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**
MATHOKOZA MTHETHWA	**:**	**MEMBER**
FOR APPLICANT	**:**	**M. SIMELANE**
FOR RESPONDENT	**:**	**Z. JELE**

JUDGEMENT ON POINTS IN LIMINE -19/02/09

1. The 1st Respondent instituted disciplinary action against the Applicant and appointed the 2nd Respondent, a practising attorney as the independent chairman of the disciplinary hearing.

2. On the 6th December 2008 the 2nd Respondent found the Applicant guilty of two charges against him and acquitted him of the other four charges. He subsequently recommended that the services of the Applicant be terminated.

3. On the 19th December 2008 the Industrial Court issued an order that the recommendation of the 2nd Respondent be set aside and the disciplinary hearing be re-opened to enable the Applicant to make representations in mitigation before the 2nd Respondent made his decision on the appropriate disciplinary sanction.

4. When the hearing resumed, the Applicant applied for the recusal of the 2nd Respondent as chairman on grounds of his bias as evidenced by the manner in which the 2nd Respondent had conducted the hearing. The 2nd Respondent dismissed this application, setting out his reasons in a comprehensive written ruling.

5. The 2nd Respondent appointed the 9th February 2009 for hearing the Applicant in mitigation of sanction. The Applicant's attorney wrote to the 2nd Respondent stating that his client intended to bring an application in the Industrial Court to have the 2nd Respondent removed as chairman, and that on 9th February 2009 he would seek a postponement of the disciplinary hearing pending an approach to the court. However on the 9th February 2009 the Applicant and his representative did not attend at the hearing,and the hearing proceeded in their absence.

6. The 2nd Respondent issued his recommendation on 10th February 2009. He again recommended that the Applicant's services be terminated.

7. It appears that the chairman issued his recommendation early on 10th February 2009, because at 10h26 on the same day the Deputy Sheriff for Manzini delivered a letter of dismissal at the Applicant's parental home at Ntondozi in the district of Manzini. The letter is signed by the National Director of the 1st Respondent. It informs the Applicant that his services are summarily terminated with immediate effect as per the 2nd Respondent's recommendation, and that the Applicant has a right to appeal against the decision to an independent chairperson to be appointed.

8. On the same day, the 10th February 2009, the Applicant instituted the present application by way of motion proceedings. The Applicant asserts that he had not yet received the letter of dismissal at the time the application was delivered to the Respondents, and the fact of his dismissal only came to his attention later that same day.

9. The Applicant is seeking an order:

9.1 That the 2nd Respondent be removed as the chairman of the disciplinary enquiry on grounds of bias and another chairperson be appointed to commence the hearing de novo.

9.2 That any action taken pursuant to the 2nd Respondent's recommendation be suspended.

10. The 1st Respondent opposes the application and it has raised a preliminary legal point to the effect that the relief sought by the Applicant cannot be granted for the following reasons:

    10.1 The disciplinary proceedings have been finalized. The chairman is functus officio and accordingly he cannot be removed;

    10.2 Since the disciplinary hearing has been completed and the Applicant has been dismissed, the Applicant's remedy is to appeal, or to report a dispute to CMAC with a view to having the dispute adjudicated upon;

    10.3 The dismissal of the Applicant has been effected and cannot be suspended at this stage.

11. It is correct that once the 2nd Respondent delivered his ruling and recommendation on the question of sanction he was functus officio. This did not previously preclude the court from intervening and issuing its order on 19th December 2008, in the exercise of its power to restrain illegalities and promote fairness and equity in labour relations. We held, in the case **of Sazikazi Mabuza v Standard Bank of Swaziland Ltd & Another (Unreported I.C. Case No. 311/2007)** that the Industrial Court may intervene in uncompleted disciplinary proceedings in rare and exceptional circumstances where grave injustice might otherwise result or where justice might not by other means be obtained. It would be extremely artificial to say that this principle applies only to uncompleted disciplinary proceedings, and the court cannot in any

circumstances intervene to remedy a grave injustice in the proceedings once they have been completed.

12. What distinguishes the present matter is that the 1st Respondent, as employer, has acted upon the outcome of the disciplinary hearing by terminating the services of the Applicant. It is well-established in our labour law and practice that the Industrial Court does not sit as a court of appeal or review on the decisions of employers. As was stated by the Industrial Court of Appeal in the case of **The Central Bank of Swaziland v Memory Matiwane (Unreported ICA Case No. 11/1993):**

"*The court a quo does not sit as a court of appeal to decide whether or not a disciplinary hearing came to a correct finding on the evidence before it. It is the duty of the Industrial Court to enquire on the evidence placed before it, as to whether the provisions of the Industrial Relations Act and the Employment Act have been complied with, and to make a fair award having regard to all the circumstances of the case. Even if the court were to find that the dismissal was unfair because of some technical defect in the application of procedures prescribed, before an award or compensation were to be made all the circumstances of the case are to be investigated ……"*

13. Once the employer has exercised its prerogative to terminate the services of an employee, the contract of employment comes to an end. The Industrial Court has the power and jurisdiction thereafter to award compensation for unfair dismissal, whether the fairness is substantive or procedural, or to restore the employment contract by making an order for reinstatement or re-engagement. The court must however take into consideration all the circumstances of the dismissal, and may not simply set aside the dismissal on the basis

of a review of the disciplinary hearing. (The position is different in the case of a public service employee - see **Melody Dlamini & The Secretary,Teaching Service Commission & Others (Unreported IC Case No. 121/2008)).**

14. A private sector employee who wishes to seek redress for his/her dismissal must ordinarily comply with the dispute reporting procedures prescribed by Part V111 of the Industrial Relations Act. If the dispute remains unresolved after conciliation under the supervision of a CMAC Commissioner, it may be referred to the Industrial Court for determination. The matter normally comes before the court by way of action procedure, so that all the circumstances of the dismissal - including any alleged procedural irregularities - may be fully explored by way of oral evidence at the trial.

15. Even accepting that the present application was instituted before the notice of dismissal was communicated to the Applicant, it is a fact that his services have been terminated by the Respondent. His remedy now is to report a dispute to CMAC in terms of the Act. In the view of the court, there are no rare or compelling circumstances that qualify the matter for exceptional treatment or that would justify the determination of a disputed allegation of bias by way of urgent motion proceedings instead of through the normal route leading to a trial action. The Applicant has recourse in terms of the law, and the normal delays attendant upon determination of an unresolved dismissal dispute do not constitute sufficient reason for the court to intervene in a completed disciplinary process which has culminated in the termination of the Applicant's services.

16. For these reasons we uphold the Respondent's preliminary legal

argument. We do not however consider that it would be fair to award costs against the Applicant, since there is a possibility that the application was initiated before the notice of dismissal had been communicated to him.

17. The application is dismissed, with no order as to costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT