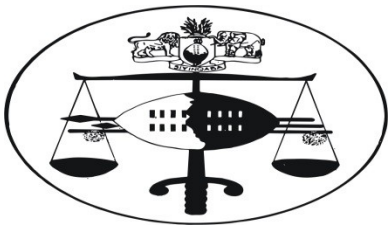

IN THE INDUSTRIAL COURT OF SWAZILAND

RULING

Held at Mbabane Case No546/15

In the matter between:

SWAZILAND POSTS AND TELECOMMUNICATIONS WORKERS UNION	**1st Applicant**
THEMBA MAKHUBU	**2nd Applicant**
ZANELE MASILELA	**3rd Applicant**

And

PHUMELELA SHONGWE N.O.	**1st Respondent**
SWAZILAND POSTS AND TELECOMMUNICATIONS CORPORATION	**2nd Respondent**

Neutral citation: *Swaziland Posts and Telecommunications Workers Union* v *Phumelela Shongwe N.O and Another (546/15) SZIC 71 (December 16 2015)*

Coram: NKONYANE J
(Sitting with S. Mvubu and G. Ndzinisa, nominated Members of the Court

Heard submissions : 04. 12. 15
Delivered judgement 16. 12. 15

SUMMARY : The Applicants instituted the present application on an urgent basis seeking an order for review of the decision of the chairman of the disciplinary enquiry. They are also seeking a declaratory order that the hearing does comply with the disciplinary code. The decision sought to be reviewed was not annexed to the papers however and the chairman denied that any ruling was made.

Held---There is evidence that the question whether or the disciplinary code was applicable was raised as a preliminary issue before the chairman---The chairman has not yet made a ruling on the matter, the application was therefore brought before the Court prematurely---The Applicants having failed to annex the ruling or to prove that the ruling was made, the prayer for review cannot be sustained---Applicants' application dismissed accordingly and matter referred back to the chairman.

RULING

---

1. The 2nd and 3rd Applicants are employees of the 2nd Respondent. They are both employed in the Customer Services Department and are stationed in Mbabane.

2. The 2nd Respondent is a corporation established in terms of the Swaziland Posts and Telecommunications Corporation Act of 1980.

3. On 30th September 2015 a staff meeting of the Customer Services Department was convened at the Swaziland College of Technology. The meeting was chaired by Mr. Jabulani Mkhonta who is the Hhohho Regional Manager and Line Manager for the Department. There were about sixty five employees of this Department who were in attendance.

4. One of the people who addressed the workers on that day was the Acting Senior Manager, Mr. Menzi Hlophe. In terms of paragraph 9 of the founding affidavit, Mr. Menzi Hlophe uttered statements that did not go down well with the employees, the effect of which was to liken the employees to baby crabs who take after their mother. The employees then took a decision that they will write a letter of protest to the Acting Senior Manager and also send a copy to the Industrial Relations Department. The letter was written and the copy is annexed to the founding affidavit and it is marked annexure "**SS2"**. The 2nd and 3rd Applicants were mandated by the workers to deliver the letter to the Acting Senior Manager, and to deliver the copy thereof to the Industrial Relations Department. Subsequently, the 2nd and 3rd Applicants were charged in connection with the letter.

5. At the internal disciplinary hearing preliminary points were raised before the chairperson, the 1st Respondent herein. The Applicants' complained that the 2nd Respondent disregarded the provisions of the disciplinary code and procedure when it formulated the charges against them. The 2nd and 3rd Applicants stated in paragraph 18 of the founding affidavit that the chairperson dismissed the preliminary points holding that the disciplinary code was not absolute or binding on the corporation.

6. The ruling of the chairperson was not annexed to the founding affidavit. The 2nd Respondent in its answering affidavit denied that the chairperson issued any ruling. The Applicant's only filed the minutes of the hearing against 3rd Applicant. Even these minutes are incomplete, page five thereof is missing. No explanation was proffered in Court.

7. The Applicants have now approached the Court under a certificate of urgency. They are seeking an order in the following terms;

"1. That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis.

2. *That an order be and is hereby issued reviewing, correcting and/or setting aside as irregular, the 1st Respondent's decision of holding that the Disciplinary Code and procedure agreed upon between the stakeholders of the 2nd Respondent is not binding on the organization, namely the 2nd Respondent herein.*

3. *That an order as be and is hereby issued declaring that the ongoing disciplinary proceedings against the 2nd and 3rd Applicants herein is improper and irregular for non-compliance with the* ***Disciplinary Code and Procedure*** *agreed upon between the stakeholders of the 2nd Respondent.*

4. *Costs of application.*

5. *Further and/or alternative relief."*

8. The Applicants' application is opposed by the 2nd Respondent on whose behalf an answering affidavit was duly filed deposed thereto by Lowena Henwood, who stated therein that she is the Industrial Relations Manager at the 2nd Respondent's establishment. The Applicants thereafter filed their replying affidavit.

9. In its answering affidavit the 2nd Respondent raised preliminary objections. They appear as follows;

9.1 The 1st Applicant has no *locus standi* to bring the present application as it has no real and substantial interest in the relief sought, not in the outcome thereof.

9.2 The 2nd Applicant has no *locus standi* to bring the present application. The disciplinary hearing of the 2nd Applicant was scheduled to proceed on 17th November 2015 but did not proceed as the 1st Respondent recused himself. There is presently no basis for him to be part of these legal proceedings. The alleged decision that is complained against was allegedly taken during the disciplinary hearing of the 3rd Applicant. That decision therefore does not affect the 2nd Applicant.

9.3 The 3rd Applicant, in whose disciplinary hearing the alleged decision was made by the 1st Respondent, did not file a founding affidavit before the Court. The 3rd Applicant only filed a confirmatory affidavit. The application cannot be sustained on a confirmatory affidavit and the application ought to be dismissed with costs.

9.4 The Applicants' application ought to be dismissed because the 1st Respondent's ruling sought to be reviewed and set aside has not been produced in Court. The Matter is therefore prematurely before the Court.

10. The parties having filed all the pleadings before the Court, the Court will address the points of law raised simultaneously with the merits of the case. The Applicants in their replying affidavit also raised a point of law that the deponent of the answering affidavit, Lowena Henwood, has no power and authority to depose to an affidavit and defend legal proceedings in terms of the Swaziland Posts and Telecommunications Act, 1963. It was stated by the deponent thereof that the relevant section of the Act would be addressed at the hearing of the matter. This, however, was not done. The point of law is therefore dismissed.

11. **Matter Prematurely Before the Court:-**

In terms of prayer 2 of the notice of application, the Applicants are seeking an order reviewing, correcting and/or setting aside the 1st Respondent's decision. According to the Applicants the 1st Respondent made a ruling that the disciplinary code and procedure at the workplace was not binding on the 2nd

Respondent. The 2nd Respondent denied in its answering affidavit that there was such a ruling by the 1st Respondent. The 1st Respondent filed a confirmatory affidavit to the answering affidavit. In the Applicants' replying affidavit, the deponent (2nd Applicant) merely stated that he had noted the averments and that he was reiterating the allegations he had made in the founding affidavit.

12. Assuming for one moment that the ruling was made, the Applicants failed annex it to their papers before the Court. Effectively, the alleged ruling of the chairperson is not before the Court, yet the Court is being asked to review, correct and or/or set it aside.

13. The Applicants are asking the Court to review the decision of the 1st Respondent which is not before the Court. The 2nd Respondent having denied that the chairman made any ruling on the preliminary points raised, the evidentiary burden shifted to the Applicants to produce the ruling before the Court. The Applicants failed to do that.

14. The Applicants only filed minutes of the disciplinary hearing against the 3rd Applicant which was held on 17th November 2015. As already pointed out herein above, these minutes are incomplete. In paragraph 7.1 of the minutes,

it shows that it was the Initiator who submitted that he saw no flaw in procedure and that it was absolutely not true that the disciplinary code was flouted. The minutes show that after the submissions by both parties, the chairman made a ruling on the issue of postponement and ruled that the hearing was postponed until Thursday 19th November 2015 or Friday 20th November 2015. There is nowhere in the minutes where the chairman made a ruling on the preliminary points raised by the 3rd Applicant's representative.

15. The 3rd Applicant or her representative at the disciplinary hearing ought to have requested the chairman (1st Respondent) to make a ruling on the preliminary points raised before him. They did not do so. Instead the 3rd Applicant has rushed to Court and she is asking the Court to make a decision on issues that are yet to be decided by the chairman. The Court cannot and should not do that. The Court should not interfere in matters that are properly before the chairman of the disciplinary hearing.

16. It will also be improper for the Court at this stage to make any declaratory order as sought in terms of prayer 3. The question whether or not the disciplinary proceedings are improper for non-compliance with the disciplinary code and procedure is pending before the chairman. The chairman has not yet made a ruling on the matter.

17. Clearly, therefore, the matter is not properly before the Court. It is the right and prerogative of the employer to hold a disciplinary enquiry against its employee. It is an internal matter and a managerial domain. The Court can only interfere in exceptional circumstances. No such exceptional circumstances have been shown to exist in the present case. **(See:- Bhekiwe Dlamini V. Swaziland Water Services Corporation, case no. 411/06 (IC)**

18. The Applicants argued in their heads of argument that what is being challenged before the Court is the decision to charge the Applicants without first following the provisions of the disciplinary code and that the decision by the chairman was a secondary issue. We do not agree with the Applicants that the issues are separable. This argument is clearly futile hairsplitting. All questions relating to the applicability of the disciplinary code are presently pending before the chairman. The chairman has not yet made his ruling thereon.

19. In an almost similar matter where the Applicant instituted proceedings in Court instead of raising the issue with the chairman of the disciplinary hearing, the Court pointed out that;

> *"19. The Applicant seems to have "jumped the gun" by coming to Court instead of attending at the disciplinary hearing and requiring the chairperson to make a decision on the question of legal representation….."*
>
> ***(Ndoda H Simelane V National Maize Corporation (PTY) LTD, case no. 453/06).***

20. In the present case, the 3rd Applicant did raise the issues at the disciplinary hearing. She has jumped the gun only in the sense that she has not waited for the chairman to hand down his ruling on the issues raised, instead she has rushed to Court asked the Court to decide on those issues.

21. The 2nd Applicant does have *locus standi* in the present proceedings by virtue of prayer 3. He is also charged under the 2nd Respondent's disciplinary code and in prayer 3 the Applicants are seeking a declaratory that the hearing is in violation of the provisions of the disciplinary code. The Court will refrain from addressing the other points of law so as not to influence the chairman as they have a direct bearing on the preliminary points that the chairman is yet to make a ruling on.

22. The application therefore ought to be dismissed because;

21.1 there is no evidence before the court that the chairman made the ruling complained of. If the chairman did make the ruling sought to be reviewed, it has not been annexed to the Applicants' papers and is not before the Court to enable the Court to determine if there was any misdirection or irregularity that the chairman committed entitling the Court to review and set it aside.

21.2 the question whether the Applicants' disciplinary hearing is improper or not for non-compliance with the disciplinary code is still pending before the chairman who is yet to make his ruling. The present application was therefore instituted prematurely.

23. The 2nd Respondent asked the Court to dismiss the application with costs based on the punitive scale. The practice of this Court is not to make an order for costs where the employer/employee relationship still exists in a bid to promote harmony at the workplace. It has not been shown that this case is an exception to this Court's practice.

24. Taking into account all the circumstances of the case, the interests of justice, fairness and equity, the Court will make the following order;

a) The application is dismissed with no order as to costs.

b) The matter is referred back to the chairman of the disciplinary enquiry.

The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicants: Mr. B.S. Dlamini

(B.S. Dlamini & Associates).

For Respondents: Mr. N.D. Jele

(Robinson Bertram).