INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.76/2018

In the matter between:

THEMBINKOSI FAKUDZE	Applicant
And	
NEDBANK (SWAZILAND) LIMITED	1st Respondent
LEONARD DLAMINI N.O.	2nd Respondent

Neutral citation: Thembinkosi Fakudze vs Nedbank (Swaziland) Limited and Another (76/18) [2018] SZIC 27

Coram: MAZIBUKO J,
(Sitting with A.Nkambule & M.Mtetwa
Nominated Members of the Court)

Last Heard: 26th March 2018

Delivered 12th April 2018

Summary: (1) Interpretation of clauses in the Collective Agreement and in the Disciplinary Code – and Procedure Agreement.

Employer signed agreements with the Union. Union represented its members, i.e. employees who are in the bargaining unit – when signing the agreements. Applicant is in senior management and affiliated to a Staff Association.

Held: *Applicant is not in the bargaining unit and therefore is not provided for in the Disciplinary Code.*

(2) *Interpretation of clause 1.11 in the code. The code restricts the time within which the employer can commence and conclude a disciplinary hearing of an employee (who is provided for in the code), to 40 days - from the date the misconduct was brought to the attention of management.*

Held: *The 40 day stipulation should be calculated from the date investigation is completed and a report is given to management with a finding that an offence has been committed, that is when misconduct; is brought to the attention of management.*

(3) Absence of a disciplinary code for employees in the staff category.

In the absence of an agreement or disciplinary code that stipulates the time within which the employer can institute and/or conclude a disciplinary hearing of an employee in the staff category, the employer is legally obligated to act within a reasonable time.

(4) Authority of Court to intervene in uncompleted disciplinary proceedings.

The general rule is that the Court is loath to intervene in an uncompleted trial or disciplinary hearing. The Court will however intervene in certain circumstances, i.e.

- *Where grave injustice might otherwise result, or*
- *Where justice might not by other means be attained, or*
- *Where compelling and exceptional circumstances exist entitling the Court to do so.*

JUDGMENT

1. The 1st Respondent is Nedbank (Swaziland) Limited a Financial institution registered in accordance with the financial Institutions Act No.6/2005. For the sake of convenience the 1st Respondent shall herein be referred to as the - bank.

2. The 2nd Respondent is Mr Leonard Dlamini who is chairman in a disciplinary hearing that is mentioned below. The 2nd Respondent is an employee of the 1st Respondent, in the position of Chief Risk Officer. The 2nd Respondent is cited in these proceedings *nomine officio*. The 2nd Respondent has not opposed these proceedings – but will abide by the order of Court.

3. The Applicant is Mr Thembinkosi Fakudze who is an employee of the bank. The Applicant joined the bank on the 2nd January 2013 in the position of Head of Sales/Branch Operations Support, which position he occupies todate.

4. About the 24th July 2017 certain employees of the bank embarked on an industrial action – a strike, which negatively affected the

operation of the business of the bank. In order to alleviate the adverse situation, the Respondent deployed senior members of staff to do the work that ordinarily would be done by the employees who are on strike. The Applicant was among the employees who were so deployed.

5. On the 25th July 2017 the Applicant together with his work colleague – named Mr Msimisi Dlamini were directed to oversee the bank's Auto Teller Machines (ATMs) during the strike. The strike lasted about a month or two. At the end of the strike, the Applicant reported a loss or shortage of E200,000.00 (Two Hundred Thousand Emalangeni) in one of the ATMs. That particular ATM was referred to as the Mbabane KFC outlet. The shortage is not in dispute. The Applicant confirmed this fact as follows:

"*16. The issue of the aforesaid alleged shortage is common cause, save that its discovery was made by myself on the 25th September 2017 after which I embarked on other verification processes until I formally made an informed report pertaining the same to the Respondent's Head of Retail on*

the 2nd October 2017. A copy of this report is hereto attached marked AE."

(Record page 10)

6. About the 21st December 2017 the Applicant was subjected to a polygraph test – with his consent. The results of the test have not been communicated to the Applicant as yet.

7. On the 12th January 2018 the Applicant was suspended from work (with pay) subject to finalisation of an internal investigation regarding the cash-shortage aforementioned. The suspension letter is attached to the founding affidavit and is marked AB. The Applicant is still on suspension todate.

8. On the 25th January 2018 the Applicant was charged with a disciplinary offence as follows:

"Gross Negligence, in that on the 25th July 2017, [you] failed to detect a shortage of E200, 000.00 for ATM KFC and neither did you report the shortage timeously. Failure to have done so has resulted in the loss of funds E200, 000.00."

(Record page 21)

The charge sheet is marked AA. The disciplinary hearing was scheduled for the 29th January 2018.

9. The disciplinary hearing proceeded as scheduled. At the hearing the Applicant raised a preliminary point the effect of which reads as follows:

"… the 1st Respondent was time barred to institute the disciplinary proceedings against myself [the Applicant].

(Record page 11)

10. In support of this point the Applicant referred to the Disciplinary Code and Procedure Agreement that is applicable at the bank. The Applicant has supplied a series of written agreements which he marked AD. These agreements include the following:

10.1 A Recognition Agreement between the bank and Swaziland Union of Financial Institution and Allied Workers (hereinafter referred to as the union). The Recognition Agreement was signed on the 18th March 1999.

10.2 A Disciplinary Code and Procedure Agreement between the bank and the union (hereinafter referred to as - the code). The code was signed on the 30th September 1999. The code is annexure 1 to the Collective Agreement.

10.3 Additional annexures included the Grievance Policy and Procedure, the Staff List and the Constituency.

11. The Court was referred to clause 1.11 of the code and it reads thus:

> "*In the case of misconduct, the Bank undertakes to apply or execute and finalise the appropriate disciplinary action within 40 (forty) days of such misconduct having been brought to the attention of management, save for that alleged misconduct which involves police investigations and/or litigation which may take longer periods, as circumstances may demand."[sic]*
>
> (Record page 33)

12. The Applicant was dismissed on the point he had raised. The ruling of the chairman is dated 27th February 2018 and is marked AG. The

Applicant has further attached a transcript of the proceedings at the disciplinary hearing which is marked A1. The Applicant has moved an urgent application before Court. the Applicant has prayed for relief as follows:

"1. That the normal and usual requirements of the Rules of the above Honourable Court relating to service of process and Notices be and hereby dispensed with and that this matter be heard as a matter of urgency.

2. That the Applicant's non-compliance with the Rules of this Honourable Court regarding motion proceedings be and hereby condoned.

3. That pending finalization of this matter and/or an otherwise directive of this Honourable Court, the ongoing disciplinary hearing at the instance of the 1st Respondent and against the Applicant be and hereby stayed.

4. That the 2nd Respondent's ruling dated the 27th February 2018 be and hereby reviewed and set aside.

5. *That the 1st Respondent be and hereby declared time barred to institute the ongoing disciplinary proceedings against the Applicant.*
6. *That prayer 3 above operates with immediate and interim effect until such time that this application is determined by this Honourable Court.*
7. *Costs of suit.*
8. *Granting the Applicant any further and/or alternative relief."*

(Record page 3-4)

According to the Applicant the chairman erred both in law and fact when he ruled that the code is not applicable in the Applicant's case. The Applicant wants to have that ruling reviewed and set aside.

13. According to the Applicant the charge he is facing is regulated under clause 1.11 of the code. He reported the cash-shortage to the bank on the 2nd October 2017. The disciplinary hearing (which he is currently facing), should have been initiated and finalised within 40

(forty) days from the 2nd October 2017 (which is the date he says the misconduct was brought to the attention of management).

The 40 (forty) days lapsed on the 11th November 2017. The bank charged the Applicant with misconduct on the 26th January 2018. The bank had no authority to charge him with the said misconduct after the 11th November 2017. The disciplinary hearing should be set aside for being out of time and therefore irregular.

14. The Applicant added that the exceptions that are mentioned in clause 1.11 do not apply in his case – since the alleged misconduct did not involve police investigation or litigation. The Court has noted that the Applicant is correct in saying that the bank did not invoke the said exceptions in its defence. Consequently the exceptions that are contained in clause 1.11 of the code do not apply in the present matter.

15. According to the bank clause 1.11 of the code does not apply in the Applicant's case. The code is a sequel to a Recognition Agreement that was concluded between the bank and the union. The union

concluded the aforesaid agreement as a representative of its members who are employees of the bank – particularly those employees who are within the bargaining unit. The Applicant is in senior management and does not therefore fall under the bargaining unit.

16. It is not in dispute that the code is part of series of agreements that the bank and the union concluded in the year 1999 – as aforementioned. The provisions of the Collective Agreement as well as the code should be examined in order to analyse the extent to which they operate.

17. The following clauses in the Collective Agreement are pertinent to the question before Court.

17.1 *"1.2.5 All agreements signed with the Union shall be <u>binding to all members of the bargaining unit</u>."*

(Underlining added)

17.2 The Recognition Agreement recognises the authority of the union to conclude an agreement with the bank, that will bind only those employees of the bank – who are in the

bargaining unit. The employees of the bank who are not in the bargaining unit are consequently excluded from the provisions of the Collective Agreement.

17.3 *"10 The parties agree that the Disciplinary Code and Procedure annexed hereto marked annexure 1 shall regulate and be applied to all disciplinary matters arising within the Bargaining Unit of the Bank."*

(Underlining added)

(Record page 30)

17.4 The application of the code is limited to disciplinary matters which involve only employees who are in the bargaining unit. Clearly therefore, disciplinary matters which involve employees who are not in the bargaining unit, particularly those that are in the staff category, are regulated elsewhere but not in the code.

18. The Collective Agreement has defined a Bargaining unit as follows:

"2.1.6 Bargaining Unit shall mean all permanent employees of the Bank who are <u>employed in positions other than those listed in Annexure 5.</u>

Underlining added)

(Record page 28)

18.1 According to the Collective Agreement the bank has 2(two) types of employees. An employee is either in the staff category of the bank or in the bargaining unit, but not in both.

18.2 Annexure 5 to the Collective Agreement contains various categories, positions and ranks of employees who are classified as- staff. An employee who is classified in the staff category cannot simultaneously be in the bargaining unit and vice versa. By definition – the bargaining unit excludes the employees of the bank who are classified as – staff.

19. In his replying affidavit the Applicant testified as follows regarding his rank or status at the workplace:

"8.1 I only confirm that I am within the staff category of employees …"

(Record page 125)

19.1 During his argument – counsel for the Applicant was asked by Court to clarify the Applicant's status – and he declared that the Applicant was in the staff category.

19.2 As a result of the Applicant's testimony and the declaration by his Counsel it became superfluous for the parties to identify the actual rank or category in the staff list under which the Applicant's position is classified. Both Counsel confirmed that such an exercise will not be necessary.

20. According to the Applicant there is a Staff Association in existence at the workplace. The association is known as Swaziland Staff Association for Financial Institutions (hereinafter referred to as SSAFI). The Applicant stated that he affiliates to SSAFI. The Applicant's testimony reads as follows:

"14 It is common cause that, the 1st Respondent under the hand of Mr. Elvis Bhembe and in his capacity as the 1st Respondent's Staff Association Secretary General, wrote to the union (Swaziland Staff Association for Financial Institutions) [SSAFI] to which I somewhat affiliate and advised them of my disciplinary proceedings whose first day was on the 29th January 2018."

(Record page 9)

The Court has noted that the Applicant does not say that he is an affiliate of the union.

20.1 At the disciplinary hearing the Applicant is being assisted by 2 (two) representatives from SSAFI namely Mr Joshua Mndzebele and Mr Vusi Sibisi. The Applicant is not represented by the union. The disciplinary hearing has not been concluded yet.

20.2 The declaration by the Applicant that he is affiliated to SSAFI, and the fact that (at the disciplinary hearing) he is being represented by members of SSAFI confirms the fact

that – the Applicant is not a member of the union. It is stated in the Recognition Agreement that: the union represents its members who are the bank's employees and who are within the bargaining unit.

20.3 It is not in dispute therefore that the Applicant is in the staff category. What is in dispute is whether or not employees of the bank who are in the staff category are provided for in the code. The Applicant says they are provided for and the bank says they are not.

21. The Applicant has contended that the code applies in his case notwithstanding the fact that his position falls under the – staff category. The Applicant has given reasons for this contention. The Applicant has stated the following in support of his argument:

"*37. I humbly submit that, the Disciplinary Code and Procedure applies to all the 1st Respondent's employees regardless of the positions they respectively hold. This also finds fortification in Clause 5 of the Disciplinary Code and Procedure which states that;*

"[DISTRIBUTION OF DISCIPLINARY CODE]

The Disciplinary Code and Procedure shall be made available to all employees on engagement free of charge."

38. Holding a senior position certainly does not rob one the status of being an employee, I humbly submit. In the case of the 1st Respondent, all the people (like myself) who render their services to it in return for remuneration are none other than its employees on engagement."

(Record pages 14-15)

22. The Applicant's argument is that since the code demands that its copies be made available to all employees on engagement – that requirement meant that all employees of the bank are subject to the provisions of the code. Since he is an employee of the bank he is *ipso facto* entitled to benefit from the provision of the code notwithstanding the fact that he holds a senior position at the bank and therefore belongs to the staff category and not the bargaining unit.

23. A close reading of clauses 1.2.5, 2.1.6 and also 10 – of the Collective Agreement indicates the fact that when the bank and the

union signed the Collective Agreement – they intended to regulate disciplinary matters of a specific group of employees of the bank – which they called the bargaining unit. By necessary implication the parties to the agreement excluded the other group of employees which is referred to as – staff. When the bank and the union refer to '*employees*' or '*all employees'* – in the Collective Agreement or the code, it shall be taken that they refer only to those employees of the bank who are referred to as – the bargaining unit.

24. The law provides the following legal maxim as an aid in the interpretation of a contract:

> *"Inclusio unius est exclusion alterius [which] means the inclusion of one is the exclusion of the other.*
>
> …
>
> *This maxim is based on the conclusion that if the parties expressly mentioned one matter in their contract, they intended to treat other similar matters that were not mentioned, on a different basis.*

CORNELIUS SJ: PRINCIPLES OF THE INTERPRETATION OF CONTRACTS IN SOUTH AFRICA, Butterworths 2002, ISBN 0 409 00343 3, page 180.

25. The bank and the union further mentioned in clause 10 in the Collective Agreement that the code shall apply to all disciplinary matters involving employees within the bargaining unit of the bank. According to the principle that is stated above, when the parties referred to employees – in other portions of their agreement they meant only those employees who are in the bargaining unit.

26. Another helpful canon of interpretation provides the following:

> *"If it appears from the contract as a whole or from the background circumstances that the parties intended a certain word to have a specialized or technical meaning, such a specialized or technical meaning should be assigned to the word concerned."*
>
> (Underlining added)

CORNELIUS SJ (supra) page 176.

27. The bank and the union used the word '*employees*' in a specialized sense in their contracts to mean – employees of the bank who are in the bargaining unit. The word '*employees'* shall be ascribed the same meaning in other parts of the Collective Agreement, code or agreements that are annexed thereto.

28. Therefore, when the parties to the code referred to *'all employees'* in clause 5 of the code, they were referring to all employees of the bank - who are in the bargaining unit. By necessary deduction the Applicant was excluded from the provision of clause 5 of the code because he is not in the bargaining unit. The Applicant is therefore not an '*employee*' within the meaning of the Collective Agreement and the code, though he is an employee of the bank in the general sense.

29. The Applicant referred to another clause in the code which reads thus:

"1.14 Discipline shall be handled fairly, impartially, consistently, progressively and promptly."

(Record page 33)

The Applicant interpreted this clause to mean that it refers to all employees in the bank, those in the staff category and the bargaining unit.

30. The principle that is articulated in clause 1.14 of the code is consistent with the legal requirement that: every employee must be disciplined fairly in accordance with a fair procedure. As one authority states, that:

"*Consistency as an element of fairness has been emphasized in numerous discussions and awards."*

Le ROUX PAK et al: THE SOUTH AFRICAN LAW OF UNFAIR DISMISSAL, Juta, 1994, page 110.

30.1 Clause 1.14 in the code does not obliterate the distinction between employees who are in the staff category from those that are in the bargaining unit. That distinction has been clearly articulated by the parties in the Collective Agreement.

30.2 The purpose of clause 1.14 is to emphasize the need for the bank to subject its employees (as defined in the Collective Agreement and the code) to a disciplinary process that is fair consistent and impartial.

30.3 Clause 1.14 does not exist in isolation but must be read in conjunction with other clauses in the Collective Agreement especially clauses 10 and 2.1.6 which have been reproduced above in paragraphs 17.3 and 18 respectively.

31. Another reason that was advanced by the Applicant in support of his contention – is worded as follows:

"39. It is worth mentioning to this Honourable Court that, on or about the year 2014 and whilst based at the 1st Respondent's Mbabane Branch, I was on the strength of the now in issue Disciplinary Code and Procedure disciplined and subsequently given a Final Written Warning. I held the very same position I still hold even today. On this score, I

therefore humbly submit that, the 1st Respondent cannot be allowed to approbate and reprobate."

(Record page 15)

32. The 1st Respondent answered as follows the preceding allegation*:*

"I am not aware of the incident referred thereto and in the limited time available to me, I have not been able to investigate this allegation. I therefore do not wish to comment on the veracity of this assertion. I do however reaffirm that the legal position is that the disciplinary code that the applicant has referred to, does not apply to employees in his category."

(Record page 113 paragraph 26)

33. In the replying affidavit the Applicant responded by saying:

"29.1 The contents therein are denied, especially that the disciplinary code does not apply to me. I therefore put the Respondents to proof thereof.

29.2 I reiterate my Founding Affidavit's paragraph 39 as if specifically incorporated herein and further add that the 1st Respondent is the custodian of my entire employment record."

(Record pages 137 – 138)

34. The Applicant has failed to provide evidence to support his allegation concerning the alleged final written warning. There is no proof that the Applicant was charged under the code and that a final written warning was issued against him. The onus is on the Applicant to prove his allegation. If the Applicant was issued a written warning, he must be or have been - in possession of same. There is no explanation for the Applicant's failure to attach that written warning to his affidavit as an exhibit. The Applicant has failed to discharge that onus – which he is legally bound to discharge. Authority provides that:

"The burden of proof usually vests on the plaintiff or <u>applicant i.e. the party who asserts</u>"

(Underlining added)

CLASSEN C.J: DICTINARY OF LEGAL WORDS AND PHRASES, Vol.3, Butterworths, 1976 SBN 409 01892 9 at page 78.

35. The Applicant has argued further that, if the code does not apply in his case, that finding would mean that the bank has no set of rules with which it could charge the Applicant with misconduct. The Applicant stated the following:

"34. In fact, if the 2nd Respondent's finding would be anything to go by, it would virtually mean that the 1st Respondent has no tool with which to charge myself for any form of misconduct. This is just unthinkable and cannot just happen."

(Record page 14)

36. The purpose of a disciplinary code, inter alia, is to promote consistency, predictability and convenience in managing disciplinary matters concerning employees referred to therein. The absence of a disciplinary code at any workplace does not mean that employees (at that workplace) cannot be disciplined for misconduct. The employer is entitled to borrow common law principles that govern good and bad conduct and use them as a basis to correct or discipline bad behavior at the workplace.

36.1 Theft for instance, is an offence at common law. An employee who is suspected of having committed theft – can be charged with that offence even in the absence of a disciplinary code at that workplace.

36.2 Likewise the fact that the Applicant is not subject to the code does not mean that he cannot be charged with negligence – in relation to loss money – which is the property of the employer (the bank). The Applicant as well as his colleagues (in the staff category), is not immuned to a disciplinary process simply because there is no code yet at the workplace that applies to them. The Applicant's arguement accordingly fails.

