IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 611/08**

In the matter between:

AARON DLAMINI **APPLICANT**

And

CONCILIATION MEDIATION AND

ARBITRATION COMMISSION **1st RESPONDENT**

MUZI SIMELANE N.O. **2nd RESPONDENT**

CORAM:

NKOSINATHI NKONYANE **JUDGE**

DAN MANGO GILBERT **MEMBER**

NDZINISA **MEMBER**

FOR APPLICANT **MR. M. MOTSA**

FOR RESPONDENT **MS. L.P. MNGOMEZULU**

JUDGEMENT 24.03.09

[1] In about March 2006 an arbitration matter between Zakhele Dlamini and Swaziland Lumber Security Services, (DSPT 397/2005) came before the applicant in his capacity as CMAC Commissioner.

[2] Appearing for the employee in that dispute before the Commissioner (the present applicant) was attorney, Mr. S. Madzinane. Appearing for the employer was attorney, Mr. M. Simelane, the 2nd respondent in the present application.

[3] During the hearing of that dispute tempers flared between the attorneys and the applicant had a tough time trying to control the proceedings. There is an allegation, which is denied by the 2nd

respondent, that at some point he banged the table and stormed out of the hearing in anger after the applicant had failed to uphold his objection.

[4] The applicant after the evidence was led before him found in favour of the employee, Zakhele Dlamini. The employer was ordered to pay compensation to the employee in the sum of E11,520:00. The employer did not appeal or challenge the applicant's findings in any other way.

[5] During November 2008 the applicant was served with a notice to appear before a disciplinary enquiry for various charges leveled against him by the 1st respondent. The hearing was set for 21st November 2008. The hearing did not proceed on that day as the chairman was not available. It was postponed until 26th November 2008. On that day the applicant found out that the chairman was the 2nd respondent. The applicant, through his present attorney, moved an application for the recusal of the

2nd respondent. The 2nd respondent refused to recuse himself and furnished written reasons for the position that he took.

The applicant was unhappy with the decision of the 2nd respondent and has thus instituted the present proceedings under a certificate of urgency. The applicant is seeking an order in the following terms:

"1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a *rule nisi* do issue calling upon the respondents to show cause on a due date to be appointed by the Honourable Court why an order in the following terms should not be final:

2.1 That the second respondent be and is hereby removed from acting as the chairperson in the ongoing disciplinary hearing of the applicant.

2.2 That the first respondent be and is hereby ordered to appoint a new chairperson of the on-going disciplinary hearing of the applicant.

2.3 That the disciplinary hearing of the applicant begin *de novo* under the chairperson to be appointed under prayer 2.2 above.

2.4 That pending the finalization of this application, the disciplinary hearing under the chairmanship of the respondent be stayed.

3. Directing that prayer 2.4 above operate with immediate and interim effect pending finalization of this matter.

4. Granting costs of this application against the respondent.

5. Further and/or alternative relief."

[7] The application is opposed by the respondents. When the matter appeared before the court on 9th December 2008, the parties agreed that an order in terms of 2.4 be granted.

[8] The applicant is seeking the removal of the 2nd respondent as chairman of the disciplinary enquiry instituted by the 1st respondent against him. The applicant says he fears that the 2nd respondent cannot be an impartial chairperson owing to the conduct of the 2nd respondent in the arbitration proceedings in 2006. In paragraph 10 of the founding affidavit the applicant stated in part that;

"... / told my attorney that because of the second respondent's conduct in those proceedings since then I had noticed that our relationship with the second respondent had been one of undeclared enmity, hostility and/or animosity, and as such I apprehend a reasonable suspicion of bias on his post against me because of which he cannot be impartial in these proceedings which if proven would deny me a fair hearing, particularly when I am facing charges which could decide the fate of my employment career and future."

[9] The transcribed record of the arbitration proceedings was made available to the court. The application to have the 2nd respondent recuse himself appears on pages 3-5. The basis of the application was that the applicant was sensing *"a feeling of a bit of animosity or hostility coming from your side as a result of a particular direction he had taken in that particular matter and he has continued to sense that feeling of animosity since that occasion..."*

[10] In court Mr. Motsa argued that their grounds for the recusal application were misunderstood by the 2nd respondent. He argued that the animosity and hostility between the parties has transcended to this very moment. In paragraph 21.12 the applicant stated in part that;

"... after that case I have never had any official dealings with second respondent, but from time to time I have come across him in the corridors of the city of Mbabane and have on several occasions raised my hand or opened my mouth to greet him in the hope that the animosity between us ended in the arbitration room , however he would literally ignore me or simply look the other way, hence I figured out that the hostility between us still lingers on and I then decided to refrain from any further attempt to greet him."

[11] These are new allegations by the applicant that were not part of his reasons for the moving of the application to have the 2nd respondent step down at the hearing. The applicant did not state the particular period when he allegedly waived or greeted the 2nd respondent vis-a-vis the time of the arbitration hearing in March 2006 and the appointment of the 2nd respondent as chairman of the disciplinary hearing in November 2008.

[12] We therefore do not agree with the applicant's submissions that the 2nd respondent misconceived the basis of the application for his removal. The applicant, as it appears from the transcribed record, never stated when he made the application for the recusal of the 2nd respondent as to what conduct did the 2nd respondent exhibit which led him to believe that the 2nd respondent was angry against him because of what happened during the arbitration proceedings in 2006. The 2nd respondent stated as much in his written judgement in paragraph 15 that;

"The defendant has not made any effort to prove the facts giving rise to a perception of bias. He has not stated what exactly did I do to warrant the conclusion that I am still bitter about his award in the Swaziland Lumber Security Service matter"

[13] The present proceedings however are not an appeal or review of the 2nd respondent's judgement. The court must consider the present application on its merits and make its own decision on the matter. The applicant's suspicion of bias against the 2nd respondent arises from what the applicant calls *"undeclared but obvious relationship of animosity and hostility"* because of the 2nd respondent's conduct towards the applicant in the arbitration proceedings in March 2006.

[14] The applicant also said that on several instances when he tried to greet the 2nd respondent, the 2nd respondent did not respond. This is denied by the 2nd respondent. The applicant thinks that the 2nd respondent is harbouring ill feelings towards him. All this seems to

exist in the mind of the applicant only. The 2nd respondent is an above average citizen. He is a professional legal practitioner. From the record of the arbitration proceedings, it seems that most of the exchanges were in fact between the attorneys who were appearing before the applicant. It is normal in court for legal practitioners to be heated up against each other. They invariably represent opposing viewpoints.

[15] It is also not an unusual occurrence in court proceedings for legal practitioners to behave in a way that shows that they do not agree with the decision of the presiding officer. It does not follow that the legal practitioners and the presiding officers would thereafter become enemies.

[16] The question of test for bias was dealt with by the President of this court in the case of;

Graham Rudolph v. Mananga College and Leonard Nxumalo Case No. 94/2007 (I.C.) (and the cases therein cited).

The court held there that the test for determining bias in our common law is the existence of a reasonable suspicion of bias. Actual bias, or a real likehood of bias need not be proved. The court there held that this standard is also applicable in the employment context.

[17] The question to be asked in this case therefore is whether a reasonable person would think that the 2nd respondent would not be impartial as chairman in the disciplinary hearing of the applicant taking into account that in March 2006 the 2nd respondent and another attorney, Mr. S. Madzinane gave the applicant a tough time when he was presiding over an arbitration hearing. We do not think so. It is normal for tempers to flare in judicial and quasi-judicial hearings between legal practitioners. Further, the 2nd respondent is

a legal practitioner, by the nature of his training and experience he knows or is presumed to know that he should not personalize issues arising in the course of execution of his duties as a legal practitioner.

[18] There was another issue that was raised on behalf of the applicant relating to the answering affidavit of by the respondents as containing hearsay evidence. This point was not raised as a preliminary objection by the applicant. Clearly the answering affidavit, erroneously referred to as replying affidavit, *prima facie* contained hearsay evidence. The deponent thereof, one Futhi Hadebe, did not say that she was present during the arbitration proceedings even though she deposed to events that took place in that hearing.

[19] In this case, the 2nd respondent could simply have prepared the answering affidavit as the issues involved relate to him. The 2nd respondent did however file a confirmatory affidavit. The court was not fully addressed on whether the answering affidavit was still objectionable even when the confirmatory affidavit by the 2nd respondent was attached. The court will therefore not make any ruling on this issue.

[20] Taking into account all the above-mentioned observations, the court will make the following order;

a) **The application is dismissed.**

b) **There is no order as to costs.**

The members agree.

NKOSINATHI NKONYANE

JUDGE OF THE INDUSTRIAL COURT