IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 176/2008**

In the matter between:

THULI NKAMBULE **Applicant**

and

JURIS MANUFACTURERS (PTY) LTD **1ST Respondent**

THULANE TSABEDZE **2ND Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**Z. LUKHELE**
FOR RESPONDENT	**:**	**N.M. MANANA**

J U D G E M E N T – 28/05/08

1. The Applicant was called to a disciplinary hearing on 1st April 2008 by her employer the 1st Respondent. She attended with

an officer from the union to which she belongs, namely the Swaziland Manufacturing and Allied Workers Union. The 2nd Respondent as chairman of the hearing ruled that she could only be represented by a shop steward or a fellow employee, not a union official. Thereafter the hearing was postponed.

2. The hearing resumed on 10 April 2008. The Applicant refused to participate in the absence of her union representative. A shop steward called by the Respondent to represent her also refused to participate. The hearing nevertheless proceeded, and was postponed for a ruling on 15th April 2008.

3. On 15th April 2008 the 2nd Respondent delivered his ruling. He found the Applicant guilty of the following charges.

(a) gross insubordination for refusing to obey a reasonable instruction of her line supervisor.

(b) offensive behaviour, because she did not show any remorse for her insubordination.

(c) serious dishonest practices, for falsely stating that she doesn't know English.

4. The 2nd Respondent as an external chairperson had no authority to sanction the Applicant. He recommended to the 1st

Respondent that she be summarily dismissed on the charges of gross insubordination and offensive behaviour, and that she be given a written warning for the charge of "serious dishonest practices."

5. The present application seeks to review and set aside the findings and recommendations of the 2nd Respondent on the grounds that the Applicant was entitled to be represented by a union official at her hearing and that the hearing should not have proceeded without her participation.

6. When the matter first came before the court on 16th April, 2008, it was common cause that the 2nd Respondent had delivered his ruling, but the 1st Respondent had not at that stage communicated any disciplinary sanction to the Applicant. The court granted an interim order interdicting the 1st respondent from imposing any sanction on the Applicant pending final determination of the application.

7. The 2nd Respondent has subsequently filed a supplementary affidavit in which he states:

"*First and foremost I wish to state that after my recommendation to the 1st respondent that the Applicant's services be terminated a decision was indeed taken on the 16th April 2008 by the 1st*

Respondent to terminate the Applicant's services."

8. The 2nd Respondent states that he encloses a copy of the letter terminating the Applicant's services but no such letter is attached to his affidavit. During submissions by Respondents' counsel, a copy of the letter was handed in from the bar. The letter is dated 17th April 2008, and purports to terminate the Applicant's services. It is signed by the director of the 1st Respondent. The letter indicates that it was delivered to the Applicant on 21st April 2008.

9. The court enquired from Respondents' counsel whether the letter did not reveal a flagrant breach of the interim order issued by the court on 16th April 2008 interdicting the Respondent from imposing any sanction on the Applicant pending final determination of the application. Counsel responded that the order was only served on 1st Respondent on the 18th April 2008 after the letter had been signed. When the court pointed out to him that the 1st Respondent went ahead and delivered the letter to the Applicant after becoming aware of the interdict, counsel stated that this was an error, and the Respondent had already remedied the error by writing a further letter withdrawing the termination of the services of the Applicant. He undertook to file a copy of the letter to confirm that the Respondent has not wilfully disobeyed the court order and that pending final determination of

this matter the Applicant's services have not been terminated.

10. A copy of a letter dated 24th April 2008 was duly filed in court. This letter purports to withdrawal the letter dated 17th April 2008. In the circumstances the court will not pursue the issue of the 1st Respondent's apparent contempt of court, although we consider the alleged 'error' in purporting to dismiss the Applicant after being interdicted from so doing to be highly questionable. We make no comment as to the legal effect of the purported dismissal and the withdrawal of such dismissal.

11. Turning to the merits of the application before us, we note that the Code of Good Practice published in terms of section 109 of the Industrial Relations Act 2000 suggests as a guideline that an employee is entitled to be assisted at a hearing "*by a fellow employee who may be a trade union representative"* - see section 11.4.

12. Where the employee faced with discipline is himself/herself a trade union representative or an office-bearer or official of a trade union, the Code suggests that he/she is entitled to be represented by a trade union official – see section 11.9.

13. The Code Guidelines reflect the general approach of our labour law

Rycroft & Jordaan: " A Guide to South African Labour Law'

(2nd Ed) page 208 note 231.

Joshua Thwala v YKK Southern African (Pty) Ltd (Unreported IC Case No. 301/2004).

14. In our view, unless express provision is made in a collective agreement or the union's recognition agreement for the right to representation by a union official at disciplinary hearings, an employee has no entitlement as of right to such representation. An employee does however have a right to be represented by a fellow employee or a workplace representative such as a shop steward or a works council representative.

15. There may be special circumstances where it would be unfair to deny an employee representation by a union official. One such instance is referred to in paragraph 12 above. Other instances may be where the disciplinary charge involves union activities or collective action organized by the union or where an issue is at stake which may affect the union's bargaining unit as a whole.

16. The decision whether to permit representation by a union official as distinguished from a workplace union representative (namely a shop steward) lies in the discretion of the chairperson presiding over the disciplinary hearing.

See **Ndoda Simelane v National Maize Corporation (IC Case No.**

453/2006)

17. In the present matter, the Applicant had no right to representation by a union official. The chairman exercised his discretion against such representation. No grounds have been advanced for the court to interfere with his decision.

18. A shop steward was available to represent the Applicant. The Applicant declined the services of the shop steward and elected not to participate in the disciplinary hearing. The shop steward, apparently on the advice of the Applicant's union, also elected not to participate. The Respondents did not deny the Applicant the opportunity to participate in the hearing with a workplace representative of her choice. She denied herself this opportunity.

19. There are no grounds for reviewing and setting aside the decision of the 2nd Respondent. The application must fail.

20. Before dismissing the application, the court considers it appropriate to make certain comments with respect to the recommendations of the 2nd Respondent regarding the sanction.

21. Insubordination and offensive behaviour fall under the definition of poor work conduct. In terms of section 36 (a) of the Employment Act 1980 it is only fair to terminate the services of an employee for poor work conduct after written warning.

22. There is nothing in the record of the disciplinary enquiry that indicates that the Applicant has been previously warned for insubordination or bad behaviour. The 1st Respondent relies on the recommendation of the 2nd Respondent to dismiss the Applicant at its peril.

23. We observe from the minutes of the enquiry that the Applicant's alleged misconduct arose after she was requested to sign an "alteration form". From the minutes it appears that this form had not previously been explained to the Applicant. When she refused to sign, she was given a broom to sweep the floor, something she was not employed to do. This humiliating instruction may well explain the Applicant's subsequent behaviour.

24. The Applicant was also found guilty of "serious dishonest practices" because she refused to speak in English, claiming that she "doesn't know English" when in fact she speaks good English. This alleged offence smacks suspiciously of penalizing the Applicant for preferring to converse in her mother tongue, which incidently is an official language of the Kingdom.

25. In our view the 1st Respondent should consider very carefully whether the charges of insubordination and offensive behaviour justify anything more than a written warning in all the circumstances, and whether the charge of 'serious dishonest

practices' should attract any penalty at all.

26. Employers are entitled to discipline workers, but such discipline should be corrective, not punitive, and dismissal should be reserved for cases of serious misconduct or repeated offences.

27. The application is dismissed with no order as to costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT