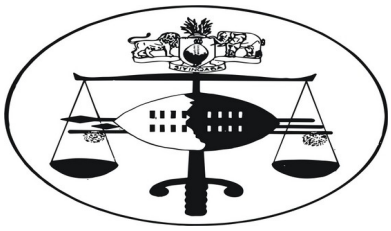

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 03/2018**

In the matter between:

ZINHLE KUNENE **APPLICANT**

and

SWAZILAND STANDARD AUTHORITY **RESPONDENT**

Neutral citation: Zinhle Kunene v Swaziland Standard Authority (03/2018) [2018] SZIC 13 (2018)

Coram : Nsibande J.P.
(Sitting with N.R. Manana and M.P. Dlamini
Nominated Members of the Court)

Heard : 31 January 2018

Delivered : 23 February 2018

Summary: Labour Law

The Applicant applying to interdict Respondent from implementing recommendations of disciplinary Chairperson and setting aside the entire disciplinary proceedings and Chairperson's recommendations:- Applicant alleging stale charges and that

Chairman deferred to Management against provisions of Human Resource Policy by issuing recommendation instead of sanction.

Held:- No deference to Management, that Respondent Chairperson entitled by Human Resource Policy to make recommendation in the particular circumstances of this case. Respondent acting in terms of Chairperson's verdict and not reviewing her decision. Application accordingly dismissed.

JUDGEMENT

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1. The Applicant is employed by the Respondent, Swaziland Standard Authority, as the Personal Assistant to the Executive Director.

2. On or about 27th November 2017, the Applicant was charged with two (2) counts of misconduct being –

   (a) ***Dishonesty*** *– in that "on or about 21st June 2013, knowingly (sic) that you did not have a Diploma in Administrative Secretarial, you deliberately told your employer that you have a Diploma in Administrative Secretarial. Acting on that information that you have the requisite qualifications, the employee employed you for the position of Personal Assistant to the Executive Director. By so doing (misleading the employer that you have the qualifications yet you do not) you committed the offence (sic) of dishonesty."*

   (b) ***Misrepresentation*** *– "On or about 21st June 2013, knowingly (sic) that you did not have a Diploma in Administrative Secretarial, you deliberately told your employer that you have a*

Diploma in Administrative Secretarial. By so doing, you committed the offence of dishonesty."

3. She received notice to attend a disciplinary enquiry which was held from 1st December 2017. It's not clear when the hearing was finalised but it appears from the papers that on 14th December 2017, the parties met wherein the disciplinary report together with the Chairperson's recommendations were presented. In terms of the Chairperson's recommendations, the Applicant having been found guilty of the charges, was to be given an opportunity to resign, failing which her services were to be terminated. According to the Respondent, the Applicant was advised, at that meeting, of its decision to align with the Chairperson's recommendations.

4. On 8th January 2018, Applicant received correspondence from Respondent referring to the meeting of 14th December 2017, and now putting her on terms to revert to it with her decision (either to wilfully resign failing which her services would be terminated) by end of day on Wednesday 10th January 2018. The Respondent indicated that when the time given elapsed, it would be left with no option but to terminate her services effective 11th January 2018. Having received this letter and fearing that her services would be terminated, Applicant launched this urgent application seeking among other orders that –

A rule nisi do hereby issue in the following terms to:

4.1 Interdict and restrain the Respondent from implementing the

recommendations of the disciplinary Chairperson pending finalisation of this matter.

4.2 That the rule nisi operate with immediate and interim effect.

4.3 Setting aside the entire disciplinary proceedings and recommendations of the Chairperson.

4.4 Costs of the application in the event of opposition.

5. The Respondent agreed to stay the implementation of the disciplinary Chairperson's recommendations pending the determination of this application. The Respondent filed its answering affidavit in which it raised two points *in limine* firstly that there was no urgency in the matter and secondly that the Applicant has failed to set out exceptional circumstances for the Court to interfere with internal disciplinary proceedings.

6. With regard to urgency the Respondent contends that the Applicant was advised on 14th December 2017 of the option to resign within two (2) days failing which she would be dismissed in terms of the recommendations of the disciplinary Chairperson', that the letter of 8th January 2018 was merely a follow up on the discussions of 14th December 2017. Respondent contends that there was no explanation for the delay from 14th December 2017 to the date on which the application was launched on 11th January 2018. The issue of urgency has, in our view, been properly ventilated by the Applicant. She was officially advised to resign on 8th January 2018 when a letter was served on her and she acted on it by bringing this application. It cannot be said that she sat on her laurels until the eleventh hour. This point *in limine* is dismissed.

7. On the failure to set out exceptional circumstances to enable the Court to interfere with an in internal disciplinary process, the Applicant asks the Court to interfere for two reasons:

7.1 That the disciplinary charges are stale and that having known of the alleged misconduct some four years ago, the Respondent no longer has the right to discipline her. Applicant, in her papers states that Respondent was aware from 21st June 2013 *"about the state of my qualifications and elected to call me for an interview and I was appointed. Any dishonesty arising from my qualifications should have been dealt with prior to completion of my probation."* She further states that had she not met the threshold set by the Respondent in it Human Resources Policy, she would not have been appointed. Clause 6.3.2 reads "The authority shall only appoint candidates who meet the minimum requirements and are deemed to be suitable for the position by a duly constituted selection panel."

7.2 In response, the Respondent states that sometime in March 2017 its Corporate Affairs Officer was involved in the development of a Human Resources Development plan. It became necessary that all employees submit the certificates they proclaimed to hold for their positions. Applicant was asked to submit her certificate for the qualification she indicated she had in her application letter, regarding the position she held at Respondent. Despite several reminders, the Applicant failed to submit the certificate. This was when it was discovered that Applicant did not have the

qualifications that she said she had in her letter wherein she applied for the position she holds. An investigation then ensued culminating in the disciplinary hearing that is the subject matter of these proceedings. It is the Respondent's contention that it was within its rights to institute disciplinary proceedings against the Applicant once it discovered her dishonesty. In any event, it was submitted, the Human Resource Policy does not set any time limits within which disciplinary action must be taken against an errant employee. It was Respondent's further submission that because Applicant had not raised the issue of stale charges before the disciplinary enquiry Chairperson, it was not proper for this Court to entertain it because to do so would amount to usurping the powers of the disciplinary hearing Chairperson.

8. In the current application it is common cause that the disciplinary enquiry has been finalised and that the disciplinary Chairperson has returned a guilty finding and has recommended a sanction with which the Respondent has aligned itself. It is also common cause that the issue of the charges being stale was not raised before the disciplinary enquiry Chairperson. It is also common cause that in terms of the Human Resource Policy, the Applicant is entitled to appeal against the verdict and/or penalty (19.6.3.5.8.6.25). That being so, it is our view that the disciplinary process is not finalised and that whoever deals with the Applicant's appeal, if she chooses to appeal, is the correct party to decide on the staleness or otherwise of the charges. There is no reason why the Court should, at this stage, usurp the discretion of the appeal Chairperson/body.

Ndoda Simelane v National Maize Corporation (PTY) Ltd Industrial Court Case No. 435/2006.

9. **Disciplinary chairperson abdicating her responsibility by failing to issue a sanction herself.** The Applicant complains that the disciplinary Chairperson failed to issue a sanction and instead made a recommendation to Management of Respondent in violation of clause 19.6.3.5.8.6.24 of the Human Resources Policy. The said clause reads, in part, **"The Chairperson may thereafter immediately at the formal hearing decide upon the appropriate permissible disciplinary penalty (together with reasons for such penalty) or may indicate that more time is required to consider a penalty (known as reserving the decision) provided that where the decision is not made immediately, it must be given in writing (together with reasons for such penalty) within five (5) working days from the formal hearing. He will also note this on the File and return it to the Head of Department for information and for onward transmission to the Corporate Affairs Officer for record purposes and further action where necessary."**

10. It is Applicant's submission that by letter of 8th January 2018, Management of Respondent clearly indicated that the disciplinary enquiry Chairperson made recommendations with which it aligned itself. It was submitted that the 'decision' was not the disciplinary Chairperson's but that of the Management of Respondent. The Applicant referred the Court to the cases of **Phumelele Dlamini v NERCHA Industrial Court Case No. 205/2017 (B) and Gugu Fakudze v Swaziland Revenue Authority & Others Case No.**

08/2017 for the proposition that a Chairperson who defers to Management by referring to her findings as recommendation is a dispute solver who relinquishes her duty. The Applicant complains that by abdicating her responsibilities, the Chairperson has caused her prejudice in that Management of Respondent who never participated in the hearing must now issue a sanction.

11. Respondent contends that it is the duty of the employer to communicate the decision of the disciplinary Chairperson to the employee in terms of clause 19.6.3.5.8.6.24. The policy reads, *"He (the Chairperson) will also, as soon as possible, arrange with Corporate Affairs Officer for his formal confirmation to be handed personally to the employer concerned."*

Respondent further submits that in any event the Human Resource Policy grants authority to the Executive Director to dismiss an employee and that this cannot be the duty of the Chairperson of the disciplinary enquiry. The Court was referred to clause 19.6.2.33 which reads: *"Line Managers may recommend the dismissal of an employee and only the Executive Director has the authority to dismiss an employee."*

The Court was also referred to the case of **Ndumiso Hlongwane v SNAT Cooperative Society & Another Industrial Court Case No. 251/2012.**

12. The Respondent's final submission was that the application currently before the Court is distinguishable from those of **Phumelele Dlamini v NERCHA** (*supra*) and **Gugu Fakudze v SRA** (*supra*) in that in those cases the employer sought to substitute the disciplinary Chairperson's recommendation whereas

in the current matter, the employer seeks to enforce the disciplinary Chairperson's recommendation. Respondent further referred the Court to article 19.6.2.11.1 of the Human Resource Policy and submitted that the route taken by the Respondent is the proper one envisaged by him and in line with the Human Resource Policy.

13. Clause 19.6.2.9.11 of the Human Resource Plan envisages a situation where an employee is given an opportunity to willingly resign. 19.6.2.9.11.1 reads – ***"as this is an alternative penalty to that of dismissal and will not under any circumstances be used for misconduct involving breach of the Authority's Code of Ethics."*** It may only be resorted to when:-

11.4 ***"The disciplinary misconduct is of such a serious nature that a dismissal penalty is warranted, but at the same time that the nature of the mitigating factors in a particular case might be such that it is justifiable to offer the employee the option to willingly resign rather than to face dishonourable dismissal."***

11.5 ***"The offer may be extended by the Head of Department and above, only after a formal disciplinary hearing has been conducted to enquire into the matter, and the Head of Department and the Corporate Affairs having been consulted."***

14. The pertinent facts of this matter are that the disciplinary Chairperson found that there were mitigating factors that were such that it was justifiable to offer the employee the option to willingly resign rather than face a dishonourable dismissal. She found that

the previous Management of Respondent had been complicit in the misrepresentation that occurred in that they did not check the Applicant's qualifications.

15. Having found sufficient mitigating factors, it appears she set into motion the process allowing the Applicant to willingly resign rather than face a dishonourable dismissal. It appears to us that there was no abdication by the disciplinary enquiry Chairperson of her responsibilities.

16. Even if we were to find that the disciplinary Chairperson had indeed abdicated her responsibility, the Respondent's submission are correct that this case is distinguishable from the **Phumelele Dlamini v NERCHA and Gugu Fakudze v SRA** cases (*supra*). In those cases the employer sought to change the disciplinary Chairperson's sanction from one of not guilty to guilty. In doing so the employer failed to engage due process which the Courts found to be unfair because of the failure to consult the employee, on all material facts impacting adversely on her rights.

17. In the case before the Court, there has been no deviation from the decision of the disciplinary Chairperson. The Respondent has not abrogated to itself, unilaterally, the right to change the decision of the disciplinary Chairperson. Respondent is infact putting into effect that decision. There is no review of the disciplinary Chairperson's decision by Respondent and the Court cannot in our view step in and interfere. The Applicant suffers no prejudice or potential prejudice from the Respondent's action. She has been through a disciplinary hearing in terms of which a recommendation

has been given and the employer is acting in accordance with the said recommendations. No new process has taken place in her absence.

18. We are unable to find any exceptional circumstances for this Court to intervene in the incomplete disciplinary process the Applicant faces.

19. By way of comment, Applicant states in her replying affidavit, paragraph 10.3 ***"I deny that I failed to submit my certificates. My letter of application dates 21st June 2013 enclosed those certificates. If the Respondent has mislaid them, the blame should not come to me."*** It appears that the Applicant did not produce the certificates when they were called for by Respondent in March 2017. When she faced a serious disciplinary enquiry in November 2017 she still did not produce the certificate. Even when she brought a challenge against the enquiry to this Honourable Court, no certificate was attached to her papers. The Court finds this attitude extra-ordinary when the production of the certificate would quash the charges and allow the Applicant to stay in employment. The certificate may still be produced at appeal level, granting the Applicant a real alternative remedy.

20. The application is dismissed. There is no order as to costs.

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. M. Simelane
(M.P. Simelane Attorneys)

For Respondent: Mr. S. Madzinane
(Madzinane Attorneys)