

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 51/2009

In the matter between:

CINDY DLUDLU

Applicant

and

SWAZILAND STANDARDS AUTHORITY

Respondent

CORAM:

P. R. DUNSEITH : **PRESIDENT**

JOSIAH YENDE : **MEMBER**

MATHOKOZA MTHETHWA : **MEMBER**

FOR APPLICANT : **MUSA SIBANDZE**

FOR RESPONDENT : **SIBUSISO SHONGWE**

J U D G E M E N T – 16/02/09

1. The Respondent in this matter is a category A public enterprise as defined in section 2 of the Public Enterprises (Control & Monitoring) Act, 1989 and its operations are subject to the control and monitoring of the Public Enterprises Unit, (“the PEU”) as provided in the said Act.
2. The Applicant is employed by the Respondent as its Chief Financial Officer. She was suspended from work on full pay on the 6th

January 2009 pending investigation of a procurement in which she was involved. On 23rd January 2009 she was given notice to attend a disciplinary hearing on 2nd February to answer to seven charges pertaining to the alleged breach of the Respondent's procurement practices, policies and procedures and alleged dishonesty.

3. The hearing was postponed at the instance of the Applicant, and she has now applied to the Industrial Court for an order interdicting the Respondent from proceeding with the disciplinary hearing pending compliance with clause 10.3.1.4 of the Respondent's discipline policy.

4. Clause 10.3.1.4 reads as follows:

“Disciplinary action which results in the dismissal of an employee, summary or otherwise, shall be instituted under the written authority of the Council, Director or Head of Department in accordance with the disciplinary procedure.

In the case of misconduct by either the Director or the Chief Financial Officer, the Council shall initiate and facilitate the hearing with the Public Enterprise Unit.”

5. The Applicant submits in her founding affidavit that the latter part of this clause requires that her hearing must be initiated and facilitated by the Respondent's Council acting together with the PEU, and that clause 10.3.1.4 was intended to ensure that the Chief Financial Officer is not subjected to disciplinary action without the joint agreement and participation of the Respondent and the PEU.
6. The Applicant further submits that as a matter of fact the PEU has played no part in the initiation of the charges and the whole

procedure is therefore irregular.

7. The Respondent opposes the application and submits that clause 10.3.1.4 requires no more than that the PEU should be made aware of the hearing. In her answering affidavit, the director of the Respondent alleges that in any event the PEU was consulted about the alleged procurement irregularities before the disciplinary process was undertaken. In support of this allegation the director refer to two letters she wrote to the director of the PEU on the 3rd November 2008 and 5th January 2009 respectively. The director of the PEU, Victor Nxumalo, has also deposed to a confirmatory affidavit in which he confirms that he was consulted on the irregularities allegedly committed by the Applicant and he states that he is aware that a disciplinary process has been instituted against the Applicant.
8. In her replying affidavit the Applicant takes issue with the allegation that the PEU director was consulted on the procurement irregularities. She says she met with Victor Nxumalo after her suspension and he told her he did not know anything about the matter. She met with him again on the 10th February 2009 after the present proceedings had been instituted and he told her he had not been informed about the disciplinary action by the Respondent and he did not wish to be involved. The Applicant said further that when she saw the correspondence attached to the Respondent's answering affidavit, referring to previous consultations between the director of the Respondent and Nxumalo, she was shocked and she telephoned Nxumalo to confront him. She said Nxumalo denied knowledge of the correspondence and stated that the first time he has been informed or consulted about the disciplinary

matter involving the Applicant was after the institution of the court proceedings.

9. With the leave of the court, the Respondent filed a further affidavit by Victor Nxumalo in which the PEU director denies what the Applicant says about him in her replying affidavit and he re-affirms the contents of his confirmatory affidavit with regard to the consultation of the PEU by the Respondent.

10. Different interpretations of clause 10.3.1.4 have been urged upon the court. The Applicant argues that, in its ordinary and literal meaning, the phrase "*the Council shall initiate and facilitate the hearing with the PEU*" requires that the decision to initiate disciplinary action should be taken by the Respondent and the PEU jointly.

11. In our view the phrase in question is ambiguous insofar as "*with the PEU*" does not define the nature or extent of the PEU's involvement in the disciplinary process. In order to ascertain the meaning and effect of the phrase, the court must have regard to the context in which it is used, the reason for its inclusion in the discipline policy, the provisions of the employment law and the Public Enterprise (Monitoring & Control) act, and the exigencies of logic, fairness and practicability.

