

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 473/09**

In the matter between:

**ABEL SIBANDZE**

**APPLICANT**

And

**STANLIB SWAZILAND (PTY) LIMITED**

**1<sup>st</sup> RESPONDENT 2<sup>nd</sup>**

**LIBERTY LIFE SWAZILAND (PTY) LTD LARRY**

**RESPONDENT 3<sup>rd</sup>**

**SHEAR N.O.**

**RESPONDENT**

**CORAM:**

**NKOSINATHI NKONYANE DAN MANGO**

**JUDGE**

**GILBERT NDZINISA**

**MEMBER**

**MEMBER**

**FOR APPLICANT**

**J. N. HLOPHE**

**FOR RESPONDENTS**

**ADVOCATE G. I. HULLEY  
S.C. (INSTRUCTED BY ROBINSON  
BERTRAM)**

**JUDGEMENT ON POINT OF LAW RAISED**

**15.09.09**

[1] This matter is an urgent application brought on Notice of Motion by the applicant against the respondents. It is akin to two other applications serving before the court under case No. 440/09 and case No. 415/09.

[2] In this particular application the applicant is seeking an order in the following terms:

"1. Dispensing with the usual rules, forms, notices, procedures and time limits relating to service and institution of proceedings, and allowing

this matter to be heard as one of the urgency.

- (a) Condoning applicant's non compliance with the said rules and provisions relating to form, service and time limits relating to applications.
- (b) That pending finalization of proceedings under case No. 440/09, the disciplinary hearing scheduled by respondents for the 24 August 2009 be hereby interdicted.
- (c) Alternatively, that a *rule nisi* do hereby issue, calling upon the respondents to show cause on a date and time to be determined by the above Honourable Court why an order in the following terms should not be made final;

4.1 That the respondents be and are hereby interdicted from proceeding with a disciplinary hearing scheduled to be held against the applicant at Braamfontein, Johannesburg, South Africa on Monday the 24 August 2009 pending the finalization of this application.

- (d) That the disciplinary hearing, preferred by the 1<sup>st</sup> and 2<sup>nd</sup> respondents against the applicant, be held in Swaziland.
- (e) That the 1<sup>st</sup> and 2<sup>nd</sup> respondents pay the costs of the application in the event of opposition thereto.

5. Granting applicant further and or / alternative relief."

[3] The respondents raised some points of law relating to the questions of urgency, jurisdiction, dispute of facts, final interdict and interference with an internal disciplinary process. Whilst Advocate Woudstra, who was at that time appearing for the respondents, was addressing the court on the question of

jurisdiction, the applicant's attorney raised an objection to the effect that the respondents' representative has no mandate from the respondents to prosecute the matter as there was no resolution passed by the Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who are the parties before the court, giving anyone the authority or power to prosecute the matter on their behalf. Secondly, it was argued that the applicant was not covered by the Disciplinary Code & Procedure ("NH3") annexed to the answering affidavit by Nicholas Trevor Haines which is applicable to Liberty Group and all wholly owned subsidiaries operating in South Africa.

[4] The objection appeared to be obstructive as it was raised on behalf of the applicant after there had been a number of papers filed before the court without any indication that the applicant was challenging the authority or power of those who are prosecuting the matter on behalf of the respondents. The same observation however goes to the respondents as they were also raising a point of law relating to jurisdiction or lack thereof after there has been a number of papers exchanged between the parties and the court having already made two rulings in case No. 415/09. The court however, using its discretion allowed the applicant's attorney to raise the objection and to formerly file a written notice to raise a point of law so that the respondents could also have a chance to file their answers to it. The matter was thus postponed until 01.09.09.

[5] On this date, 01.09.09, there was new counsel appearing on behalf of the respondents. The questions of law raised before the court were equally important. If the court has no jurisdiction, the application would simply have to be dismissed. Similarly, if Nicholas Trevor Haines has no authority in the form of resolutions by the Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to prosecute the case, or if the Disciplinary Code is not applicable to the applicant, the respondents' defence would have to be dismissed. The parties agreed that the applicant's attorney should address the court first.

[6] The applicant's arguments were that;

(f) *The 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel has no authority to appear*

*before the court and prosecute the matter as he has not been mandated or authorized by a resolution of the Board of Directors of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.*

- (g) *The applicant is not an employee of the "Company" whose Disciplinary Code is attached because in terms of that document "Company " means the Liberty Group and all wholly owned subsidiaries operating in South Africa*
- (h) *The 1<sup>st</sup> and 2<sup>nd</sup> respondents have their own Board of Directors of which the applicant is a member and that the applicant is not aware of any Board meeting that was called or convened by the chairman where a resolution was passed authorizing Mr. Nicholas Trevor Haines to prosecute this matter.*
- (i) *The 1<sup>st</sup> and 2<sup>nd</sup> respondents have their head offices in Swaziland, to wit, Standard Bank House Mbabane, and 1<sup>st</sup> Floor Public Service Pension Fund Building Mhlambanyatsi Road, Mbabane respectively and that no meeting of the Board of Directors was held at these venues where a resolution was taken authorizing Mr. Nicholas Trevor Haines to prosecute the present matter and to instruct counsel accordingly.*
- (j) *The resolutions produced in court are improper as they do not state where the meetings were held and that they were not properly executed.*
- (k) *There Is no clarity or evidence as who convened the meeting as the names of the chairman of the Board of Directors Mr. Tineyi Mawocha and the Board Secretary Nozizwe Mulela do not appear on the documents.*

On behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents it was argued that the court should accept

the resolutions as proper documents as, *ex facie*, the documents appear to be proper. It was also argued further that whether or not the resolutions are proper documents is a question of fact which the court cannot decide without the leading of oral evidence.

The authority of Nicholas Trevor Haines and the respondents' representative is now no longer in issue. The High Court in case No.2915/09 which was a review application between the same parties before the court, has ruled that Nicholas Trevor Haines does have the authority to prosecute the respondents' defence.

The court now only has to concern itself with the second aspect of the applicants argument, namely that the respondents have no authority to prosecute the case in the sense that the applicant is not subject to the Disciplinary Code ("NH3") annexed to the answering affidavit deposed to by Nicholas Trevor Haines because that Code is not applicable to him as he is employed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents who are distinct legal entities from Liberty Life and Stanlib Limited.

**See: Salomon v Salomon & Co. Ltd. [1897] AC 22 Dadoo v Krugersdorp Municipality Council 1920 AD 530**

**Cilliers and Benade "Company Law" Fourth edition (Butterworths) at 543**

[10] Clearly the 1<sup>st</sup> and 2<sup>nd</sup> respondents are distinct legal entities from Stanlib Limited and Liberty Limited respectively. In the Disciplinary Code and Procedure of Liberty Group and Stanlib it is stated in Article 3.6 that;

*""Company" shall mean the Liberty Group and all wholly owned subsidiaries operating in South Africa. "*

The 1<sup>st</sup> and 2<sup>nd</sup> respondents are not wholly owned subsidiaries operating in South Africa. Further, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not mentioned as part of the Liberty Group. Article 2 of the Code provides that;

## "2. SCOPE AND APPLICATION

*This Disciplinary Code Procedure shall apply to all Employees (including Management, permanent and temporary Employees) of the Liberty Group. The Liberty Group comprises of the following companies- Liberty Group Limited, Liberty Active Limited, Rentmeester Versekeraas (Pty) Ltd, Liberty Properties (Pty) Ltd, Liberty Healthcare (Pty) Ltd, Capital Alliance Life Limited and Stanlib, any act by one company in terms of this Code and Procedure will be an act of all the companies i.e. the Liberty Group. "*

The 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel urged the court to follow the decision of the Court of Appeal of Swaziland in the case of **Shell Oil Swaziland (Pty) Ltd v. Motor World (Pty) Ltd T/A Sir Motors case No. 23/2006** to the effect that the court should not allow technical objections to less than perfect procedural aspects to interfere in the expeditious and, if possible, inexpensive decision of cases.

If the Code is not applicable to the applicant, that is not a mere technical issue which the court can ignore.

In the letter of appointment of the applicant by the 1<sup>st</sup> respondent, annexure "NH2" of the answering affidavit by Nicholas Haines, it is stated in article 15 that *"The Company's Disciplinary Code and Grievance Procedure are incorporated herein by reference and form an integral part of this contract of employment.... "* The company that was hiring the applicant was Stanlib Swaziland, the 1<sup>st</sup> respondent herein. Again in article 21 it is provided that *"You are required to comply with the Company's policies and procedures, disciplinary and grievance procedures...."* The employment contract was signed by F.S Terblanche in his capacity as the Director of Stanlib Swaziland (Pty) Limited.

[14] After the arguments in court on 01.09.09, the ruling of the court was due to be handed down on Wednesday 09.09.09. On Tuesday 08.09.09 at about 11:45 am the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed further documents titled "First and Second Respondents' Further Replying Affidavit".

[15] The handing down of the court's ruling on Wednesday 09.09.09 was therefore

postponed and the court asked the parties to address the court on the status of the newly filed documents. Mr. Jele told the court that the respondents filed these documents because there was an issue raised about the quorum of the Board of Directors of the respondents and that attached to these documents were the articles of association which would clarify that issue. Mr. Hlophe objected and submitted that arguments having already made based on the papers that was before the court, admission of these documents would mean re-opening of the matter and that there would be no end to this matter.

[15] We are inclined to accepting the view that there should be an end to litigation and that the admission of these documents at this stage would be highly prejudicial to the applicant as he will not have the opportunity to challenge the truthfulness of the contents of these newly filed affidavit. It seems to the court that the affidavit is sought to be filed simply as a reaction to what was said in court. That is not the proper way to conduct litigation in court. If the respondents were desirous of filing opposing papers, they should simply have made their intentions known in court on 01.09.09 and the matter would have been postponed so that when the time for arguments came, all the papers would be before the court. In our view these documents have been filed because of the realization by the respondents that they had failed to make out their case. The court will therefore not allow the introduction of new evidence at this stage as this would be prejudicial to the applicant.

**See: Susan Nsibande v. Royal Swaziland Sugar Corporation case No. 469/05 (IC).**

The court taking into account all the foregoing observations and also all the circumstances of this case, the court will make the following order;

- (l) **The point of law raised is upheld.**
- (m) **The intended disciplinary hearing is set aside as it has not been shown that the applicant is subject to the Disciplinary Code & Procedure**

**applicable to employees of Liberty Group and all its wholly owned subsidiaries operating in South Africa.**

**(n) The 1<sup>st</sup> and 2<sup>nd</sup> respondents are to pay the costs of the application.**

The members agree.



**NKOSINATHINKONYANE JUD&B'OF THE INDUSTRIAL COURT.**