

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 633/08

In the matter between:

GCINA DLAMINI

Applicant

and

NERCHA

1st Respondent

SIKHUMBUZO SIMELANE N.O.

2nd Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : M. SIMELANE

FOR RESPONDENT : D. JELE

JUDGEMENT ON COSTS - 27/01/09

1. In this matter the Applicant applied for an order in the following terms:

- 1.1 *That the disciplinary hearing involving the Applicant be stayed pending review of 2nd Respondents recommendation and factual findings and any action*

taken pursuant thereto be suspended.

1.2 *That the factual findings and recommendations made by the 2nd Respondent be and is hereby corrected, reviewed or set aside.*

1.3 *That the 2nd Respondent be removed as the chairman of the disciplinary enquiry and another re-appointed to commence the hearing de nova.*

2. The Respondent opposed the application and raised certain points in limine, which were dismissed by the court after hearing legal arguments. The court thereupon issued a rule nisi, but in terms far narrower than those sought in the notice of motion.

3. On the return date, the Respondent consented to the confirmation of the rule, but opposed an adverse order for costs.

4. The Applicant argues that he was the successful party, albeit the relief he obtained was less than that sought, and the normal rule is that the costs should follow the event.

5. The Respondent's counterargument is that the court has an equitable discretion on the question of costs, and it should exercise its discretion against awarding costs for the following reasons:

5.1 the Applicant was only partially successful;

5.2 if the Applicant had confined his application to the

issue and the relief in respect of which he was successful, the Respondent would not have opposed the proceedings;

5.3 the Respondent was not aware that the chairman of the disciplinary hearing had reneged on an extension of time he granted to the Applicant for mitigation. The Applicant should have first attempted to resolve the matter without resorting to litigation.

6. The issue upon which the Applicant was successful was the principal complaint raised by the Applicant in his founding affidavit. The complaint was clearly spelled out, and the Respondent had opportunity upon receipt of the application papers to concede the merits of this complaint. It did not do so, and challenged the merits of the application in its entirety. It was of course entitled to do so but its opposition exposed it to an adverse order for costs.
7. The Respondent was aware that the Applicant had been unfairly denied the opportunity to mitigate at the end of the disciplinary enquiry. It took no action to remedy this. The Applicant had good cause to approach the court for relief. He was substantially successful in obtaining relief, even if he did cast his net wider than was called for. In the view of the court he should not be out of pocket due to his effort to enforce his entitlement to a fair disciplinary process.
8. We order that the Respondent pays the costs of the application.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT