IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 4/2011

In the matter between:

PRINCESS NOMCEBO DLAMINI **APPLICANT**

AND

EXECUTIVE FINANCIAL CONSULTANTS GROUP **RESPONDENT**

CORAM:

D. MAZIBUKO **JUDGE**
A. M. NKAMBULE **MEMBER**
M.T.E MTETWA **MEMBER**

MR. N. MANANA **FOR APPLICANT**
MR. MNISI **FOR RESPONDENT**

JUDGEMENT – 20th JUNE 2011

Jurisdiction of the Industrial Court of Swaziland on employee misconduct committed outside the country.

Grounds on which the Industrial Court can exercise jurisdiction on a litigant include domicile, residence and terms of the employment contract.

Disciplinary enquiry; notice to employee to attend enquiry, 2 days notice insufficient for preparation.

Venue dispute; employer and employee choosing different venues for disciplinary enquiry. Employee entitled to attend enquiry at a venue that will facilitate fairness in the enquiry and is accessible to all parties concerned.

1. The Applicant is Princess Nomcebo Dlamini an adult female Swazi of Mbekelweni in Manzini Region.

2. The Respondent is Executive Financial Consultants Group, a company incorporated under the company laws of Swaziland having its principal place of business in Manzini.

3. The Applicant was employment by the Respondent on the 8th November 2005 as a clerk. The contract of employment was oral and subsists to date.

4. The Applicant served the Respondent in Swaziland from the 8th November 2005 to March 2010. On the 4th March 2010 the Applicant was transferred to Pretoria in the Republic of South Africa. The Respondent has a branch in Pretoria.

5. While still in Pretoria, the Applicant was suspended from work by letter dated 13th January 2011. The letter is attached to the founding affidavit marked **PND1.** The Respondent stated in annexure **PND 1** that the suspension was with immediate effect pending the outcome of a disciplinary enquiry yet to be instituted. Furthermore, the suspension was with full pay and benefits. It appears that the Applicant returned to Swaziland upon receipt of the letter of suspension.

6. On the 17th January 2011 the Applicant was formally charged with six (6) counts of misconduct. The charge sheet is annexed to the founding affidavit marked **PND2.** The Applicant was further notified to attend a disciplinary enquiry scheduled for the 20th January 2010. The enquiry was to take place in Pretoria.

7. Upon receipt of the charges the Applicant consulted her attorneys namely B.S. Dlamini & Associates. The said attorneys are based in Swaziland. Acting on instruction the attorneys addressed a letter of complaint to the Respondent. The letter is attached to the founding affidavit marked **PND 3.** The contents of annexure **PND3** were subject of the Applicant's argument when the matter proceeded before Court.

8. Among the complaints raised in annexure **PND 3** was that of short notice of the disciplinary enquiry date. The Applicant complained that she was given two (2) days notice by the Respondent to attend a disciplinary enquiry (hearing). She was served with the notice on the 17th January 2011. The hearing was scheduled for the 20th January 2011. The Applicant argued that the notice was too short for her to prepare herself.

9. The Applicant further challenged the Pretoria venue which the Respondent had designated for the hearing.

10. The Applicant argues that she was employed in Swaziland in order to render her services in Swaziland. She is domiciled in Swaziland. She is also resident in Swaziland particularly in the Manzini Region.

11. The Applicant states further that the Respondent's head office is also situated in Swaziland. Both the Applicant and the Respondent are therefore domiciled in Swaziland. The Swaziland office has jurisdiction to hear the disciplinary enquiry. The Applicant insists on having her disciplinary matter heard in Swaziland.

12. The Applicant avers further that she has been working at the Pretoria branch of the Respondent with two (2) co-employees. She has been advised by the Respondent of her right to be represented by a co-employee at the hearing. This advise is contained in annexure **PND 2.** However practically she is unable to exercise that right.

13. The Applicant states further that one of her co-employees aforementioned has also been charged with a disciplinary offence. The remaining co-employee has been made a witness for the Respondent. Both the Applicant's co-employees are therefore unavailable to represent her. Her last option is to bring a non - employee representative at the hearing.

14. The Respondent replied annexure **PND 3** by letter dated 18th January 2011 marked annexure **PND 4.** The contents of annexure **PND 4** were also the subject of the Respondent's argument before Court.

15. The Respondent admits in annexure **PND 4** that she gave the Applicant two (2) days notice to prepare for the disciplinary hearing. According to the Respondent two (2) days is sufficient time for the Applicant to prepare. On that basis the Respondent refused to postpone the date of hearing. In addition, the Respondent warned the Applicant by letter (annexure **PND4)** that the disciplinary enquiry will proceed in Pretoria on the 20th January 2011 in the absence of the Applicant, if she fails to attend as scheduled.

16. The Respondent further argued that she has arranged for the Applicant to be transported to Pretoria for the hearing. In addition, the Respondent has arranged accommodation overnight for the Applicant in Pretoria. This assertion is contained in annexure **PND 4.**

17. The contents of the Respondent's letter (annexure **PND 4)** aforementioned caused the Applicant to move an urgent application before Court. The Applicant prayed for relief as follows;

(a) That an order be and is hereby issued condoning non conformity [with the] Rules ***of Court*** *with respect to time limits and service and hearing the matter on urgent basis.*

(b) That an order be and is hereby issued stopping the disciplinary inquiry against the Applicant scheduled for the 20th January 2011 at 1640 hours in South Africa on the basis of inadequate notice.

(c) That an order be and is hereby issued directing that any disciplinary [enquiry] scheduled for South Africa be declared unlawful on the ground that the Applicant was employed in Swaziland and the labour laws of Swaziland should apply to her.

(d) Costs of application.

(e) Further and/alternative relief.

18. On the 20th January 2011 the Applicant approached the Court for an interim order interdicting the Respondent from proceeding with the disciplinary enquiry. The enquiry was scheduled for the 16:30 hours the same day.

19. The matter was duly enrolled on an urgent basis about 15:00 hours. The Court was advised that the Respondent had been

served with the application papers about three (3) hours earlier. Service was effected at the Respondent's head office which is situated in Swaziland

20. There was no appearance for the Respondent on the 20th January 2011. The Court granted an interim order interdicting the disciplinary hearing (enquiry) pending finalization of this application. In accordance with the order of Court, the disciplinary hearing did not proceed as scheduled by the Respondent.

21. The Respondent has opposed the main application. Both parties have filed their affidavits. The Respondent has raised points of law and further pleaded over on the merits. On the points of law the Respondent has challenged the urgency under which the application was brought to Court. The Respondent has further challenged the jurisdiction of the Court in hearing this matter.

22. According to the Respondent the matter has been brought to Court by way of an urgent application. That urgent application has been filed contrary to the rules of Court. The Applicant has failed to comply with the mandatory provision of Rule 15(1), (2) (a), (b), and (c). The application is therefore defective for failure to comply with the said rule and should be dismissed.

23. *Rule 15 (1) and (2) (a), (b), and (c) provide as follows:*

"15. (1) A party that applies for urgent relief shall file an application that so far as possible complies with the requirement of rule (14).

(2) The affidavit in support of the application shall set forth explicitly-

(a) the circumstances and reasons which render the matter urgent.

(b) the reasons why the provisions of Part VI11 of the Act should be waived; and

(c) the reasons why the Applicant cannot be afforded substantial relief at a hearing in due course".

24. According to the Applicant the matter is urgent within the meaning of Rule 15. The Applicant states that she was called to a disciplinary enquiry without being given sufficient time to prepare herself. She was given two (2) days to prepare for the hearing. That time is too short for a meaningful preparation considering the six (6) charges she is facing. The charges relate to the manner the Applicant allegedly mishandled money belonging to the Respondent while she was on duty. The charges date back to 5th October 2010. There are several names mentioned and various amounts of money listed in the charge sheet.

25. The Applicant argues that she needs sufficient time to study the charges in detail in order to adequately respond to each

allegation. The Applicant further avers that she has a right to be given adequate notice to prepare her defense.

26. On the other hand the Respondent argues that the two (2) days notice is sufficient time for the Applicant to prepare for the hearing. There is therefore no need for extension of time. For that reason the Applicant's request for more time was refused.

27. When dealing with the subject of adequate notice to prepare for a disciplinary enquiry, the learned author states as follows;

> '*The notice must not only be comprehensible:* ***employees must also be given sufficient time to prepare for the hearing*** *and be informed of the charges they are required to meet*".
>
> (emphasis added)
>
> **JOHN GROGAN : DISMISSAL DISCRIMINATION & UNFAIR LABOUR PRACTICES 2nd edition (Juta), 2007 at page 335.**

28. The amount of time required by an employee to prepare for a disciplinary hearing varies from one case to another. The underlining principle is that the employer must act fairly towards the employee. Fairness in this case requires that the employee

must be given sufficient time to study the charges, consult the records, examine the witnesses, consider the exhibits and analyse the evidence that is likely to be adduced against him. The employee must be given an opportunity to give a representative of his choice a complete brief on the pending hearing. A complete briefing will not be possible where the employee has been denied sufficient time to prepare himself.

29. A disciplinary enquiry has the potential of terminating the employee's contract of employment. The employer has a duty therefore to ensure that a disciplinary enquiry is conducted in a manner that is fair and transparent both in matters of substance and procedure. Subject to compliance with procedure, the law should protect an employee against actual or potential termination of employment arising from a disciplinary enquiry which is compromised by irregularity, impropriety or unfairness.

30. The Applicant is not being unreasonable in asking for more time to study the six (6) charges and consider the details therein. This exercise will include examining the various amounts of money mentioned in each charge, analysing the role of each of the potential witnesses mentioned and confirm the dates it is alleged the misconduct was committed. The Applicant must be given sufficient time to fully understand and adequately prepare for the case she has to meet at the hearing.

31. When issuing a notice to an employee to attend a disciplinary enquiry, the employer must take into consideration the rights, interest and personal circumstances of the employee. Where an employee requests for more time to prepare for a disciplinary enquiry, the employer must seriously consider the request and the reasons given in support thereof. A refusal by an employer to extend the hearing date must be accompanied by cogent reasons.

32. The Court finds that the Respondent acted unreasonably in refusing to extend the period of notice for the Applicant to attend a hearing from the two (2) days initially given. The amount of work which the Applicant has to do in preparing her defence will under normal and reasonable circumstances require more that two (2) days to complete.

33. The Applicant had already notified the Respondent that she intends to have a representative at the hearing. This notification is contained in annexure **PND 3.**

The Respondent has a duty to allow the representative time to consult with the Applicant and prepare for the hearing. Such preparation may require the representative *inter alia* to interview the witnesses, study the charges and conduct research on the law. A meaningful preparation and consultation by the representative is likely to take more than two (2) days to

complete. The Court re-iterates that a request by the Applicant for an extension of time was reasonable.

34. In terms of annexure **PND 4,** the Respondent had made it clear that the disciplinary enquiry will continue in the Applicant's absence if she fails to attend at the Pretoria branch at 16:30 hours on the 20th January 2011. Annexure **PND 4** is dated 18th January 2011. That created sufficient urgency on the Applicant's part to seek a Court interdict restraining the disciplinary hearing.

35. The Applicant filed and served the urgent application on the 19th January 2011. The application was before Court about two (2) hours prior to the time and date scheduled for the disciplinary hearing. The Court finds that there was no delay on the Applicant's part in protecting her rights by taking urgent legal action.

36. The Respondent's conduct created the urgency contemplated in rule 15 (2) (a), (b), and (c). The refusal to extend the date of hearing coupled with the threat to proceed with the disciplinary hearing even in the absence of the Applicant, created the circumstances and the reasons for the urgency.

37. The Applicant could not get adequate relief if she were to follow the dispute resolution procedure available at CMAC under part VIII of the Industrial Relations Act No. 1/2000 as amended

(Act). By CMAC is meant the Conciliation Mediation and Arbitration Commission established under section 62 (1) as read with 64 (1) (b) and (c) of the Act. The relief sought before Court is one that justified waiving the provisions of Part VIII of the Act.
38. There is a great likelihood that if the matter was reported to and dealt with by CMAC, by then the disciplinary enquiry which the Applicant seeks to interdict would have long been finalized. It is doubtful whether CMAC or the Industrial Court of Swaziland would have authority to reverse the consequences of a disciplinary enquiry that has taken place and was finalized in Pretoria. Whatever order is made by CMAC or the Industrial Court it must be capable of effective implementation. The Court is satisfied that the Applicant could not be affordance substantial relief at a hearing in due course if the matter had not been brought to Court urgently.

39. The Applicant was accordingly justified in approaching the Court in terms of Rule 15 (2) (a), (b) and (c). The point raised by the Respondent challenging urgency is dismissed.

40. The Respondent has also challenged the jurisdiction of the Industrial Court of Swaziland (Court) to hear the present matter. The Respondent advances five (5) reasons for this proposition, namely;

(a) the cause of action (alleged misconduct) arose wholly in South Africa,

(b) the contract of employment is performed in South Africa,

(c) the disciplinary process was instituted in South Africa,

(d) the Respondent's witnesses and the documentary evidence are in South Africa.

41. On the contrary, the Applicant argues that the Industrial Court of Swaziland (Court) has jurisdiction to hear this matter. The contract of employment was entered into in Swaziland in November 2005. The contract was to be performed in Swaziland. About March 2010 the Respondent transferred the Applicant to its branch in Pretoria for the Applicant to train the Respondent's employees. The Applicant concludes that the contract of employment vests the Court with the jurisdiction to hear the matter.

42. It is common cause that the employment contract between the parties was entered into in Swaziland in November 2005. The parties are in agreement that the Applicant worked for the Respondent in Swaziland from 8th November 2005 to March 2010.

On the 4th March 2010 the Applicant was transferred to Pretoria (South Africa).

43. What is in dispute is the reason for the transfer. According to the Applicant she was transferred to Pretoria at the instance of the Respondent. The purpose of the transfer was for the Applicant to train the Respondent's employees who were based at the Pretoria branch of the Respondent's business.

44. According to the Respondent, the transfer from Swaziland to Pretoria was at the Applicant's instance. The Applicant is said to have informed the Respondent that she is legally entitled to work and stay in South Africa. The Respondent thereupon transferred the Applicant to Pretoria in order to train her. The transfer was permanent. The Applicant was allegedly not familiar with the payment system which the Respondent was using in Pretoria. It became necessary for the Respondent to train the Applicant in Pretoria where the new payment system was in operation.

45. For the purposes of this case it does not matter at whose instance the Applicant was transferred to Pretoria. What matters is that the Respondent, as employer, transferred the Applicant, as employee to Pretoria. For the sake of progress the Court is prepared to accept the Respondent's version that the Applicant was transferred to Pretoria for training as mentioned in paragraph 44.

46. The Respondent states that it contemplated deploying the Applicant to Nasi (South Africa) to work there after training her in Pretoria. The Respondent stated further that it was preparing to open a branch at Nasi area.

47. The Respondent argues that her conduct of transferring the Applicant to Pretoria (South Africa) for training and her intention to transfer the Applicant further to Nasi (South Africa) after training, gives the Labour Court of South Africa jurisdiction in the matter. In addition, the reasons listed by the Respondent in paragraph 40 deprive the Court (Industrial Court of Swaziland) of jurisdiction in the matter.

48. It is common cause that the Respondent as a company was incorporated in Swaziland. The Respondent has established her head office in Swaziland. The Respondent operates business in Swaziland. This business has been in existence even before the 8th November 2005 (being the date the Applicant was employed). The Respondent has a branch in Pretoria. The domicile as well as the residence of a company (juristic person) is relevant in determining which Court has jurisdiction over that company.

49. The learned authors have commented as follows regarding the domicile of a juristic person;

> "*By analogy with a natural person the attributes of domicile can be given to an artificial or juristic person. A corporation is*

domiciled, in this sense, in the country in which it is incorporated. The law of this country governs all questions relating to the corporation's creation, continuance and dissolution. It may be regarded as the personal law of the corporation.

45. *...A corporation cannot change its domicile, for it cannot alter its place of registration. The fact that a company trades in another country does not mean that it can acquire a domicile in that country. Since the domicile of a corporation is simply the country where that juristic person was incorporated, it is clear that the corporation can only have one domicile, and this clings to it throughout its existence.*"

W.A JOUBERT et al: The Law of South Africa, Vol 2 Part 2 (2003) Butterworths at Page 324.

50. A country where a corporation or juristic person is domiciled has jurisdiction to hear and determine legal disputes relating to that entity. The learned authors have stated this principle as follows;

> "*... the domicile of a corporation is of further importance in that it constitutes a ground upon which the jurisdiction of a High Court can be exercised.*"
>
> **W.A JOUBERT et al (ibid) at Page 324.**

51. The Court agrees with the principle as stated above. Since the Respondent is domiciled in Swaziland, it follows that the Industrial Court of Swaziland has jurisdiction over the Respondent in the labour dispute before Court.

52. In as far as labour disputes are concerned, the Industrial Court of Swaziland enjoys common law jurisdiction similar to that of the High Court of Swaziland.

(See Section 8 (3) of the Act.)

In addition, the Industrial Court of Swaziland enjoys exclusive jurisdiction over disputes between employer and employee. (See section 8 (1) of the Act)

53. On the basis of domicile of the Respondent, the Court (Industrial Court of Swaziland) has jurisdiction to hear and determine the dispute before it.

54. Besides domicile, the jurisdiction of the Court can also be based on the residence of a juristic person. Legal authorities have listed some of the elements that are relevant in determining the residence of a juristic person. These elements include the principal place of business or seat of the central management and control of the juristic person concerned.

55. In particular the learned authors state as follows;

> "*Such a juristic person usually resides where its principal place of business or the seat of its central management and control is centered. But a company can also reside at the place of its registered office.*"
>
> **W.A. JOUBERT et al (ibid) at Page 324.**

56. As forestated, the Respondent's head office, which is its principal place of business, is situate in Swaziland. It follows therefore that the Respondent is resident in Swaziland. The Respondent is therefore resident within the territorial limits of the jurisdiction of the Court (Industrial Court of Swaziland.)

57. Once the residence of a juristic person is identified, the Applicant or plaintiff is entitled to follow that juristic person and sue her at that place of residence.

58. The learned authors explain this jurisdictional ground as follows;

> "*The general rule with regard to the bringing of actions is actor sequitur forum rei. The plaintiff ascertains where the defendant resides, goes to his forum, and serves him with the summons there*".

HERBSTEIN AND VAN WINSEN: The CIVIL PRACTICE of the HIGH COURTS of South Africa, 5th edition 2009, Vol 1, Juta at Page 66.

59. The Applicant is accordingly entitled to institute in Swaziland, the present legal suit against the Respondent. The Respondent is resident in Swaziland. The Court exercises jurisdiction over the Respondent on the ground of residence as well.

60. The employment contract between the parties is oral. However those terms of the contract which have so far been established can indicate which Court the parties intended should exercise jurisdiction over their labour dispute.

61. The contract of employment between the parties was entered into in Swaziland. It was the intention of the parties that performance was to be carried out wholly in Swaziland. Indeed performance took place in Swaziland. These facts lead to a conclusion that the Applicant was employed to work for the Respondent in Swaziland on a permanent bases. A further conclusion is that the parties intended the Court (Industrial Court of Swaziland) to have jurisdiction over their contract of employment.

62. As aforementioned, on the 4th March 2010 the Respondent transferred the Applicant to Pretoria for training. The parties did not at any point terminate the jurisdiction which the Court already had over them and their employment contract. The jurisdiction of the Court therefore continued despite the transfer of the Applicant to Pretoria. In addition to the grounds aforestated, this Court enjoys jurisdiction in this matter based on the terms of the employment contract.

63. The Respondent's version is also helpful in determining the question of jurisdiction of the Court. The Respondent avers that the Applicant was transferred to work permanently in South Africa. The Applicant was transferred to Pretoria (South Africa) for training in the new payment system which the Respondent allegedly was using in the Pretoria branch. Upon completion of the training exercise, the Respondent was contemplating transferring the Applicant further to Nasi (South Africa). This is the area where the Respondent was planning to open a new branch.

64. The transfer of the Applicant from Swaziland to Pretoria (South Africa) amounted to a variation of the employment contract. At the time when the employment contract was entered into, namely 8th November 2005, there was no agreement between the parties that in the future the Respondent will transfer the Applicant to work in Pretoria. Other than the change

from Swaziland to Pretoria (for training) the other terms of the employment contract remained intact.

65. The contemplated transfer of the Applicant from Pretoria to Nasi was subject to approval by the Applicant. A transfer of an employee by an employer which results in a change or variation of the term(s) of the employment contract must be done with the consent of the employee concerned. In the absence of consent from the employee concerned the transfer would result in a breach of contract and a contravention of a statute.

66. The employment contract between the parties is governed by section 21 (1) as read with section 26 (1), (2) and (3), of the Employment Act No.5 of 1980 as amended. According to section 26 (1), (2), (3) an employee is entitled to voice his opinion in the event that the employer varies or proposes to vary a term in the employment contract. The Labour Commissioner is empowered to look into the variation and determine whether or not it is prejudicial to the employee. In the event that the Labour Commissioner makes a determination that the variation or proposal is prejudicial to the employee, such variation or proposal is rendered void and of no effect. **MASWAZI S. DLAMINI VS SWAZILAND DEVELOPMENT AND SAVINGS BANK** case No. 261/2010 I.C (unreported).

67. It is noted that there is no allegation in Respondent's affidavit that the Applicant consented to the contemplated transfer to Nasi area. There is no suggestion that the Respondent's contemplation was discussed with the Applicant. Without the Applicant's approval the Respondent could not transfer the Applicant to Nasi or any other place.

68. The Respondent's allegation that it transferred the Applicant to South Africa permanently is not supported by the facts. The Respondent avers that it transferred the Applicant to Pretoria for training and nothing else. The purpose of the training was to equip the Applicant with some knowledge and skill. It follows therefore that the transfer of the Applicant to Pretoria was temporary. The Respondent could not have permanently transferred the Applicant to Pretoria for a temporary training exercise. The training was not intended to be permanent.

69. Other than the training exercise in Pretoria, the Applicant had no work to do in South Africa. At the end of the training exercise the Applicant is or was entitled to return to Swaziland and continue working for the Respondent in accordance with the employment contract.

70. The Court rejects the Respondent's version that the Applicant was transferred to work permanently in South Africa. It is the finding of the Court that the transfer to South Africa was

temporary to facilitate the training of the Applicant. The parties are still subject to the employment contract which they concluded in Swaziland on the 8th November 2005. In terms of that contract the Industrial Court of Swaziland has jurisdiction to hear the labour dispute between the parties.

71. In paragraph 40 the Respondent has advanced several reasons in support of its argument that the Court has no jurisdiction in their matter. These reasons deserve further attention.

72. The Respondent argued *inter alia* that the misconduct which the Applicant is accused of arose wholly in South Africa. Also that the contract of employment was performed in South Africa at the time the alleged misconduct was committed.

73. The Court has already made a finding that the Respondent temporarily transferred the Applicant to Pretoria for training purposes only. The jurisdiction of the Court was not affected by that temporary transfer. The jurisdiction that the Court has already is also not affected by the venue where the misconduct allegedly occurred.

74. The Respondent argues further that it has instituted the disciplinary proceedings in South Africa. Furthermore the

Respondent's witnesses and documentary evidence are in South Africa.

75. The Applicants choice of venue for the disciplinary enquiry does not deprive the Court of jurisdiction which it has.

76. The Respondent's aforementioned reasons will be considered further when the Court deals with the Applicant's prayer for the change of venue.

77. The Applicant's second prayer is for the change of venue for the disciplinary hearing from Pretoria to Swaziland. The Respondent has arranged for the disciplinary hearing to proceed in Pretoria.

78. By letter annexure **PND 3,** the Applicant notified the Respondent that she is challenging the Pretoria venue. According to the Applicant travelling from Swaziland to Pretoria to attend the hearing will impose an unduly onerous burden on her in terms of expense, preparation and representation.

79. According to the Applicant she is unable to bring a fellow employee to represent her at the hearing. Both her colleagues are disqualified or incapacitated from representing her for reasons stated in paragraph 13.

80. In terms of annexure **PND 4** the Respondent offered to transport only the Applicant to Pretoria to attend the hearing. The Respondent further offered to provide only the Applicant accommodation in Pretoria.

81. The Applicant's argument is that she intends to bring a representative at the hearing. Her representative is based in Swaziland. She has no means to pay the expense of transporting the representative from Swaziland to Pretoria. Further, she has no means to pay for board and lodging for the representative while he is in Pretoria. Without the necessary finance she is unable to bring a representative to Pretoria. Without representation at the hearing, her right to a fair disciplinary hearing will be compromised. That will result in an irreparable harm to her. This is because the representative plays a pivotal role at the hearing.

82. According to the Respondent, she has a right to conduct an effective and meaningful disciplinary enquiry against her employee (Applicant) whom she has charged with various counts of misconduct. She will not be able to conduct an effective enquiry if the venue were to change from Pretoria to Swaziland.

83. The Respondent argues that Pretoria is a convenient venue for her to conduct the disciplinary hearing. Her witnesses and documentary evidence are in Pretoria. If the venue were to change from Pretoria to Swaziland she would suffer an additional

expense in transporting and accommodating the witnesses and the safe keeping of the documentary evidence and computers.

84. An employee who has been charged with a disciplinary offence is entitled to be assisted at the hearing by a representative of his choice. The right to representation is legally enforceable.
See JAMES BOND vs YKK SOUTHERN AFRICA (PTY) LTD AND ANOTHER. Case No. 386/07 I.C. (unreported).
NDODA SIMELANE vs NATIONAL MAIZE CORPORATION (PTY) LTD. Case No. 453/06 I.C. (unreported).

85. The Applicant has explained the reason she cannot use her two (2) colleagues to assist her at the hearing. One of the colleagues is being used as a witness for the employer (Respondent). The other colleague has also been charged with a disciplinary offence. That colleague therefore has to concentrate on her own case instead of assisting the Applicant. Both colleagues are therefore unavailable to assist the Applicant at the hearing. The Applicant has expressed her desire to be represented at the hearing.

86. The circumstances of this case present a uniquely difficult situation to the Applicant. These circumstances entitle the Applicant to look for representation outside the company

structure. The Applicant has found a representative who is based in Swaziland and willing to assist her if the hearing proceeds in Swaziland. The Applicant is unable to bring her representative to Pretoria due to lack of funds. The representative is not willing to travel to Pretoria at his own expense in order to assist the Applicant there.

87. If the hearing proceeds in Pretoria, the Respondent's choice of venue will effectively deny the Applicant repre sentation. A denial of representation effectively denies the Applicant a fair hearing. Fairness is an indispensable component in a disciplinary hearing. The absence of fairness in a disciplinary hearing is an irregularity which may result in the hearing being set aside.

88. The representative in a disciplinary is the *proverbial eye ear* and *mouth* of the employee concerned. In order for the representative to function effectively, he must be present from the beginning to the end of the hearing in order to watch, listen and speak on behalf of the said employee. The representative will lead the defence every step of the way until the conclusion of the hearing. It is of utmost importance therefore that the attendance of the representative be facilitated and secured before the commencement of the hearing and not later.

89. Having initiated the disciplinary hearing, the employer has a duty to take such steps as may be necessary to ensure that the process is not tainted by unfairness or injustice.

90. In terms of section 32 (4) (d) of the Constitution of the Kingdom of Swaziland Act No. 1 of 2005, provision is made for the protection of employees against unfair treatment or dismissal. It amounts to unfair treatment by an employer to deny an employee representation at a disciplinary hearing. A denial of representation can be direct or by necessary implication.

91. If the Applicant were to go to Pretoria for a disciplinary enquiry, she will appear without a representative. The Applicant's rights to representation will thereby be compromised. That compromise will result in an unfair hearing.

92. If the disciplinary hearing proceeds in Swaziland, the Respondent will have to pay extra money in order to transport her witnesses and the documentary evidence from Pretoria to Swaziland. That extra payment does not result in an irregular or unfair hearing. It may result in a financial inconvenience on the Respondent's part. Should any of the Respondent's witnesses fail to appear at the disciplinary hearing owing to a change in venue, an arrangement can be made with the chairperson for an alternative date or means of securing the witness or the evidence concerned.

93. It must be noted that at this stage that the Court is not dealing with the merits of the disciplinary hearing. The Court has not touched on the charges or the evidence that will be led for or against the Applicant. That is the domain of the chairperson of the hearing.

94. The Applicant's complaint against the Respondent is two-pronged. The Applicant has raised a complaint concerning the venue of the disciplinary hearing. Interlinked with the request for an appropriate venue is the issue of representation at the hearing. The presence of the Applicant's representative at the hearing will be determined by the venue. It is crucial that the disciplinary hearing proceed at a venue that is also accessible to the Applicant's representative.

95. It is a duty of the Court to regulate fair play between the parties prior the commencement of hearing. The issues that the Applicant has brought before Court are preliminary. Though preliminary, these are fundamental issues which cannot wait until the commencement of the hearing. If it were so, it would be too late for the Court to prevent the potential unfairness and irregularity that the Applicant seeks to prevent.

96. In order for the chairperson to sit as such and commence the hearing there must be an agreed venue. If there is a dispute regarding the venue, that dispute must be settled before the commencement of the hearing. The chairperson lacks the capacity to deal with disputes that arise before his time i.e (the commencement of the hearing). The Court is the only competent forum to determine the venue dispute in this particular case.

97. The Court is satisfied that the Applicant has no alternative remedy but a Court interdict. The Applicant's fear that she would suffer irreparable harm if she were to attend a disciplinary hearing without a representative is justified. The Applicant's fear that the Respondent would proceed with the hearing in Pretoria in the absence of the Applicant is also justified and supported by evidence (annexure **PND 4).** The Applicant has satisfied the requirements of an interdict.

98. The Court is persuaded that it is in the interest of justice and fairness that the disciplinary hearing concerning the Applicant be held in Swaziland.

99. The Applicant is entitled to adequate notice to attend the enquiry. A period of ten (10) court days will be sufficient notice for the purposes of this case. The Applicant has made out a case for the order that is being sought.

100. The general rule is that costs follow the event. The Applicant has successfully argued the points of law and the merits in this case. It is fair that the Applicant be compensated for the costs incurred in prosecuting her case.

101. The Court accordingly orders as follows;

(1) The disciplinary enquiry which is scheduled to take place in Pretoria against the Applicant is hereby interdicted.

(2) Should the Respondent intend to proceed with the disciplinary enquiry against the Applicant, it may do so in Swaziland. The Applicant shall be entitled to not less than ten (10) court days notice to attend the enquiry.

(3) The Respondent shall pay the cost of this application

Members agree

D. MAZIBUKO
INDUSTRIAL COURT JUDGE