IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 313/08 (B)

In the matter between:

LUNGILE MASUKU Applicant

And

NATIONAL AGRICULTURAL MARKETING

BOARD 1st Respondent

MAKHOSI C. VILAKATI 2nd Respondent

Neutral citation: Lungile Masuku v National Agricultural Marketing Board (313/08) [2018] SZIC 115 (26 October 2018)

Coram: **S. NSIBANDE JP**
(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 15 October 2018

Date Delivered: 26 October 2018

Summary: *Applicant having moved an unsuccessful application for legal representation at internal disciplinary enquiry institutes urgent application to inter alia set aside disciplinary chairperson's decision as being grossly irregular and liable to be set aside – Settled principle is that the Industrial Court interferes in incomplete disciplinary proceedings in exceptional circumstances – Settled principle is that there is no general rule allowing legal representation in internal disciplinary enquiry however there may be special circumstances where fair disciplinary process requires that legal representation be allowed – That onus is on Applicant to show that such special circumstances are in existence in particular matter – That no special circumstances were established to entitle Applicant legal representation – Applicant dismissed.*

JUDGMENT

[1] The Applicant, Lungile Masuku, is employed by the 1st Respondent as Packhouse Management Officer. The 1st Respondent, the National Agricultural Marketing Board (Namboard) is a category A parastatal said to have its head office in Manzini, (hereinafter referred to as **"the respondent"**). The Respondent opposes the application and full sets of pleadings have been filed.

[2] In February 2018, the Respondent suspended the Applicant on full pay. She was brought before a disciplinary enquiry on 26th September 2018 on three (3) charges of misconduct. The charges were as follows –

- gross negligence
- gross insubordination

- poor work performance and/or gross incompetence.

The disciplinary enquiry was chaired by the 2nd Respondent whom we were told, had undertaken to abide by the Court's ruling.

[3] When the Applicant appeared before the 2nd Respondent on the 26th September 2018, she applied that she be allowed legal representation at the enquiry. 2nd Respondent allowed the applicant's attorney, who was present at the enquiry, to motivate the application for legal representation.

[4] According to the Applicant's founding affidavit the application for legal representation was based on the following grounds:

(a) that because both the initiator and the chairperson are lawyers, the Applicant would be disadvantaged if she were not allowed legal representation;

(b) that the charges she is facing are sufficiently complex and legalistic so as to warrant legal representation;

(c) that the charges are very serious and may result in her dismissal, if upheld; and

(d) that there is no employee of the Respondent willing to represent her following the withdrawal of one Sandile Mkhonta, as they fear

victimisation particularly because the Agro Business Manager is a potential witness in more than one of the charges Applicant faces.

[5] In his ruling on the application the 2nd Respondent states (at paragraph 9 of the ruling):

"I have considered the submissions by both parties in particular that myself and Mr Dlamini are both admitted attorneys of the High Court. If I had not received the resignation of Mr Dlamini as an initiator I was inclined to allow Mr Madzinane to represent the accused employer in order for a fair hearing to be attained.

Upon Mr Dlamini's resignation I therefore recommend that the accused employee to seek representation from fellow employees."

[6] It is this ruling that Applicant complains of, asserting that the 2nd Respondent has committed a gross irregularity by; (a) failing "*to apply his mind on the issue of the seriousness of the charges faced by Applicant"*, (b) "*totally ignoring to determine the issue of unavailability of applicant's colleagues who is (sic) willing to represent her* at the disciplinary inquiry; (c) failing "*to determine the issue of the legalistic or technical nature of the offences that Applicant is called upon to answer";* and (d) failing "*to determine the issue that no employee will be willing to represent Applicant*

since the Agri Business Manager (ABM) is a potential witness in some of the charges."

It was further alleged that the 2nd Respondent abdicated his duties *"by not considering the difficulties that would arise from the involvement of the Agri Business Manager at the hearing as he will have to be cross-examined as a witness."*

[7] The Applicant's further complaint is that the 2nd Respondent's decision is grossly irregular, because it is only based on the resignation of the initiator, without a consideration of the other factors raised by the Applicant at the hearing.

[8] In argument the Applicant emphasized the points made above and in particular that there was no one at the Respondent's undertaking who could challenge the Agri Business Manager (the complainant) through cross-examination as the employees were far too junior to him.

[9] It was also emphasized that 2nd Respondent's finding that no evidence was furnished to prove the seriousness of the charges faced by the Applicant flies in the face of the facts because the letter of notice to attend the disciplinary enquiry itself advised the Applicant that *"you are implicated*

in some serious misconduct whilst employed by the company." It was submitted that the failure to acknowledge that the charges were, by their nature quite serious, constituted a gross irregularity in itself. The report from which the charges arises also indicates the seriousness of the charges. Paragraph 20 thereof reads, *"the above charges are in my view of a serious nature and can possibly attract a sanction of dismissal."* This fact, it was submitted was overlooked by the 2nd Respondent who in so doing it was submitted, committed a gross irregularity by failing to apply his mind to the Applicant's submissions.

[10] The submission was made that on the facts of this matter the Applicant had made a compelling case for the Court to set aside 2nd Respondent decision and allow legal representation.

[11] The Respondent argued in the contrary, submitting that no exceptional and compelling circumstances had been established to allow the court to interfere with the incomplete disciplinary process. It was submitted on behalf of the Respondent as follows;

11.1 That paragraph 9 on page 3 of the 2nd Respondent's ruling (Annexure D of the founding affidavit) indicates that the 2nd Respondent had considered all the submissions made on behalf of the Applicant. In

part of the said paragraph reads, *"I have considered the submissions by both parties, in particular that myself and Mr Dlamini are both admitted attorneys of the High Court. If I had not received the resignation of Mr Dlamini as an initiator I was inclined to allow Mr Madzinane to represent the accused employee in order for a fair hearing to be attained."*

It was submitted that having considered the submissions, the 2nd Respondent's decision was not open to review simply because the Applicant felt it was wrong.

11.2 That the Applicant bases her assertion that there is no one at the Respondent's undertaking who can represent her for fear of victimization, on mere speculation. This is because nowhere in her papers does the Applicant say who she approached among officers at her level, to represent her at the hearing.

11.3 That the resignation of the initiator means that the scales of justice will be balanced if the 2nd Respondent is the only admitted attorney at the hearing.

11.4 That the charges are straight forward and are not legalistic in nature so as to need legal minds. It was submitted that the charges were neither legalistic nor technical.

In the premises it was submitted, that the application ought to be dismissed following that no exceptional and compelling circumstances for the Court to intervene were made out in the application.

[12] It is settled in our law that this Court has the jurisdiction to interfere in incomplete disciplinary proceedings in exceptional circumstances only. This is in recognition of the employer's management prerogative which makes discipline at the workplace the sole prerogative of management. **(**See: **Sazikazi Mabuza v Standard Bank of Swaziland and Another Industrial Court Case No. 311/2007.)**

[13] It is also settled in our law that an employee facing a disciplinary enquiry is not as a general rule entitled to legal representation as of right. It is also trite that despite there being no general right to legal representation at a disciplinary hearing, there may be special circumstances where fair disciplinary process requires that representation by a legal practitioner be

afforded to an employee (See **Ndoda H. Simelane v National Maize Corporation (Pty) Ltd Industrial Court Case No. 453/06)**.

[14] In the matter before Court, it is our view that the Applicant faces serious charges at the disciplinary enquiry. The report of the consultant on which the charges are based and the invitation to the enquiry say as much. It is not clear what further evidence of the seriousness of the charges was required from the Applicant by the 2nd Respondent. The seriousness of the charges does not on its own entitle an employee to legal representation, after all most employees appearing at disciplinary enquiries face serious charges. The seriousness of the charges must be taken into account together with other's factors, for example whether such charges are legalistic or technical in nature as to require a legal mind and other relevant considerations. The 2nd Respondent did not address this aspect of the Applicants submissions in his ruling. It is our view that serious as the charges are, they are not legalistic or technical in nature. They are straight forward charges, the outcome of which will depend mostly on facts proven by the initiator.

[15] With regard to the Applicant's assertion that she is unable to find a representative following the withdrawal of her initial representative,

Sandile Mkhonta, we find that it has not been established that there is no one at Respondents undertaking who can represent the Applicant. In her founding affidavit the Applicant makes a bold statement that *"there is no employee of the Respondent who is willing to represent me after the withdrawal of Sandile Mkhonta as they fear victimization…"*

She has made no allegation of who she has asked to represent her and what that person's or persons' reaction thereto was. Furthermore she has not set out where in the administrative heirachy of the Respondent she is and whether there are officers of the same level as herself or above – in other words, whether there are other officers of her status or above in the organization that could possibly represent her. It is for the Applicant to establish special circumstances that make for her to be allowed legal representation in an internal disciplinary enquiry. She has not done so in our view.

[16] The Applicant's other submission was that no one at the Respondent's organization can be brave enough to challenge the Agro Business Manager at the hearing. Again the Applicant makes a bold assertion without stating who she has asked to represent her who indicated his/her reluctance on this basis. It is not unusual for senior managers such as the

Agri Business Manager to be complainants in disciplinary matters. In fact an employee being disciplined is usually disciplined on the complaint of one to whom he or she is subordinate. The case of **Norbert LeCordier v Spintex Swaziland (Pty) Limited and Elliot Magongo N.O Industrial Court Case No. 424/2009** was cited herein.

[17] This matter is distinguishable from the **Norbert LeCordier** matter in that in the **LeCordier** matter, the Applicant was able to show that the one employee who could have represented him had been involved in the preparing the charges against him. This then eliminated all chances of internal representation. In this matter the Respondent pointed out other managers/officers who are of equal status to the Applicant, who could represent her. The Applicant does not say she has spoken to them and they have refused to represent her at the hearing. She simply says that they will not be able to represent her without telling the Court whether she has in fact asked them to represent her. She has also not set out the administrative heirachy at the Respondent's undertaking in order to assist the Court establish what, if any, inhibiting factors may arise from the circumstances of her case that would make fellow managers/officers reluctant to represent her. She simply assumes and concludes that such officers/managers will not be able to represent her and/asserts that they

will be too intimidated to represent her. Where that assertion is based is unknown as she has not told the Court if she in fact asked any of the officers to represent her.

[18] It is an old principle that an Applicant stands or falls by his papers. On the papers before court we find that the Applicant has not made a case for legal representation. In the circumstances the application is dismissed. **There is no order as to costs**.

Members agree

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. R. Mahlalela (Madzinane Attorneys)

For Respondent: Mr. M. Dlamini (Robinson Bertram)