IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 143/08**

In the matter between:

MAKHOSONKE SHONGWE **1st APPLICANT**

WALTER NXUMALO **2nd APPLICANT**

And

SWAZILAND ELECTRICITY BOARD	**1st RESPONDENT**
MUZI SIMELANE (NO)	**2nd RESPONDENT**

CORAM:

NKOSINATHINKONYANE **JUDGE**

DAN MANGO **MEMBER**

GILBERT NDZINISA **MEMBER**

FOR APPLICANTS FOR **1st** RESPONDENT **N. MTHETHWA M. SIBANDZE**

FOR 2nd RESPONDENT **NO APPEARANCE**

JUDGEMENT 04.04.08

[1] This is an urgent application brought by the two applicants who want the Chairman of the Disciplinary Hearing in which they are appearing to recuse himself.

[2] The two applicants are employed as Treasury Manager and Distribution Manager respectively by the 1st respondent. They are presently under suspension pending the disciplinary action against them.

[3] They were initially represented by attorney Sibusiso Shongwe of Sibusiso Shongwe & Associates. They attended the Hearing with Mr. Sibusiso Shongwe on 18th February 2008. On that day the Hearing did not proceed but was postponed until 22nd February 2008 by consent.

[4] When they appeared on 22n February 2008 their attorney made an application for the recusal of the Chairman of the hearing. The Chairman issued his ruling on the application on 25th February 2008 dismissing the application. The matter was postponed until 28th February 2008. On that date however the applicants' attorney did not attend as he was reported to be sick. The matter was accordingly postponed and scheduled to proceed on two days being 11th and 12th March 2008. Again on that day the applicants' attorney was unable to attend because he was reported sick. When the matter was postponed on 11th March 2008, the applicants were placed on terms. The applicants met their attorney and revealed to him that they were unhappy about the way he was handling their case. They met him on 15th March 2008. They also told him that they were unhappy that

he had not yet launched an application to this court for the recusal of the Chairman.

On the next day of the hearing on 17 March 2008 the attorney withdrew his services. The applicants had to quickly find another attorney. They managed to engage the present attorney Mr. Ndumiso Mthethwa who attended the Hearing and applied for a postponement. It was granted and the matter was given two days being 27th and 28th March 2008. Mr. Mthethwa then filed the present urgent application on behalf of the applicants.

From the above history of the application there can be no doubt that the matter is indeed urgent. The point in *limine* raised that the matter is not urgent is therefore dismissed.

The applicants are asking the Chairman of the Disciplinary Hearing to recuse himself. They argue that the Chairman cannot be impartial as there is a relationship between him and the 1st respondent. That relationship is a contract of service.

It is not in dispute that the Chairman is a legal practitioner. He is with a law firm called Waring Simelane Attorneys. In terms of paragraph 20 of the Founding Affidavit there is a subsisting contract of service between the 1st respondent and the offices of Waring Simelane Attorneys for debt collection.

The court must therefore decide whether the applicants' apprehension they will not be afforded a fair hearing if Mr. Simelane presides over their Disciplinary Hearing is reasonable.

The Industrial Court had occasion to deal with this type of question in the case of **GRAHAM RUDOLPH V. MANANGA COLLEGE AND LEONARD NXUMALO N.O. CASE NO. 94/2007 (I.C.).** The court in that case distinguished between institutional bias and other forms of bias. At page 8 of that judgement **DUNSEITH P.** referred to the writing of **JUDGE EDWIN CAMERON** in his article **"THE RIGHT TO A HEARING BEFORE DISMISSAL - PART 1" (1986)7 ILJ 18** at 212 where the eminent judge stated:

"The principle seems to be this: while allowance will be made for the unavoidable practicalities of prior contact, personal impression and mutual reaction in the employment relationship, any further feature which precludes the person hearing the complaint from bringing an objective and fair judgement to bear on the issues involved such as bias or presumed bias stemming from a closed or prejudiced mind or from a family <u>or other relationship</u> will render the procedure unfair. The importance of appearances in this area must not be left out of account and it is submitted that where an employee has a reasonable basis for believing that something more than merely the traces unavoidably left by prior contact in the employment relationship, is present and that this precludes a fair hearing, a complaint on the ground of bias should be upheld, "(my underlining).

The notion of institutional bias means that there is no way that the Chairman of a Disciplinary Hearing can avoid prior contact with the employer. Someone must approach the Chairman to find out if he is available to chair the hearing. Someone must also pay the Chairman for the sittings. That is usually done by the employer.

In this case however the applicants are not complaining about institutional bias. Their complaint is that there exists other relationship between the Chairman and the 1st respondent other than the prior contact whereby the Chairman was approached and appointed by the 1st respondent. That other relationship between the parties is that of attorney-client in terms of which the law firm to which the Chairman belongs is doing debt collection on behalf of the 1st respondent.

In the **GRAHAM RUDOLPH** case (supra) the court having referred to the case of **BTR INDUSTRIES SA (PTY) LTD & OTHERS V. METAL AND ALLIED WORKERS UNION & OTHERS (1993) 2 LCD 6 (A),** stated on page 8 that;

"The test for determining bias in our common law is the existence of a reasonable suspicion of bias. Actual bias, or a real likelihood of bias, need not be proved. The matter is viewed from the standpoint of a lay person, and the test to be applied is objective."

[13] The court went further to state as follows in paragraph 28:

"The question is whether the same standard should be applied in the employment context. One should be careful not to equate an internal disciplinary hearing with proceedings before a court of law or an administrative tribunal...."

The court answered this question in the affirmative. It pointed out in paragraph 33 that;

"The application of the common law test for disqualifying bias is not in our view, inappropriate to the context of employment. Confidence in the disciplinary process is an important part of harmonious industrial relations and the avoidance of conflict at the workplace. Grave consequences, including the loss of livelihood, may flow from the disciplinary enquiry. Impartiality of the presiding officer, and the appearance of independence, is as important in private disciplinary hearing as in judicial and public administrative hearing subject to proper allowance being made for the institutional bias 'implicit in the employment disciplinary process."

[14] The court is therefore of the view that because of the subsisting relationship between the law firm of the Chairman and the 1st respondent, the applicants' apprehension that they will not have a fair trial under the Chairmanship of Mr. Simelane is reasonable. The court is alive to the principle that an employer has a right to subject

its employees to disciplinary action. The court should not lightly interfere with this prerogative of the employer. In this case however the court will interfere to prevent an unfair labour practice. The court will interfere only in exceptional circumstances.

Taking into account the evidence and submissions made before court and all the circumstances of the case the court will make an order that;

i) The 2nd respondent be and is hereby removed as the Chairperson in the on-going Disciplinary Hearing of the 1st and 2nd applicants.

ii) The 1st respondent be and is hereby ordered to appoint a new Chairperson of the on-going Disciplinary Hearing against the 1st and 2nd applicants.

iii) The Disciplinary Hearing shall begin *de novo* under the Chairperson to be appointed under order ii) above.

iv) There is no order as to costs.

The members agree.

NKOSINATHP NKONJA
JUDGE - INDUSTRIAL COURT