



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGMENT**

Case NO. 203/12

In the matter between:

**NHLANHLA MATHUNJWA**

**Applicant**

And

**AFRICAN ECHO (PTY) LTD**

**1<sup>st</sup> Respondent**

**LEE-ANNE HEENAN**

**2<sup>nd</sup> Respondent**

**INNOCENT MAPHALALA**

**3<sup>rd</sup> Respondent**

**Neutral citation:** *Nhlanhla Mathunjwa v African Echo (Pty) Ltd & two Others  
(203/12) [2012] SZIC 14 21 JUNE 2012*

**Coram:** NKONYANE J,  
*(Sitting with G. Ndzinisa & S. Mvubu  
Nominated Members of the Court)*

**Heard:** **14 JUNE 2012**

**Delivered:** **21 JUNE 2012**

**Summary:**

**Applicant served with notice to appear before a disciplinary hearing – Applicant giving notice that he would move an application for legal representation. When the Applicant arrived for the hearing, the Chairperson told the Applicant that legal representation would not be allowed without first hearing the Applicant’s submissions. The Court found that the Chairperson’s conduct was irregular and violated the audi alteram partem principle. The decision accordingly reviewed and set aside.**

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**JUDGMENT 21.06.12**

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- [1] This is an urgent application brought by the Applicant against the Respondents.
- [2] The Applicant is an employee of the 1<sup>st</sup> Respondent. He is employed as a Reporter attached to the Times Sunday.
- [3] The 1<sup>st</sup> Respondent is African Echo (Pty) Ltd, trading as Times of Swaziland, a company duly incorporated in accordance with the Company Laws of the Kingdom of Swaziland, having its principal place of business at Mbabane Industrial Site, Mbabane, District of Hhohho.

[4] The 2<sup>nd</sup> Respondent is Lee-Anne Heenan, an adult female of Mbabane and an employee of the 1<sup>st</sup> Respondent.

[5] The 3<sup>rd</sup> Respondent is Innocent Maphalala an adult male employee of the 1<sup>st</sup> Respondent. He is holding the position of Editor of the Times Sunday.

[6] The Applicant is seeking an order in the following terms;

- “1. Dispensing with the normal Rules of court with respect to time limits and manner of service and enrolling this matter to be heard as one of urgency;
2. That a rule nisi do hereby issue calling upon the Respondents to show cause on Thursday the 21<sup>st</sup> June 2012, why the orders set out below should not be made final;
3. That the First and Second Respondents be interdicted from proceeding with the disciplinary hearing scheduled to continue on Tuesday 19<sup>th</sup> June 2012;
4. That the Second Respondent be removed as chairman of the disciplinary hearing on the basis that she has exhibited bias against the Applicant to the measure that the Applicant can no longer receive a fair hearing under her auspices;

5. That the Second Respondent's decision to deny the Applicant legal representation be and is hereby reviewed; corrected and set aside.
  6. That prayers 3, 4 and 5 above operate with immediate and interim effect.
  7. That the Third Respondent be interdicted from proceeding with a second disciplinary hearing against the Applicant, which hearing is scheduled for Friday 15<sup>th</sup> June 2012 pending the finalization of this application.
  8. That the Respondents pay the costs of this application jointly and severally in the event of opposition thereto.
  9. Granting the Applicant further and/or alternative relief.”
- [7] The application is opposed by the Respondents. On their behalf an Answering Affidavit was filed deposed thereto by Sipiwo Mabila who stated therein that she is the Group Human Resources Manager of the 1<sup>st</sup> Respondent.
- [8] Before the court Mr. Sibandze appearing on behalf of the Respondents informed the court that although they raised points in limine, they were ready to deal with the merits of the case so that the court could give a final

judgement on the matter. Mr. Jele, appearing for the Applicant also indicated that he was not going to ask the court for a postponement to file a Replying Affidavit, but was ready also to argue the Applicant's case on the papers before the court.

[9] **Background Facts:**

On Sunday 03<sup>rd</sup> June 2012 the Times Sunday published a story which was entitled "Tragedy at Ka-Boyce High School." This article was written by the Applicant. The editor on duty who passed the story for publication in the newspaper was Mr. Nathi Gule. The 3<sup>rd</sup> Respondent was away on leave. As the editor on duty, Mr. Nathi Gule made the final decision that the story be published. After the story was published, it turned out that there was a lack of balance in the story in that the deceased person's relatives were not consulted before the story was published. The editor on duty, Mr. Nathi Gule was aware of this when he passed the story for publication.

[10] The Applicant says he explained to the Human Resources Manager as to what happened that led to the story being published even though it was known that the family had not been contacted for comment. The Applicant says that the Human Resources Manager undertook to deal with the matter.

[11] On Thursday of that week that the story was published, the Applicant was served with a notice to attend a disciplinary hearing. The charges are contained in ANNEXURE “NM1” and they appear as follows:-

**“Re: Disciplinary Hearing**

You are hereby notified of your disciplinary hearing to be conducted at the Times offices on Tuesday, June 12, 2012 at 2pm.

**Charges**

1. Negligence in that on June 3, 2012 you wrote the article with the headline. ‘Tragedy at KaBoyce High’ describing how a teacher identified as Samson Mntambo had died but failed to contact his family for comment. This resulted in the story being published without their side of the story, which meant it was not balanced. This resulted in the newspaper printing an apology.
2. Dishonesty in that on Wednesday, June 6, 2012, you informed your supervisor Innocent Maphalala that you had discussed the issue of the same story mentioned on Count one with the Human resources Manager and she had promised to handle it. You made it sound like the matter had been resolved, which was not true.

**Rights**

To be advised on the hearing within 48 hours  
Representation by any company employee  
Witnesses and/or documentary proof to support your case  
Cross examine the company witness and/or the initiator

You are requested to attend without.

Yours faithfully

**Innocent Maphalala**

**Initiator”**

[12] The Applicant says he failed to get a fellow employee to represent him. He said the five that he talked to refused for fear of victimization. The Applicant then approached his present attorneys. His attorneys caused a letter to be written to the Human Resources Manger of the 1<sup>st</sup> Respondent that they would come to the disciplinary hearing and that they would move an application for legal representation on behalf of the Applicant. There was no response to this letter.

[13] On the day of the hearing indeed the Applicant appeared in the company of his attorney, Mr. Mxolisi Dlamini. The chairperson of the disciplinary hearing was the 2<sup>nd</sup> Respondent, Lee-Anne Heenan. Also present was Siphwo Mabila and Innocent Maphalala.

[14] The chairperson then advised the Applicant and his attorney that the Respondents have received the letter with the notification to move an application for legal representation on behalf of the Applicant. She also advised them that the Respondents were objecting to the request and that the Applicant would have get one of his colleagues to represent him as he was not a senior employee.

- [15] The chairperson informed the Applicant and his attorney of her decision without having first given the Applicant or his attorney a chance to move the application and to present submissions in support thereof.
- [16] Whilst the disciplinary hearing was still pending, the Applicant was again served with another notice to attend a disciplinary hearing on 15<sup>th</sup> June 2012. The charge is ANNEXURE “NM3” of the Founding Affidavit. It reads thus;

**“RE: DISCIPLINARY HEARING**

You are hereby notified of a disciplinary hearing to be conducted at the Times Offices on Friday, June 15, 2012 at 11 am.

You are charged with the following:

**COUNT ONE**

Dishonesty in that, writing a story under the headline, “How did she die,” which was published on June 10, 2012, you identified the late PLS Officer Vamile Gumbi as a Financial Officer. The Editor had to call Sports Editor Bhekisisa Magongo to verify this. Magongo clarified that Gumbi was actually an accountant at PLS.

On Tuesday, June 12, 2012, you were asked by you had written that Gumbi was the Financial Officer when she was not, and your first response was that PLS boss Sport Dlamini had given you that information. Later, you turned around to say you had taken it from Bhekisisa Magongo.

Bhekisisa was called and he denied ever telling you that Gumbi was the Financial Officer because he knew her as the accountant.

**RIGHTS**



1. To be informed of the charges.
2. To have an interpreter availed to you should the need so arise.
3. To have action taken within a reasonable time frame.
4. To be advised of the hearing within 48 hours.
5. To be represented by a Company employee of your choice.
6. To call witnesses and/or documentary evidence to support your case.
7. To be advised of the appeal procedure.

Yours faithfully

**Innocent Maphalala**  
**Times Sunday Editor”**

[17] Again, on 13<sup>th</sup> June 2012 the Applicant was served with a letter by the 3<sup>rd</sup> Respondent in which the Applicant was being accused by the 3<sup>rd</sup> Respondent of insubordinate behaviour and was being asked to explain in writing.

[18] The circumstances surrounding the second notification to the Applicant to appear before a disciplinary hearing on 15<sup>th</sup> June 2012 are as follows: On Sunday 10<sup>th</sup> June 2012 the Times Sunday published a lead story entitled “How Did She Die.”

[19] The story related to the passing on of the late Premier League of Swaziland (“PLS”) employee, Ncamsile Gumbi. This story was also written by the

Applicant. In his manuscript, which was submitted to the 3<sup>rd</sup> Respondent, the Applicant had identified the deceased as a Financial Officer. In the newspaper, however, the deceased was referred to as an Accountant by the 3<sup>rd</sup> Respondent. When the Applicant was asked by the 3<sup>rd</sup> Respondent as to why he referred to the deceased as the Financial Officer, the Applicant says he told the 3<sup>rd</sup> Respondent that he got that information from the PLS CEO, and that he also verified that information with the Sports Editor, Mr. Bhekisisa Magongo.

[20] The Applicant says he thought that this matter was trivial as no adverse publication occurred. The 3<sup>rd</sup> Respondent however decided to prefer charges against the Applicant for that.

[21] The circumstances that led to the Applicant being served with the letter, **Annexure “NM4”** in terms of which he is being accused of insubordinate behaviour are as follows: During a meeting called by the Managing Editor Mr. Mbongeni Mbingo on 13<sup>th</sup> June 2012, Mr. Mbingo enquired whose note books had not been checked and signed by their respective departments. The Applicant raised his hand and pointed out that his note book had not been signed by his editor, the 3<sup>rd</sup> Respondent. After the meeting, the 3<sup>rd</sup> Respondent told the Applicant that he wanted to see him concerning the issue of the unsigned note book. Later on that day the Applicant was

served with the letter dated 13<sup>th</sup> June 2012 Annexure “NM4” by the 3<sup>rd</sup> Respondent.

[22] The Applicant says this conduct by the 3<sup>rd</sup> Respondent of subjecting him to concurrent disciplinary hearings and of also serving him with the letter in Annexure “NM4” indicated a sinister motive by the 3<sup>rd</sup> Respondent to get rid of him from the 1<sup>st</sup> Respondent’s employment at all costs.

[23] **Points of Law :**

**a) Matter not reviewable**

It was argued on behalf of the Respondents that at law the decisions of private individuals not exercising statutory authority are not reviewable unless an allegation is made that the employer or private person has breached its own rules or contractual conditions which have become the rights of the Applicant.

[24] It was further argued on behalf of the Respondents that the Industrial Court has no power to review if the High Court would not have had that power. It was also argued that review of private bodies is permissible only in certain circumstances and that, *in casu*, those special circumstances have not been pleaded.

[25] This point of law will be dismissed by the court for the following reasons;

25.1 The application is properly before the Industrial Court as it emanates from an employer – employee relationship.

25.2 The law is now trite in this country that the Industrial Court is the port of first call for all disputes arising from employer – employee relationships. The Industrial Court has exclusive original jurisdiction in labour related disputes. There is therefore no question of the High Court enjoying concurrent jurisdiction.

**“See: Swaziland Breweries Limited & Sicelo Mabuza  
v. Constantine Ginindza case No. 33/06 (SCA)).**

25.3 The Applicant *in casu* is seeking the review of the decision of the chairperson, and not the decision of the employer. The employer has not yet made any decision as it is awaiting the conclusion of the disciplinary hearing against the Applicant.

25.4 The Industrial Court has a duty under the laws of this country to restrain unlawfulness or injustice at the workplace.

**(See: Section 4 of the Industrial Relation Act, 2000 as amended).**

In the present case the facts revealed that the Applicant or his attorney was not given the opportunity to address the chairperson on the question of legal representation before she made the decision to refuse the appearance of a legal practitioner to represent the Applicant at the disciplinary hearing. The principle of natural justice namely, *audi alteram partem* was clearly not observed by the chairperson. Regarding this important common law principle, the court pointed out as follows in the case of **Graham Rudolph v. Mananga College & Leonard Nxumalo case No. 94/2007** (unreported at pages 6-7;

**“The importance of a fair procedure in disciplinary enquiries was emphasized in Twala v. ABC Shoe Store (1987) 8 ILJ 714(IC) where the industrial Court of South Africa held that “natural justice is a process of value in itself. It is an end in its own right ....” It is so fundamental in the context of industrial relations, said the court, that it “should be enforced by the courts as a matter of policy, irrespective of the merits of the particular case.”**

In the present case, there is no doubt to the court that the failure of the 2<sup>nd</sup> Respondent to give the Applicant or his

attorney the opportunity to be heard on the question of legal representation was an irregularity and an infraction of the *audi alteram partem* principle. The decision of the 2<sup>nd</sup> Respondent is therefore clearly reviewable.

[26] **b) Interim Interdict**

It was argued on behalf of the Respondents that the Applicant has failed to establish that he will suffer irreparable harm, and that he has other satisfactory alternative relief other than to approach the court on an urgent basis. It was argued further that the Industrial Court has broad powers that, even if the Applicant were to be dismissed, it has the power to reverse the dismissal and order the re-instatement of the Applicant.

[27] This point of law will also be dismissed by the court for the following reasons:

27.1 The Applicant has proved that he has no similar protection by any other ordinary remedy. The Conciliation, Mediation and Arbitration Commission (“CMAC”) has no power to grant an interdict. The Applicant therefore could only come to the Industrial Court for immediate relief.

27.2 High court of Swaziland has no original jurisdiction to entertain labour related disputes. It is only the Industrial Court that has been clothed

with exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint which may arise at common law between an employer and an employee.

**(See : Section 8(1) of the Industrial Relations Act, 2000 as amended)**

27.3 When the Applicant has shown that he has a clear right, it is not necessary for him to establish that the harm he fears will be irreparable. When the wrongful act impairs the Applicant's right or makes it impossible for him to exercise his right, the injury will be considered to be irreparable. **(See : Herbstein and Van Winsen : The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> edition at page 1073).**

In this case the conduct of the chairperson of failing to give the Applicant or his attorney a chance to move the application for legal representation, was a wrongful act that impaired or made it impossible for the Applicant to exercise his right to be heard before the adverse decision was taken against him.

[28] **Merits:**

On the merits, the case for the Applicant is that the Industrial Court must intervene and protect his right to a fair disciplinary hearing. It is the inherent duty of this court and indeed any other court of law, to intervene and stop any form of injustice from taking place. In the present case it was irregular for the 2<sup>nd</sup> Respondent to make the decision that she will not allow

legal representation without having heard submissions for or against from both parties on this issue.

[29] The court was informed that the 2<sup>nd</sup> Respondent has since been removed and that the employer [1<sup>st</sup> Respondent] will be appointing someone else to chair the disciplinary hearing against the Applicant. Presently, we do not know what the approach or decision of the new chairperson will be on the question of legal representation. The court has no right at this point to pre-empt his or her decision. The court will therefore not make any comment based on the submissions before in relation to the guidelines set out by the court in the case of **Ndoda H. Simelane v. National Maize Corporation (Pty) Ltd case No. 453/06 (IC)** dealing with the factors to be taken into consideration when an application for outside or legal representation is made before the chairperson of a disciplinary hearing.

[30] In the present case there is no doubt to the court that the principle of *audi alteram partem* was violated by the 2<sup>nd</sup> Respondent by failing to give the Applicant or his attorney a chance to be heard before she made the decision that no legal representation will be allowed during the disciplinary hearing of the Applicant.



[31] It was also agreed in court that the main prayer before the court is prayer 5, and that all the other prayers would fall in line with whatever decision the court will make on that prayer.

[32] It was also argued on behalf of the Respondents that should the court decide to review the decision, it should also correct the decision. With respect we are unable to agree with Mr. Sibandze. There exists no special circumstances in this case entitling the court to usurp the powers of the chairperson of the disciplinary hearing. The application before the court is not review proceedings in the traditional sense of the word where the record of the proceedings of a lower body forms part of the pleadings. Secondly, the Industrial Court has no right to exercise the role of the chairperson of the disciplinary hearing. The decision whether or not to allow legal or outside representation is a decision that is to be made by the chairperson and not the Industrial Court. There is a presumption that the chairperson is appointed because he or she is fit and proper to chair the disciplinary hearing and is supposed to act independently despite the fact that he or she has been appointed by the employer.

[33] If therefore, the decision of the 2<sup>nd</sup> Respondent is set aside and the 1<sup>st</sup> Respondent decides that it will continue with the disciplinary hearings

before a new chairperson, the Applicant should be entitled to move the application before the new chairperson.

[34] Taking into account all the evidence before the court, and also all the circumstances of this case and the submissions by both attorneys, the court will make the following order;

- a) **The 2<sup>nd</sup> Respondent's decision refusing the Applicant legal representation without first having heard the Applicant is hereby reviewed and set aside.**
- b) **If the 1<sup>st</sup> Respondent decides to continue with the disciplinary hearings against the Applicant, the Applicant is to be entitled to move the application for legal representation before the new chairperson.**
- d) **Each party to pay its own costs.**

The members agree.

**NKONYANE J**

**For Applicant : Mr. Z.D. Jele  
(Robinson Bertram)**

**For Respondents : Mr. Musa M. Sibandze  
(Musa M. Sibandze Attorneys)**