12. The interpretation urged upon the court by the Applicant gives rise to the rather disturbing consequence that the Respondent has rendered its prerogative as employer to discipline its employees subject to the consent of a third party. Even more disturbing is the consequence that the Chief Financial Officer is subjected, without her consent to the disciplinary decision of a third party who is not

her employer.

13. Furthermore, the PEU is not merely a third party, it is a statutory body which controls and monitors the Respondent's operations and functions and it is in a position to exert considerable influence over the Respondent's decisions.

14. Section 8 (2) of the Public Enterprises (Control & Monitoring) Act provides as follows:

“The Chief Financial Officer of each category A public enterprise shall be appointed, and may be dismissed, by the governing body in consultation with the Minister responsible, the Public Enterprises Unit and the Statutory Committee.”

15. There can be no doubt that the reference to the PEU in clause 10.3.1.4 was prompted by section 8 of the Act. Yet section 8 (2) only requires that the PEU be consulted with regard to a decision to dismiss the Chief Financial Officer. In our view it would be anomalous, and repugnant to the spirit and intention of the Act, for the PEU to have some sort of veto power with regard to the decision to initiate disciplinary action, as argued by the Applicant.

16. Clause 10.3.1.4 as interpreted by the Applicant would not only detract from the disciplinary authority conferred on the Respondent's Council by section 8 (2) of the Act, it would also in our view give rise to an unfair labour practice, by subjecting an employee to discipline by a third party. Such a clause - or more specifically the second part thereof - would be null and void. For these reasons we do not consider that the Respondent intended clause 10.3.1.4 to bear the meaning urged by the Applicant.

17. The Respondent, on the other hand, wants the court to interpret the phrase as if it were written thus:

“the Council shall initiate and facilitate the hearing *with the knowledge of the PEU.*”

In our view the phrase cannot sustain such a meaning. “Initiate with the PEU” implies some form of active participation, not merely a passive awareness. No justification has been shown for adopting an interpretation that distorts the grammatical wording of the clause.

18. It is the view of the court that the Respondent intended clause 10.3.1.4 to provide for any disciplining of the Chief Financial Officer to be initiated in consultation with the PEU. This is the only reasonable and logical interpretation that can be given to the clause taking into account the provisions of section 8 (2) of the Act. Such an interpretation is consistent with the language used, does not fall foul of the law, and does not impose any hardship or disadvantage on the Respondent, its employees or the PEU.

19. Having ascertained the meaning and requirements of clause 10.3.1.4, the court must now decide whether the Respondent has complied with same. What the Respondent was required to do was to consult with the PEU regarding the initiation and facilitation of the Applicant’s disciplinary hearing. Consultation involves seeking information, or advice on, or reaction to, a proposed course of action. It envisages giving the consulted party an opportunity to express its opinion and make representations, with a view to taking such opinion or representation into account.

see: **SAPWU v Usuthu Pulp Company Ltd t/a SAPPI (Unreported IC Case No. 423/06) at 26.**

20. The director of the Respondent, in her answering affidavit, makes the following allegations:

20.1 the PEU was aware of the alleged irregularities and the subsequent suspension and charges brought against the Applicant;

20.2 the PEU was consulted about the alleged irregularities before the disciplinary process was undertaken.

21. These allegations are corroborated by the contents of the two letters to the director of the PEU, but they fall short of the requirements of clause 10.3.1.4. The letter dated 5th January 2009 contains an intimation that a disciplinary process may need to be undertaken and requests a meeting *“where the results of the investigation process may be discussed with you with a view to deciding on the way forward concerning this matter.”* There is however no allegation that such meeting ever took place, or that the PEU was consulted with regard to the institution of disciplinary action against the Applicant. Merely informing the PEU or making it aware of a decision to initiate a disciplinary hearing does not amount to consultation – **SAPWU v Usuthu Pulp Co. Ltd op. cit. at 27.**

22. The affidavits of Victor Nxumalo, director of the PEU, go no further than confirming that he was consulted on the irregularities allegedly committed by the Applicant and that he was made aware that

disciplinary action had been taken against the Applicant.

23. Since in our view the evidence of the Respondent does not establish that the Respondent's Council initiated the disciplinary hearing in consultation with the PEU, the Applicant is entitled to the relief sought. It is not necessary for the court to decide the dispute as to whether the PEU director was consulted about the alleged irregularities, or whether he was made aware of the disciplinary action, since this falls short in any event of the requirements of clause 10.3.1.4

24. An order is granted in the following terms:

- (a) **The Respondent is hereby interdicted from proceeding with the disciplinary hearing against the Applicant pending compliance with clause 10.3.1.4 of its own policies and procedures.**
- (b) **The Respondent is to pay the costs of the application.**

The members agree.

**PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT**