



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**Case No. 94/18**

In the matter between:

**BABSY EZROME MAVUSO**

**APPLICANT**

and

**SWAZI SPA HOLDINGS LIMITED T/A  
ROYAL SWAZI SPA HOTEL & CASINO**

**1<sup>ST</sup> RESPONDENT**

**JOHN DE-LANGE**

**2<sup>ND</sup> RESPONDENT**

Neutral citation : Babsy Ezrome Mavuso vs Swazi Spa Holdings Limited

t/a Royal Swazi Spa Hotel and Casino (94/2018)  
[2018] SZIC 35 (2018)

**Coram** : **L. MSIMANGO – ACTING JUDGE**  
(Sitting with Mr. P.S. Mamba and Mr. E.L.B. Dlamini Nominated Members of the Court)

Arguments Heard : 30 April 2018

Date Delivered : 25 May 2018

**Summary:** Application for an order interdicting the continuation of a disciplinary hearing and setting aside the order of the Chairperson of the 27<sup>th</sup> March 2018, refusing that the Applicant be represented by a legal representative at the disciplinary hearing. The Respondent argues that the nature of the application is that of a review, and the Applicant has failed to allege any legal ground for review or basis for seeking to set aside the 2<sup>nd</sup> Respondent's decision.

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## JUDGEMENT

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1. The Applicant under Case Number 94/18 launched an urgent application before the Court for an order in the following terms:-
  - (a) Dispensing with the normal and usual requirements relating to time limits, manner of service, form and procedure and enrolling the matter as one of urgency in terms of Rule 15 of the Industrial Court Rules.
  - (b) Condoning any non-compliance with the Rules of Court.
  - (c) That a **rule nisi** do hereby issue operating with interim and immediate effect calling upon the Respondent to show cause on a date to be fixed by the above Honourable Court why an order in the following terms must not be issued and made final.
  - (d) Interdicting and restraining the 1st and 2nd Respondents from continuing with the Applicant's disciplinary hearing in the work place, which was scheduled to be heard on the 5<sup>th</sup> April 2018, pending finalization of this application.

(e) That the decision of the 2<sup>nd</sup> Respondent of denying the Applicant a right to be represented by an external Attorney in the internal disciplinary hearing be set aside.

(f) That the Applicant be given a right to be represented by an external representative, including an Attorney, in the internal disciplinary hearing.

(g) Costs of the application.

(h) Further and/or alternative relief.

2. The Applicant is employed by the Respondent as a Sales Manager and this position is at Executive Management level, in short, the Applicant is a Senior Management employee.

3. On the 9<sup>th</sup> March 2018 the Applicant received a letter requesting him to attend a disciplinary enquiry to be held on the 19<sup>th</sup> March 2018, to answer to charges of misconduct.

4. On the charge sheet, the Respondent was informed of his right to be represented in the disciplinary hearing, however, that right was limited in a representative who is said to be a co-employee and not external representation.

5. The first sitting of the disciplinary hearing was on the 19<sup>th</sup> March 2018 and the Applicant attended alone, reason being that he had requested several colleagues in the workplace to represent him but they all refused.
  
6. The Applicant did not request one Derrick Mavuso who is the Hotel Manager for Lugogo Sun, because he is his relative and would obviously be conflicted in the matter, he also did not request Mr. Kevin Konnor because he is not an employee of the hotel but is an external independent Consultant. He also did not request Mr. Phinley Vilakati because he is the initiator in the hearing, likewise, Kobus Richter who is listed as a witness and also the Human Resources Manager who is also a witness for the employer.
  
7. The Applicant advises that he is a Senior Managerial employee and there are only a few competent employees who can be able and capable to represent him at Managerial level. He cannot be represented by any junior employee. Further, there is no Worker Representative Union or Staff Association in the 1<sup>st</sup> Respondent and as such there is no alternative option of being represented by a Union or Staff Association official.

8. On the 19<sup>th</sup> March 2018, the Applicant wrote to the employer and in particular the 2<sup>nd</sup> Respondent and stated that he required legal representation in the matter.
9. On the same date, 19<sup>th</sup> March 2018, the 2<sup>nd</sup> Respondent replied and stated that it is clearly indicated in the charge sheet, that the Applicant has a right to internal representation, and that the company does not allow an employee to be represented by an external person in an internal disciplinary hearing.
10. On the 22<sup>nd</sup> March 2018, the Applicant attended the disciplinary hearing with his Attorney. The Attorney was asked by the Chairperson to explain his presence in the hearing, and he moved an application for Applicant's legal representation in the matter, mentioning that even if the 1<sup>st</sup> Respondent has a workplace rule that limits representation only to internal staff members, but in all fairness Applicant's case should be viewed as one where exceptional and compelling circumstances exist to allow external representation.
11. The 2<sup>nd</sup> Respondent thereafter directed Applicant's Attorney to file a written application for legal representation not later than close of business

on the 23<sup>rd</sup> March 2018 and the initiator to reply thereto if the initiator would decide to oppose the application. The written application was filed by Applicant's Attorney on the 23<sup>rd</sup> March 2018, the initiator did not file any grounds for opposition, however, the 2<sup>nd</sup> Respondent dismissed the application. It is that decision that is being challenged in this Honourable Court.

12. In opposing the application the Respondent answered as follows:-

12.1 The advise that the Applicant is entitled to be represented at the disciplinary hearing by a co-employee is in terms of the Respondent's policy. Hence the Applicant is trying to go against the 1<sup>st</sup> Respondent's policy by filing this application, which if granted would be unfair and prejudicial to the 1<sup>st</sup> Respondent.

12.2 The disciplinary hearing conducted against the Applicant is an internal process, in terms of which, the Applicant is only entitled to be represented by a fellow employee. The position occupied by the Applicant is that of Sales Manager and there are a number of other Managers who are of his rank who can meaningfully represent him. That therefore vitiates the exceptional circumstances which is sought to be established by the Applicant for purposes of getting external representation. Therefore the Court ought to protect the 1<sup>st</sup>

Respondent's policy of having employees being represented by co-employees in disciplinary hearings and allow the disciplinary process to remain an internal process.

12.3 The initiator in the disciplinary hearing is a lay person, who has got no legal expertise and the Chairperson is also a lay person who also has got no legal expertise. Therefore, allowing the Applicant to be represented by an Attorney will be prejudicial to the whole process of the disciplinary hearing and to the Respondent in that the presence of an Attorney on behalf of the Applicant will imbalance the scales of justice.

12.4 The Applicant on the 27<sup>th</sup> March 2018 requested that he be granted a right to get a representative in any other company under the group, the request was granted by the 2<sup>nd</sup> Respondent, however, the Applicant now alleges it was the Respondent's idea. It is surprising that the Applicant then decided not to. Even though a representative from the group would still be external, but the 1<sup>st</sup> Respondent would have at least tolerated it solely because the scales of justice or expertise would still be balanced within the panel.

12.5 Thus there are no legal basis or grounds alleged by the Applicant for challenging the Chairperson's ruling, further, it has not been

alleged at all that the Chairperson failed to exercise his discretion judiciously

or committed a misdirection amongst other things. The Court has now to decide whether or not the Applicant is entitled to legal representation at the disciplinary hearing.

13. There is no general right to legal representation at a disciplinary hearing but there may be special circumstances where a fair disciplinary process requires that legal representation be afforded to the employee. In **Ndoda Simelane Vs National Maize Corporation Industrial Court Case No. 453/06** at page 3, the Court held that:-

**“Whether legal representation is indispensable to ensuring a procedurally fair hearing is a discretion conferred on the Chairperson of the enquiry. The Chairperson must exercise that discretion judiciously having regard to all the circumstances of the particular case”.**

14. In the present matter before Court, the Chairperson exercised his discretion by disallowing legal representation, and the Court is being



asked to overturn the decision of the Chairperson on the grounds that he did not exercise his discretion judiciously and fairly.

15. The 1<sup>st</sup> Respondent submits that the Applicant has failed in his own papers to prove valid reasons for approaching the Honourable Court for external representation by an Attorney, and that the application seeks to review the decision of the Chairperson. However, the Applicant has dismally failed to set out grounds for review in his Founding Affidavit. The submission therefore is that the Applicant has an alternative remedy and he has prematurely and inappropriately rushed to Court.
16. The attitude of the Courts has long been that it is inappropriate to intervene in an employer's internal disciplinary proceedings until they have run their course, except in exceptional circumstances.
17. Whether the Court will intervene depends on the facts and circumstances of each particular case. It is not sufficient merely to find that the Chairperson of the disciplinary enquiry came to a wrong decision. In order to justify intervention the Court must be satisfied that this is one of those rare or exceptional cases where a grave injustice might result if the Chairperson's decision is allowed to stand.

18. The possibility of the Court being over whelmed by a flood of ill-conceived or undeserving applications for relief cannot justify the Court refusing altogether to entertain applications for intervention in disciplinary proceedings – otherwise relief would be denied to those rare cases where a miscarriage of justice might otherwise occur.
  
19. In circumstances where procedural fairness requires that an employee be legally represented but such representation is denied, it would follow inexorably that the ensuing enquiry would be vitiated at its inception and that all subsequent phases of the disciplinary proceedings would suffer the same fate.
  
20. The duty resting on the Chairman of a disciplinary enquiry to exercise his discretion judiciously means that he is required to listen to the relevant evidence, weigh it to determine what is probable, and reach a conclusion based on the facts and the law. The Court cannot interfere with his decision where he has applied his mind to these matters, even if the Court disagrees with his conclusions on the facts or the law. No more is required of the Chairman that he should properly apply his mind to the matter. However, where he fails to properly apply his mind at all, to one

or more of the issues he commits a gross irregularity, because then he has failed entirely to perform the function which was required of him, he has failed to exercise his discretion judiciously. His decision will then be reviewable.

21. The Honourable Court was referred by both Attorneys during the argument, to the judgement of the Industrial Court in the case of **Ndoda Simelane Vs National Maize Corporation (PTY) Ltd (supra)**. This judgement sets out by way of guidance certain considerations to be taken into account by the Chairperson of a disciplinary enquiry in deciding whether legal representation or other external representation is indispensable to ensuring a procedurally fair hearing. One such consideration is expressed as “whether an employee of the organization can satisfactorily represent the interests of the Applicant in the hearing”.
22. Further more, the case of **Ndoda Simelane Vs National Maize Corporation** supra, gives guidance to the Court in that the following considerations should be taken into account by the Chairperson in deciding whether legal or other external representation is indispensable to ensuring a procedurally fair hearing:-

- 22.1 Whether a fellow employee of equal status to the Applicant is available to represent him;
- 22.2 If not, whether representation by a subordinate would be unreasonably degrading to the Applicant and/or hamper him in the presentation of his defence;
- 22.3 Whether an employee of the organization can satisfactorily represent the interests of the Applicant in circumstances where the Chief Executive Officer is the complainant;
- 22.4 In circumstances where external representation is appropriate, whether it is reasonable to restrict the Applicant's choice to an employee from another local parastatal;
- 22.5 Whether the charges are sufficiently complex or legalistic as to warrant the involvement of an Attorney;
- 22.6 Whether the charges may result in the dismissal of the Applicant;
- 22.7 Whether the Respondent will be unreasonably prejudiced if the Applicant is permitted a representative of his choice, and in particular a legal representative.

23. These considerations are by no means exclusive. The parties may raise other factors, and the Chairperson may exercise his discretion taking into account all issues which he may consider relevant.
24. The 1<sup>st</sup> Respondent's guidelines on disciplinary process and procedure afford the employee the right to be represented by a work colleague, and the Applicant argued for legal representation at the preliminary hearing inter alia, because he has a few work colleagues of equal status and those available are disqualified for one reason or another. The Applicant argues that at the hearing the Chairperson suggested that he be represented by one of the employees from the Swazi Spa Holdings group of Companies, within which there are colleagues at his level and above that are eligible to represent him.
25. The Court is of the view that colleagues employed by different corporate entities in foreign countries, albeit in the same group/industry can realistically not be considered as work colleagues.
26. The Applicant is justified in viewing the charges against him in a serious light, and regarding his employment as being in jeopardy if the charges

are proven against him at the hearing. It is not surprising then that he wishes to be properly represented at the hearing.

27. Furthermore, the Applicant is not eligible for membership of a union or staff association because of his status as an Executive Manager. It remains to consider whether he can be represented by a work colleague.
28. The pool of work Colleagues of equal status to the Applicant is limited to Senior Managers who are members of the 1<sup>st</sup> Respondent's Executive Committee. The Applicant has given reasons why none of his work Colleagues on Executive Committee can represent him. We find these reasons convincing.
29. The 1<sup>st</sup> Respondent submits that the duty to get a representative is upon the employee, and the Applicant did not fully apply himself in getting a representative. The need for an external representation is his personal choice, there are no exceptional circumstances established by the Applicant to allow legal representation.

30. The 1<sup>st</sup> Respondent submits further that, the disciplinary Panel has already been selected, and they are all lay persons, hence it would be improper to impose an Attorney on the disciplinary hearing.
  
31. The implication of 1<sup>st</sup> Respondent's submissions is that the Applicant does not need representation to the same extent as, say, a less sophisticated employee. This may be so, but the right to representation is a central aspect of fairness, in respect of unsophisticated employees and senior managers alike. Edwin Cameron in his article *The Right to a Hearing before Dismissal – Problems and Puzzles* (1988 ILJ p 147) remarked that, the benefits of representation go beyond the availability of technical advice and assistance to include moral support and objective guidance. As the proverb goes "a lawyer who represents himself has a fool for a client". The Applicant has a right to representation, and if such representation cannot be found within his place of employment, then other options must be considered.
  
32. It has been said that lawyers make the disciplinary process legalistic and expensive. They are accused of prolonging the proceedings and causing delays due to their unavailability. On the other hand, lawyers usually do

ensure a proper ventilation of the issues and the observance of fair procedure.

33. The charges against the Applicant appear to be straight forward but as is stated by John Grogan, “the Presiding Officer cannot know how the hearing will unfold, or what issues might come up. It may accordingly be perilous to hold at the outset that a matter is so simple that legal representation is not required”. (Grogan: Is there a Lawyer in the House? Legal Representation in Disciplinary Proceedings (2005) 21 Employment Law Part 3 page 8).

34. As it has been mentioned earlier on that, there is no general right to legal representation, but such representation should be permitted in exceptional circumstances where it is necessary to ensure a procedurally fair hearing. We are of the view that the Applicant be permitted legal representation if he is to have a procedurally fair hearing. We accordingly grant an order in the following terms:-


(a) The decision of the 2<sup>nd</sup> Respondent that the Applicant is not entitled to legal representation at the disciplinary enquiry is set aside.



(b) The Applicant is permitted to be represented by an Attorney at the disciplinary enquiry.

(c) No order as to costs.

The Members agree.



L. MSIMANGO  
ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. S.M. Simelane  
(Simelane Mtshali Attorneys)

For Respondent : Mr. K. Simelane  
(Henwood & Company)