IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 406/08**

In the matter between:

NOSIPHO DLADLA **Applicant**

and

THE MAL (PTY) LTD t/a THE MALL

SUPER SPA **1st Respondent**

NDUMISO MTHETHWA N.O. **2nd Respondent**

CORAM:

N. NKONYANE	:	**JUDGE**
D. MANGO	:	**MEMBER**
G. NDZINISA	:	**MEMBER**
FOR APPLICANT	:	**B. S. DLAMINI**
FOR 1ST RESPONDENT	:	**B. MAGAGULA**
FOR 2ND RESPONDENT	:	**NO APPEARANCE**

RULING ON POINT OF LAW – 30/09/08

1. The Applicant was employed by the Respondent in the

confectionary department on 1st December 2003. On 28th April 2008 she was charged with the offences of misconduct, fraud and dishonesty. She appeared before a disciplinary hearing panel. She was found not guilty on two of the charges, namely fraud and dishonesty. She was found guilty only on the charge of misconduct.

2. The chairperson of the disciplinary hearing imposed a sanction of a written warning. The 1st Respondent however later appealed against this judgement. The Applicant objected to this step that was taken by the 1st Respondent on the basis that it was contrary to article 37 of the parties' Disciplinary Code and Procedure which states that only the employee has the right to appeal the decision of the chairperson in a disciplinary hearing.

3. During the appeal hearing the chairperson dismissed the Applicant's objection that it was unprocedural for the 1st Respondent to lodge the appeal. The objection was dismissed by the 2nd Respondent. During the appeal hearing, the 1st Respondent introduced new evidence which led to the Applicant being found guilty and subsequently dismissed by the 1st Respondent.

4. The Applicant has therefore instituted the present application wherein she seeks an order in the following terms:

" (a) That an order be and is hereby issued reviewing, correcting and/or setting aside the 2*nd Respondent's decision of allowing the 1st*

Respondent to appeal against the findings of a disciplinary hearing as being irregular, unlawful and improper.

(b) *That an order be and is hereby issued declaring that the 1st Respondent is bound by the finding of the disciplinary hearing.*

(c) *That an order be and is hereby issued declaring that the Applicant should resume work with the Respondent and that the Applicants be paid all arrear wages.*

(d) *Costs of application."*

5. The 1st Respondent in its opposing affidavit has raised a point in limine namely that the mater is prematurely before the court as the Applicant did not report a dispute with the Conciliation Mediation and Arbitration Commission ("CMAC") as envisaged by Part V111 of the Industrials Relations Act of 2000 as amended.

6. The 1st Respondent further argued that the application was not properly before the court as it was not given at least fourteen day's notice as required by Rules 14 (2) of this Court's Rules. It was also argued that this court does not have the power to review the decision of the chairman of the disciplinary hearing.

7. Dealing firstly with the Rules of this court, it is clear that they were not complied with by the Applicant. Rules 14 (2) provides that the party which initiates an application must give the other at least fourteen day's notice. In the present case the papers show that

the 1st Respondent received the application on 15th August 2008 for the matter to be heard on 21st August 2008 which was clearly less than fourteen days.

8. On the failure to comply with Part V111 of the Industrial Relations Act, the evidence as it appears on paragraphs 14 and 15 of the Applicant's Founding Affidavit shows that the Applicant had already been dismissed by the 1st Respondent. In these paragraphs the Applicant states that:

"*14. Upon the 2nd Respondent's decision being made, a hearing date was convened by the latter and I was found guilty in absentia and subsequently dismissed by the 1st Respondent.*

15. The decision to terminate my services was irregularly taken following the initial decision in which the 2nd Respondent wrongly allowed the 1st Respondent to appeal. "

As the Applicant is of the view that her dismissal was not lawfully carried out, she has the right to lodge a dispute at CMAC. She does not state in her papers why she has not done that as she is not happy about her dismissal.

9. It is clear to the court that there is a dispute between the parties. The Applicant is saying that the 1st Respondent was not entitled to lodge the appeal and to lead fresh evidence which led to her

dismissal. The 1st Respondent says it was entitled to appeal and to lead fresh evidence against the Applicant. This application is therefore not one where a material dispute of fact is not reasonably foreseen. The court may therefore only hear the matter after the Applicant has complied with Part V111 of the Industrial Relations Act and a certificate of unresolved dispute is annexed to the papers.

10. It was also argued that this court has no power to grant an order in terms of prayer (a) that is reviewing the decision of the 2nd Respondent allowing the 1st Respondent to appeal and also lead new evidence. The court was not favoured with a copy of the Disciplinary Code and Procedure of the parties. In his ruling however, 2nd Respondent quoted Article 3.7 of the Code and it appears as follows:

"3.7 Employees have the right to appeal the following grounds:

- *New evidence being available*

Procedure not followed.
Disciplinary action being more severe than indicated in the disciplinary code and procedure."

11. The Applicant's complaint is that on a proper reading of this article, the employer, (1st Respondent) has not right to appeal. The court agrees with the Applicant's position. A Disciplinary Code and Procedure is a document made by the parties at the workplace as their guiding tool. The parties expressly provided in the document

that it will be the employee only who will have the right to appeal on the grounds stated therein. If the parties wanted the employer to exercise such a right, they would have expressly so provided in their document.

12. The question in issue therefore involves an internal grievance procedure. It is a question arising between an employer and an employee. It is a labour matter. We do not see how it can be said that a Labour Court has no jurisdiction to entertain this question. This court is the port of first call in all labour issues in the country. It has exclusive jurisdiction in labour matters. To hold otherwise would be contrary to the provisions of Section 8 (1) and (3) of the Industrial Relations Act which provides that this court has exclusive jurisdiction in matters arising under statute or at common law between employers and employees and that in the exercise of its powers it shall have all powers of the High Court.

See: **The Attorney General v Stanley Matsebula (ICA) Case No. 4/07**

Swaziland Breweries Limited v Sicelo Mabuza Case No. 33/06 (ICA).

13. This application was not brought as an urgent application. There is no justification why the provisions of Part V11 of the Industrial Relations have not been followed. It seems that the Applicant brought the present application merely for the purposes of by-passing the provisions of Part V111 of the Industrial Relations Act. The court will not allow that.

14. Taking into account all the above observations, the court will uphold the points of law raised that the matter is not properly the court as it has not followed the dispute resolution procedures provided for under Part V111 of the Industrial Relations Act and also that the Applicant did not comply with the provisions of Rule 14 (2) of this Court's Rules.

15. The application is accordingly dismissed with costs.

The members agree.

NKOSINATHI NKONYANE
JUDGE OF THE INDUSTRIAL COURT