37. Even if the Court had found that the Applicant was subject to the code (which is not the case) the Applicant's reliance on clause 1.11 of the code would have been met with certain difficulty. An extract of clause 1.11 reads thus:

"In the case of a misconduct, the Bank undertakes to apply or execute and finalise the appropriate disciplinary action within <u>40</u>

(forty) days of such misconduct having been brought to the attention of management …"

(Underlining added)

(Record page 33)

38. The 40 (forty) day stipulation starts operating from the day misconduct is brought to the attention of management. There must be a distinction between a report of misconduct and one of discrepancy or inconsistency.

39. The Applicant stated that he made a written report to management on the 2nd October 2017 about a cash – discrepancy he had noted in a particular ATM. The Applicant's report is annexed to the founding affidavit and is marked AE. An extract of annexure AE reads thus:

"*When reconciling the device in question … I discovered that there was a discrepancy of E200,000.00 cash shortage."*

(Underlining added)

(Record page 51)

40. According to the Applicant, he reported a cash – discrepancy to management and not misconduct. The Applicant explained further

the steps he took to investigate the source of the discrepancy as follows:

"The first initiative was to check whether ATM settlement figures were posted correctly into the ATM … account. My findings were that all settlements were posted correctly into ATM … account. The next thing I did … was to check if the debit entries on the ATMs were posted correctly or not. A debit of E720, 000.00 was discovered instead of E520, 000.00 that was received and indexed …. I then requested … (Team Leader Cash Centre) to accompany me to Mbabane branch to spot check their cash treasury.

…

I am still to investigate the entry of E200 000 in E200s that was withdrawn from vault by the branch …"

(Record pages 51 – 52)

41. The Applicant's report indicates additional steps the Applicant intended to take in his quest to get to the truth regarding the source of the discrepancy. The Applicant did not report misconduct to management. The Applicant had no idea then – that misconduct

had occurred. At that stage the Applicant entertained hope that the discrepancy could be a result of an error- which could be corrected.

42. For the purposes of clause 1.11 of the code: the date on which misconduct is brought to the attention of management – is the date when investigation is completed and a report is brought to management which contains a finding that an offence has been committed. That is the stage when the bank can institute disciplinary action against the employee who is implicated in the report. If the investigation were to reveal that the discrepancy is a result of a genuine error which can be explained or rectified, then at that stage – it cannot be said that misconduct had been established and/or brought to the attention of management. The 40 (forty) day rule regulates not the investigation itself but the process that follows the investigation.

43. The purpose of clause 1.11 of the code is to protect an employee (who is suspected to have committed an offence at the workplace),

from an undue delay in the prosecution of the charge/s against him/her. An employer will not be able to charge an employee with any offence unless the employer forms an opinion that misconduct has been committed at the workplace, and that opinion is a product of an investigation.

44. This Court is in agreement with the *ratio decidendi* of his Lordship Sibandze JP in the matter of PATRICK NGWENYA AND ANOTHER VS SWAZILAND DEVELOPMENT AND SAVINGS BANK SZIC case no. 536/2008 (unreported).

44.1 *"It is the Court's view that the thirty day period would start at the time that management forms the opinion that a misconduct has occurred … following the finalization of the … investigations."*

(At paragraph 16)

In the NGWENYA case the time limit was 30 (thirty) days yet in the matter before Court the limit is 40 (forty) days, the principle is however similar.

44.2 The Court may further refer to the ratio decidendi of his Lordship Nkonyane J in the matter of: BHEKIWE DLAMINI VS SWAZILAND WATER SERVICES CORPORATION SZIC case no.41/2006 (unreported). The Court dealt with a similar problem as follows:

"26. As regards the question of the applicability of the disciplinary code, the court will observe as follows; the code is not applicable to the applicant because she is not a member of the union at the respondent's place. The applicant argued that the code was applicable to her by virtue of article 3.1, which states that:-

'This code shall be equally applicable to all employees'

27. Employee in the code is defined as per the definition of employee as found in the Industrial Relations Act 1996. It is true that the applicant is an employee of the respondent. When a recognition agreement is entered into, the parties define [sic] which category of

employees it is going to apply to. In terms of article 2.4. All employees from Grade D3 upwards including secretarial staff were, however, excluded."

(At paragraph 26 – 27)

45. Subject to the exceptions, once the employer receives a report that misconduct has occurred, it has 40 (forty) days within which to charge and prosecute the employee concerned and also finalise the disciplinary hearing – failing which the disciplinary process shall be time barred.

46. According to the Applicant – he took the Polygraph test on the 21st December 2017 and was charged on the 26th January 2018. The Polygraph test was part of the investigative exercise at the instance of the bank. The date on which the investigation was completed is not stated in the answering affidavit. Even if it were to be said that the day of the Polygraph test was the day investigation was completed, still the 40 (forty) day rule has not been breached. The period 21st December 2017 and 26th January 2018 does not exceed 40 (forty) days. Even if the code was applicable in the Applicant's matter (which is not the case) still it cannot be said that the bank

failed to comply with clause 1.11 of the code. Consequently prayers 4 and 5 of the Notice of Motion fail.

47. It is appropriate at this stage to deal with preliminary points that were raised in the answering affidavit – especially since they require an understanding of the facts of the matter. The Applicant argued, inter alia – that the matter is prematurely before Court and that a case has not been made out for the Court to intervene in uncompleted disciplinary hearing. It is common cause that the disciplinary hearing has not been completed. The chairman made a determination that the Applicant is not in the bargaining unit of the bank and therefore the code does not apply in his case. The hearing is yet to proceed on its merits.

48. In the absence of agreed time limits regarding commencement and completion of a disciplinary hearing the principle of reasonableness would apply. Subject to the peculiar facts of each case the employer is legally obligated to commence and complete a disciplinary hearing within a reasonable time, after misconduct had been brought to its attention.

48.1 The chairman (2nd respondent) found at paragraph 2.6 that:

"… the Bank has instituted the proceedings against the employee within a reasonable time frame, no undue delays have been found on the facts at hand."

(Record page 57)

48.2 The chairman did apply his mind to the facts before him and issued his ruling. There is no justification in interfering with his ruling.

49. The general rule is that Courts do not intervene in an uncompleted trial or disciplinary hearing. The Courts have allowed intervention in uncompleted matters under very stringent circumstances. The need to allow an exception to the rule has been well expressed by the authorities as follows:

49.1 "*While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether mandamus or otherwise, upon the unterminated cause of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other*

<u>means be attained</u> … . In general however it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."

(Underlining added)

GARDINER AND LANSDOWN: SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE, Vol.1, 1957 Juta ISBN (not available) at page 750.

49.2 In the matter of WAHLHAUS VS ADDITIONAL MAGISTRATE, JOHANNESBURG AND ANOTHER 1959 (3) SA113 (AD), the Court re-stated the principle and stated as follows:

"By virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief by way of review, interdict or mandamus - against the decision of a Magistrates Court give before conviction. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any

precise definition of the ambit of this power, for each case must depend upon its own circumstances … and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained … .”

49.3 In the matter of SAZIKAZI MABUZA vs STANDARD BANK OF SWAZILAND LIMITED and ERROL NDHLOVU N.O. SZIC case no. 311/2007 (UNREPORTED) the Court confirmed that the principle in the WAHLHAUS case has been extended to apply in civil matters including labour relations matters.

49.4 In the MABUZA case the learned Judge President made the following instructive comment which this Court respectfully agrees with:

“*The intervention of the Court, though in the nature of a review, is based upon the Courts power to restrain illegalities and promote fairness and equity in labour relations.”*

(At page 13 paragraph 36)

49.5 Since the MABUZA case the principle has received wide application in the Courts in Swaziland such that the principle can now be considered settled.

50. The question before Court is whether or not the code is applicable in the Applicant's case. This question is foundational to the Applicant's defence at the hearing. It is imperative therefore that the question be determined before the hearing proceeds any further. If that question is not determined now, the Applicant's defence would be hamstrung and that event would subject the Applicant to a potentially irreparable harm. The Applicant has to know before the hearing proceeds any further; whether or not he can rely on the code in his defence. The Applicant's case therefore falls under the exception to the rule. Grave injustice would occur – if the Applicant is denied the use of the code in his defence, at the disciplinary hearing, and only be told after the completion of the disciplinary hearing that the code is actually applicable in his case. That question has now been determined as aforementioned.

51. The bank also challenged the time within which the application was brought to Court. the argument is presented as follows:

"*7 The ruling sought to be impugned, was delivered on 27th February 2018. The applicant has waited for a period of twelve working days before bringing this application on less than four hours' notice to the respondent. It is submitted that the abridgement by the applicant of the timelines provided for in the rules of Court is unreasonable and constitutes an abuse of court process. A litigant should not be allowed to unduly delay the institution of an application and thereafter subject the other party to unreasonable timelines in order to secure by default the interlocutory relief of staying the proceedings."*

(Record page 105)

52. It is common cause that the chairman delivered his ruling on the 27th February 2018 and that the Applicant filed the Court application on the 15th March 2018. The Applicant has explained the events that took place between the aforementioned dates, as stated below:

52.1 On the 2nd March 2018 the Applicant wrote to the chairman and requested a transcript of the record of the

disciplinary hearing. That transcript was made available to the Applicant on the 9th March 2018. The Court acknowledges that the transcript is a necessary supporting document in this matter – and that the parties quoted extensively from its contents in order to support their respective arguments.

52.2 On the 12th March 2018 the Applicant consulted his attorney. It transpired during the consultation that the Applicant had to furnish his attorney with certain relevant documents. Those documents were in the possession of SSAFI. The Applicant had arranged to meet his attorney again on the 13th March 2018.

52.3 The Applicant fell ill on the 13th March 2018. The Applicant has annexed to his replying affidavit a 'sick sheet' which was issued by Dr Ruta of Mkhiwa Clinic, which is dated 13th March 2018. According to the 'sick sheet' the Applicant was unfit for duty from 13th March 2018 to the 15th March 2018. The contents of the 'sick sheet' have not been challenged.

52.4 The Applicant deposed to a founding affidavit on the 15th March 2018. On the same day the Applicant's papers were received and signed by the Court Registrar and served at the bank. The matter was enrolled for the 16th March 2018.

52.5 According to the Applicant the alleged delay in having the matter enrolled was not willful and was further unavoidable.

53. The steps taken by the Applicant in having the matter enrolled (as listed above), are not in dispute. The Court is satisfied that the Applicant acted with reasonable haste in having the matter enrolled and that there was no undue delay. The matter is urgent and had to be enrolled as such. The reasons stated above to justify the intervention of the Court in an uncompleted disciplinary hearing – are equally applicable in support of the urgent enrolment of this matter. Prayers 1 and 2 of the Notice of Motion was granted. The bank's second point *in limine* also failed. Consequently that matter was enrolled as urgent and further determined on its merits.

54. Wherefore the Court orders as follows:

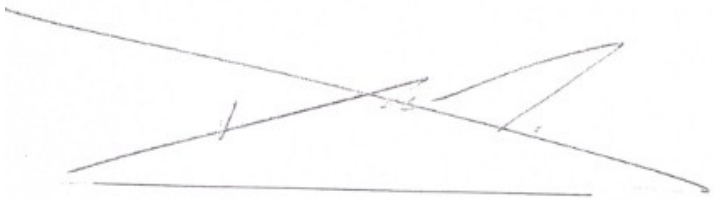
54.1 The prayer to have the chairman's ruling dated 27th February 2018 reviewed and set aside is hereby dismissed.

54.2 The prayer to declare the disciplinary hearing time barred is hereby dismissed.

54.3 The disciplinary hearing will proceed as determined by the chairman

54.4 Each party is to pay its own costs.

Members agreed



D.MAZIBUKO

INDUSTRIAL COURT – JUDGE

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