consequences to him except prejudice as he was ordered to represent himself in the meantime. Further, the employees he had approached were those he had confidence upon. He could not approach others he could not trust. I shall deal with this point under adjudication.

g) Worse still, his application for external representation was not the first one as previous similar application had been granted in the past. I shall consider this point under adjudication.

h) The 3rd respondent failed to consider the seriousness of the charges levelled against him by 2nd respondent. I shall deal with this point under adjudication.

The 2nd respondent

[4] The 2nd respondent has asserted that the application for recusal of the Chair was not before the Chair. It was correctly dismissed by the 1st respondent. Secondly, the matter was adjudication upon by 1st respondent after Counsel for applicant filed heads of arguments. Applicant's legal representative in the court *a quo* failed to file a reply. I accept these averments as the record of proceedings supports the same.

[5] The applicant never raised before the 1st respondent that the 3rd respondent failed to decide on his application for legal representation but referred the matter to 2nd respondent. Further, applicant did not move an application before the 3rd respondent that his external representation be granted audience in order to motivate the application for external representation. I have already addressed this submission above.

[6] The 2nd respondent then deposed:

> *"43. Union Officials are not necessarily co-employees however the corollary of that provision would be that the Applicant or any managerial employee would be entitled to representation by officials of a Staff Association which is recognized by the representation by operation of Clause3.2.2, let alone legal representation, which is what the Applicant was seeking before the 3rd Respondent."* [1]

[7] On applicant's averments that past employees have been granted the right to solicit external representation, 2nd respondent asserted:

> *"55. Each matter in which an employee is requesting to be allowed outside representation is taken on its own merits and the Applicant failed to give any compelling and exceptional circumstances as required by law, either before the 1st Respondent or before the 2nd Respondent why outside or legal representation is required in his case."*[2]

[8] Responding on applicant's assertions that he had approached five management employees to represent them and they refused, 2nd respondent pointed out:

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[1] Page 69A paragraph 43 of the book of pleadings

[2] Page 71A paragraph 55 of the book of pleadings

> *"57. The applicant by his own admission only approached four [4] co-employees to represent him whereas it emerged that there are in fact at least twenty – six [6] managers of equal or more senior status than the Applicant who would be eligible to represent the Applicant."*[3]

[9] 2nd respondent further contended that the mere fact that the charges are of a serious nature is not a license for applicant to have external legal representation.

Adjudication

Grounds for review submitted before the *court a quo*

[10] I think the first port of call is to ascertain the grounds for review of 2nd respondent's decision that served before the court *a quo*. This is because Counsel on behalf of 2nd respondent pointed out that the applicant's ground as raised in this court were not sewing before the *court a quo.*

[11] Narrating the background, applicant had deposed in the *court a quo* that:

- The disciplinary hearing commenced despite his "*protestation*"[4]

[3] Page 72A paragraph 57 of the book of pleadings

[4] See paragraph 6 page 7B of the book of pleadings

- He did engage the Human Resource Manager for firstly to allow him external representation. This was because his fellow employees had declined to represent him. In fact, only one allowed him to reveal his name, while the four admonished him not to reveal their names.

- Secondly, he engaged the Human Resource Manager requesting for a copy of 2nd respondent's policy. He needed to see the clause denying him the right to legal representation. After a number of exchanged emails, the Human Resource Manager conceded that there was no such policy but only a draft. He also deposed before the *court a quo:*

> *"8. I have therefore been unable to secure an internal representative. The Human Resource Manager came in with an unprecedented suggestion that I write a letter to the Managing Director to request for external representation. I objected to such an alien procedure but was compelled to do it on the pain of being seen as insubordinate* [5]

[12] The Managing Director declined to entertain the letter and referred it back to The Human Resource Management. The applicant then deposed:

[5] Page 8B paragraph 8 of the book of pleadings

"*10. From the advice given to me and which I believe to be verily correct is that an application for external representation is made before the presiding officer (2nd Respondent in my case).*"[6]

[13] Applicant referred to the prayer to have the matter heard *de novo*. He averred:

"*12. There is prayer for the hearing to commence de nova. If that prayer is granted, then it has the consequence that the DC Chairpersons will have to recuse himself. The Court may as well, given the allegations of his involvement rule that the hearing commences before a new Chairperson.*"[7]

[14] He explained on why such an application could not be made before him:

"*13. Am advised that a recusation* [sic] *application has to be made before him. That has not been possible to do in the given timelines. The extent of the irregularities that have occurred in the hearing under his watch, does make him unsuited to continue presiding. These include for example;*

[6] Page 8B paragraph 10 of the book of pleadings

[7] Page 12B paragraph 12 of the book of pleadings

13.1. The 2nd Respondent in his email of 18th November 2020, (annexure NM8) seems to take a bad view of my efforts to consult an external representative for guidance in dealing with the hearing.

13.2. This has been his view of insisting that the enquiry is internal, but there is no precise policy provision excluding assistance by external representation. It would be very absurd that the Society allows unionized members the right to external representation and not so for me. That if upheld, will boarder on discrimination. We are all employees of the Society.

13.3. Even in the hearing, per the attached transcript, he appears to have a special disdain for legal representation. It being not what I asked for. These are people out there who are not lawyers but labour practitioners who represent people at disciplinary enquiries. As to how the 2nd Respondent translates external representation to mean legal representation, I have no idea."[8]

[15] He referred to 3rd respondent act of accepting that 2nd respondent had a policy which excludes external representation despite the

[8] Page 12B paragraph 13 of the book of pleadings

correspondence by the Human Resource Manager to the effect that there is no policy as yet. He also added:

> *"14. In the interest of fairness, it is ideal as well that I be afforded the right to seek external representation. The 1st Respondent is represented by two senior officials who are initiators. In addition to that, there is the HR Manager that I have to keep watch over, as she gives contradictory statements on policy issues."*[9]

[16] He pointed out at his paragraph 18[10] that there is no Staff Association and that as he could not be unionized, the only option after denial of his legal representation was to represent himself.

[17] From the above highlighted deposition which served before 1st respondent, it is my considered view that two grounds were advanced, viz., that the policy that served at 2nd respondent did allow unionized members external representation and that his denial of such a right resulted in discrimination. The second ground is that he had failed to secure internal representation, a fact recognised by 3rd respondent.

Any grounds justifying review?

[18] I must from the onset point out one cardinal position of the law and it is that the courts have moved away from the traditional approach in the review proceedings which was that the court must look for

[9] Page 13B paragraph 14 of the book of pleadings.

[10] See page 14 of record of proceedings

procedural irregularities in the *strict sensu* of the word. For instance, on whether the court did consider a witness's evidence. The procedural irregularities envisaged in our modern day litigation is broad. A conclusion or decision must be based on justiciable grounds. If the conclusion or decision is based on grounds not supporting the conclusion, the review application stands to succeed. In our daily legal language, the court often state that the grounds supporting the decision should not be absurd. Where absurdity is evident, the courts leans in favour of the applicant. This is when the court views the decision as having been taken arbitrarily.

[19] It is the common cause in the present application that the applicant has sought from the onset for his right to lexternal representation. He was denied by both 2nd and 3rd respondents. He lodged a review application in the *court a quo* seeking for redress on his right to legal representation.

[20] I appreciate that both 2nd and 3rd respondents took the review that the applicant had a right to representation. However, applicant was confined to a specific class of representation, viz., internal representation to be selected by him from the employees of 2nd respondent.

Does internal representation in disciplinary proceedings at the workplace suffice?

[21] It appears that since 1920, the question on whether an employee is entitled to representation at all has been a subject of controversy. This controversy is deduced from the case of **Dabner V South Africa Railways and Harbours 1920 AD 583.** The enquiry by the court was the validity of a provision in the employer's regulations prohibiting legal appearances in disciplinary hearing against the respondent's employees. **Kotze J** held that the section was invalid. His decision was set aside by the **Cape Division**. In the **Appellate Division,** it was argued before **Innes CJ** that the provision violated the fundamental right to hearing.

> *"Now, the statutory Board with which we are concerned is not a judicial tribunal. Authorities and arguments, therefore, with regard to legal representation before court of law, nor is this enquiry a judicial enquiry. True, the Board must hear witnesses and record their evidence, but it cannot compel them to attend, nor can it force them to be sworn; and, and most important of all, it has no power to make an order. It reports its finding, with the evidence, to an outside official, and he considers both and gives his decision. Nor can it properly be said that there are two parties to the proceedings. The charge is formulated by an officer who is no party to an enquiry. The Board is a domestic tribunal constituted by statute to investigate a matter affecting the relations of employer and employed. And the fact that the enquiry may be*

concerned with misconduct so serious as to involve criminal consequences cannot change its real character. No Roman-Dutch authority was quoted as establishing the right of legal representation before tribunals other than courts of law, and I know of none." [11]

[22] The learned Chief Justice proceeded:

"*Tribunals specially created to deal with disputes relating to administration or discipline are not bound to follow the procedure of a court of law. Certain elementary principles, speaking generally, they must observe; they must hear the parties concerned; those parties must have due and proper opportunity of providing their evidence and stating their contentions, and the statutory duties imposed must be honestly and impartially discharged. These elementary principles must be regarded as embodied in the Act, and regulations running counter to them could not be upheld. But the rule in question violates no such principle."* [12]

[23] The honourable Chief Justice stated of the English position:

[11] Page 598 (supra)

[12] See page 598

> "*But the English cases go to show that no legal right of representation can be claimed before special tribunals which are not courts of law.*"[13]

[24] **Innes CJ** therefore set out a clear line of demarcation on when legal representation ought not and when to be allowed. The position of the law as espoused by **Innes CJ** is clearly that where the hearing in disciplinary matters is confined to investigation, the rights to legal representation is excluded. This principle of the law however, does not apply where the powers of the hearing extend beyond investigation to making a definitive finding on the employee about the charges. To me, it is a matter of procedure akin to criminal investigation conducted by the police. Representation is not permitted in the interviewing room in as much as the accused may insist on his right to remain silent. The rationale behind this principle is simply that the investigator either in a form of a chair, a tribunal or a commissioner is not the decision maker. The difference though is that the employee is able to cross-examine witnesses and bring his own witnessed in the fact finding proceedings under disciplinary hearing.

[25] However, it appears to me that the principle of the law has developed over the years to the effect that "*the fact that the employee was unrepresented and unassisted at the crucial first fact finding enquiry was unfair*"[14] Similarly as per **Rossouw v South Africa Mediese**

[13] See page 599

[14] **See Sasibo v SA Stevendores Ltd (1987) 8 ZLJ at 790 - 2**

Navorsingsraad (1) (1987) 8 ICJ 650 (IC) where two committees set. The first committee was task with fact findings. It did however make recommendations that the applicant be acquitted of the charges. The second committee which was clothed with the duty to make a decision, ignored the recommendation and found against the employee without a representation from the applicant. The court dismissed the second committee's decision on the ground that the employee ought to have been invited for representation.

[26] In **National Union of Mine workers and Others v Durban Reodeport Deep,**[15] the court held:

> *"The primary object of the enquiry, whatever form it takes, is to*
>
> *endeavor to investigate any complaint against an employee, as honestly and as objectively as is possible, so that he or she is not dismissed for want of a just cause and without having been afforded a fair and a reasonable opportunity of speaking in rebuttal or in mitigation of the complainant in accordance with the audi alteram partem rule."*

[27] Writing on the same view **Marais JA**[16]

[15] (1987) 8 iILJ 156 at 164-5

[16] **Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others (384/2000)**

"S3 makes provision for legal representation only in a 'serious or complex' case in which, 'in order to give effect to the right to procedurally fair administrative action', an administrator decides, in the exercise of a discretion, to grant an opportunity to obtain 'legal representation'.

[28] Section 21(1) of our 2005 Constitution Act No. 1 of 2005 reads:

> *"(1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law."*

[29] In **Hamata,** the court pointed out that the legislators were concerned with matters before a court of law or statutory bodies clothed with the power to adjudicate. In the *case in casu*, the 2nd respondent's powers to establish the disciplinary hearing emanates from its policies and not on parliamentary enactment.

[30] In **Hamata's** case, the court was faced with a policy of the employer. The court in **Hamata's** case resorted to interpreting the clause termed regulation in the employer's policy. I intend to follow suit.

[31] It is common cause that in the case at hand a unionised employee may be represented by a member of the union. Counsel for applicant

submitted that the policy for 2nd respondent therefore allowed for an outsider to represent an employee. It was contended on behalf of 2nd respondent that a union member was not an outsider by reason of the agreement between the 2nd respondent and the union.

[32] In **Hamata,** a similar argument was raised. The employer's policy provided that a lawy student of the employer could represent an employee in the disciplinary hearing. That provision, the argument proceeded, prohibited outside legal representation. The court dismissed the contention and interpreted the provision allowing the employer's lawy student to include an outside attorney.

[33] I see no reason why I should deviate from a similar interpretation. The fact of the matter is that a union representation is not different from an outsider for a number of reasons. The rationale for employers to insist on an internal representation is to avoid confidential information unique to the institution or company to be known by an outsider. Once a union representation is allowed, the employer must be deemed to have waived the right to secrecy in the event such evidence is relevant to the enquiry.

[34] It is common cause that union representation is allowed by 2nd respondent's policy to represent members falling within the bargaining unit. No doubt, a union representative is not necessarily an employee of the 2nd respondent. For this reason, a union representative could safely be described as an outsider. In essence by

so allowing an outsider in the likes of a union representation where the employee falls within the bargaining unit, the 2nd respondent waived its rights to insist on internal representation. It follows therefore that where its employee seeks for external representation, such application ought not to be denied. This position carries much force where the employee falls outside the bargaining unit such as the present applicant.

[35] In other words, the 3rd respondent ought to have directed his attention to the policy of respondent. It was an irregularity to refer the question of external representation to the Managing Director in the first place. However, I make no issue on this for the reason that at the end of the day the 3rd respondent did consider the applicant's application albeit without relevant attention to the 2nd respondent's policy. On this point alone, the review application stands to succeed.

[36] There is a second point warranting review of the orders of the *court a quo*. A plethora of case law is to the effect that the 3rd respondent ought to have been guided by the following as espoused by **Mlangeni J** in **Ndzinisa Ephraim Themba v Skhumbuzo Simelane NO and Another (1993/18) [2019] SZHC 18 (11th February, 2019)** who eloquently espoused:

> "*It is well-settled in our labour laws that for purposes of*
>
> *an internal disciplinary hearing an employee is not entitled as of right to external representation. For purposes of an*

internal disciplinary hearing an employer may be represented by his co-worker, preferably at his level or above. To make a case for external representation the employee must establish exceptional circumstances. In the case of ***LYNETTE GROENING v STANDARD BANK SWAZILAND LIMITED,*** *supra,* ***P.R. Dunseith P****. stated that the question whether or not special circumstances exist which require legal representation 'is to be decided by the chairperson of the disciplinary hearing. By way of guidance, the court has enunciated the following considerations which, however, are not exhaustive.*

8.1 Whether an employee of equal status to the

Applicant is available to represent the Applicant.

8.2 If not, whether representation by a subordinate would or would not be degrading to the Applicant or hamper him in presenting his defence;

8.4 Whether an employee of the organization can satisfactorily represent the Applicant. Whether the charges are sufficiently complex or legalistic to warrant the involvement of an attorney;

8.5 Whether the charges may result in the dismissal of the Applicant;

8.6 whether the employer will be unreasonably prejudiced if the Applicant is permitted a representative of his choice, in particular a legal representative."16

[37] From the record of proceedings, it is reflected that the applicant submitted that he failed to secure representation of equal standing within the organisation. The 2nd respondent countered such

submission by pointing out that applicant ought to have approached all twenty five employees of 2nd respondent and not just five. However, the 3rd respondent did accepted the submission by applicant that the five employees rejected applicant's request for representation. This is evident from his comments directed to the head of Human Resource Management and other members of 2nd respondent's management to the effect that capacity building exercise should be taken in that regard. [17] He ought to have directed his attention to the predicament faced by applicant instead of focusing on procedures to remedy the situation such as calling for workshops. This was a gross irregularity. The end result is that the very first requirement on the question of whether there is internal representation for the applicant ought to have been answered in the negative, warranting a grant of his application before the 3rd respondent of an external representation.

[38] Similarly, the 3rd respondent ought to have proceeded to enquire on the second requirement as per **Ndzinsa'**s judgment. His charges served before 3rd respondent. It is not clear why he deliberately[18] decided not to consider their gravity as this is one of the circumstance that would have informed him on whether to allow or disallow the application that serviced before him. The short of it is that it was grossly irregular for 3rd respondent not to consider the seriousness of the charges faced by applicant in the assessment of the application by applicant.

[17] See pages 103-104 of record of proceedings

[18] See pages 99 & 101

[39] It is not denied that should the applicant once convicted of the formulated charges, a dismissal penalty may be imposed upon him. In this regard, the 3rd respondent ought to have been guided by the laid down principles in considering the application before him for an outside representation. From the record, it is clear that the 3rd respondent considered irrelevant factors as he enquired from every member that was present whether he was a lawyer or not. This is not one of the enquiries he ought to have made. He ought to have considered the gravity of the charges faced by applicant as laid down in case law.

[340] Lastly, Counsel for respondent submitted that applicant was making a new case before this court. The submissions before me were not served before **Magagula AJ** *a quo.* Applicants founding affidavit before **Magagula AJ** reflected:

> *"11.1 The Chairperson made a ruling in respect of an issue not brought before him. The letter wherein I requested external representation was addressed to the Managing Director.*
>
> *11.11* ***The 2nd Respondent failed to take into account all relevant considerations. He clearly did not address himself to the Disciplinary Code which allows for 5 union representatives.*** *If he had, he would not have made the decision he did. Because that demonstrates the*

fact that in the Bank, issues of representation are dealt with by external person's i.e. the Union representatives.

11.12 The 2nd Respondent despite being alive to the genuiness of my inability to some internal representative, still failed to allow my application. In ruling this is what he stated:

'HR I request that we really take that serious to the fact that we still need to do more work to make sure that our internal staff where it comes to this disciplinary hearing. They have a confidence to support staff members. I do not know what probable the past practices is but maybe the facts that there may be other people that have experienced victimization. But I believe that so far there is none and listening to the conversation here ***Mr. Mngoma*** *my assessment says it is coming as shock that we still have some people that fell they will be victimized in representation. It is very unfortunate occurrence which for now we have nothing much we can do we only request HR to make sure that today we redo a refresher for them on that hand so that we are on the same level.*

I am speaking her because all of you are Managers. And you ***Mr. Mngoma*** *it is also to your interest that as you manage people within SBS you want to make sure that if you have any case that you dealing with people can support. So I am saying this not for the*

*employer not just for you **Mr. Mngoma** to make sure that we have the common ground be able to support accordingly. Maybe you today you are facing this allegations but maybe next day you may be sitting where I am sitting and you should also have a good playground when coming to this. **Thulane** and **Melusi** that is an assignment for the organization.'*

*11.13 The Chairperson concluded by calling upon the employer representatives. **Thulane** and **Melusi** to attend to this assignment for the organization. **He did not address my immediate plight.** In effect, whilst the organization creates an enabling environment, I should in the meantime suffer the lack of representation.*

11.14 There is in any event no demonstrable prejudice that the 1st Respondent will suffered by allowing external representation. I know and have heard of cases involving senior managers that were legally represented in their disciplinary enquiries. If the 1st Respondent disputes this, I will then be forced to mention names in my replying affidavit."[19] [underlined, my emphasis]

[19] Pages 9-12B paragraphs 11.1, 11.11 to 11.14 of the book of pleadings

[41] On the above, it is my considered view that applicant made a case for a review in the *court a quo*. The learned Justice in the *court a quo* dismissed applicant's application on the following:

"*The question that we must now apply our minds to, is whether the Applicant in his papers, has established a prima facie right to the relief he seeks. Further, whether he has placed all the relevant and compelling considerations before this Court, to justify his instistence on external representation."*

[42] The learned Justice correctly ascertained the issues before him. He further correctly quoted the relevant applicable case law. The *court a quo* also held,

"*The chairman was very patient and applied his mind. He entertained and deliberated on the issues at length, to the extent of be laboring on some of the issues, in a bid to ensure that there was fairness. Reading from the minutes, we are of the view that the chairman applied his mind to the matter. It is not for the Court to agree or disagree with his conclusions on the facts.* ***No more is required of the chairman, other than he should properly apply his mind to the matter before him and exercise his discretion judiciously."***[20] [My emphasis]

[20] See pages 127-128 para [21]

[43] Again, I must point out that the analysis of the law was correct. It was correct that the 3rd respondent ought to have applied his mind to the matter. He ought to have exercised his discretion judiciously. The emphasis must be on '*judiciously*'. There is no judicious exercise of discretion where the trier of fact fails to consider relevant factors and take into account irrelevant one as I have demonstrated above. For instance, not to consider the policy and the gravity of the formulated charges was a failure of exercising discretion judiciously as he ought to have done so in terms of our common law principle. To consider that the composition of his committee consisted of non-lawyers was a travesty of justice as it is not one of the requirements set out in the case law.

Orders

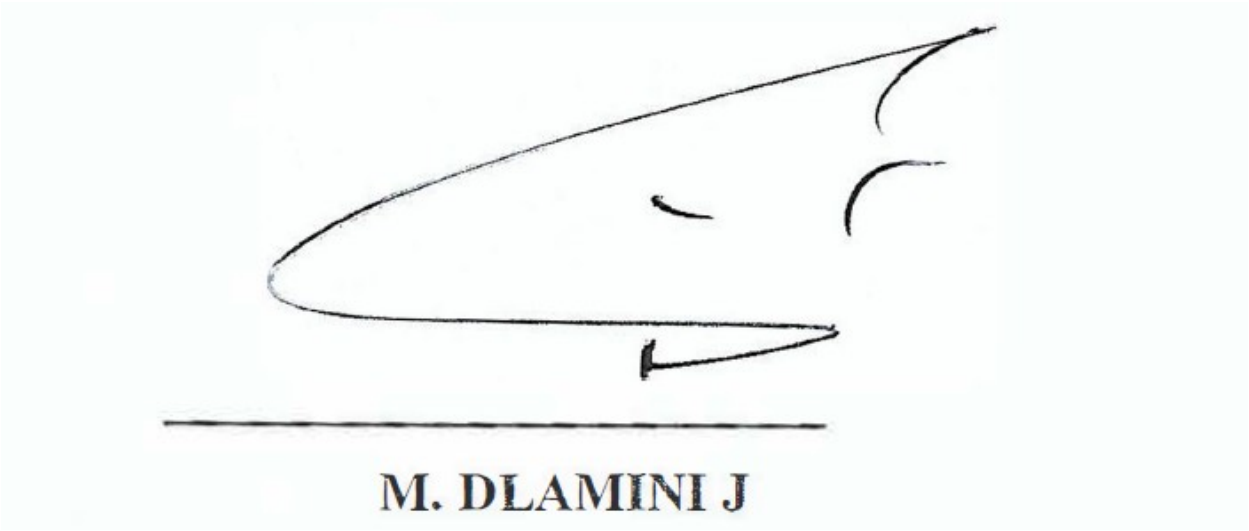
[44] In the final analysis, I enter as follows:

[44.1] Applicant's review application succeeds;

[44.2] The orders of the *court a quo* are hereby set aside;

[44.3] The 3rd respondent is hereby ordered to allow applicant outside representation;

[44.4] No order as to costs.



M. DLAMINI J

For Applicant : **SP Dlamini of SPD Corporate Attorneys**

For 2nd Respondent: **B. Gamedze of Musa M Sibandze Attorneys**