



IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 282/18

In the matter between:

SOLOMON MAINE

Applicant

And

DHL SWAZILAND

1st Respondent

MPHILISI MTSHALI N.O.

2nd Respondent

Neutral citation: Solomon Maine v DHL Swaziland and Mphilisi Mtshali N.O.
(282/18) [2019] SZIC 09 (18 February 2019)

Coram: **S. NSIBANDE JP**

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

Heard: 25 October 2018

Delivered: 18 February 2019

JUDGMENT

[1] The Applicant approached the Court on urgent basis seeking an order in the following terms:

- “1. *Condoning the Applicant’s non compliance with the Rules of this Court as relate to service and time limits.*
2. *Reviewing and setting aside the oral decision of the 2nd Respondent issued on the 27th August 2018 and declaring same as null and void of no force and effects (sic);*
3. *Declaring the disciplinary action and process in its current form and as instituted by the Applicant’s subordinate without authority from 1st Respondent Superiors in the form of Regional Manager East and Southern Africa and Vice President Human Resources SSA to be invalid null and void ab initio.*
4. *Uplifting the suspension of the Applicant which was effected through the Notice of suspension dated 27th July 2018 and without authority from Regional Manager East and Southern Africa and Vice President Human Resources Manager SSA;*
5. *Prayer 1,2,3 and 4 should not be granted operate (sic) with immediate, interim effect pending finalisation of this matter on a date to be determined by this Court;*

6. *A Rule Nisi hereby issue calling upon the Respondents to show cause on the return date to be determined by the court why prayers 1,2,3,4 and 6 should not be made final;*
7. *Costs, of Application if opposed;*
8. *Further and or alternative relief.”*

[2] The application arises out of the following facts –

2.1 On the 19th April 2018, the Applicant accepted employment, as the Country Director of DHL, Swaziland. In terms of the offer of employment he signed, he was to report to the Regional Manager East and Southern Africa, one Morgan Uloko at the time.

2.2 On 27th July 2018, Applicant was suspended with full salary, pending the conclusion of an investigation into serious misconduct against him relating to sexual harassment allegations, victimisation of staff and urinating in public outside the DHL office. The letter suspending Applicant was signed by one Mfanafuthi Maphumulo, an Employee Relationship Manager at DHL Swaziland. It is disputed by the Respondent that the Employee Relationship Manager is subordinate to the Applicant, as alleged by the Applicant.

2.3 The Applicant's disciplinary hearing proceeded on 9th August 2018 where he was allowed legal representation by the disciplinary hearing Chairperson and if one Khulile Nxumalo was led in evidence. The matter was then postponed to 27th August 2018 for continuation of the disciplinary hearing.

2.4 Prior to the 27th August and by letter of 23rd August 2018, the Applicant challenged the disciplinary enquiry and the appointment of the chairperson of the disciplinary hearing. The basis of the challenge was that the Applicant *"is superior than the Human Resources Officers who charged him and the very same officer"* who are (sic) appointed you, honourable chairman of the hearing to preside over the Country's Director matter are subordinates to the office of the Country Director."

2.5 When the disciplinary hearing convened on 27th August 2018, the Applicant moved an application to be furnished with written authority for the Employee Relations Manager to convene the hearing and to take disciplinary action against him before the hearing could continue. The chairperson ruled immediately that the hearing should continue and that the Employee Relations Manager, Mr Mfanafuthi Maphumulo furnish the written authorisation that Applicant requested.

2.6 It is this ruling that Applicant seeks to challenge. He alleges that the ruling is tainted with irregularity in that the chairperson made his decision without having seen the letter sought by the Applicant. Applicant alleges that the chairperson failed to properly apply his mind to the question before him. It is for this reason that the Applicant launched the current application seeking amongst other prayers to set aside the oral ruling made by the chairperson on 27th August 2018.

[3] The application is opposed and in its answering affidavit the Respondents raised certain points in *limine*.

3.1 Urgency - The Respondent contends that the Applicant has not fulfilled the requirements of Rule 15 (2) (b) of the Industrial Court Rules of 2007 in that he has failed to allege why he can not be afforded redress in due cause. At argument of the matter the Respondent took issue with the time Applicant took to bring the application. It was submitted that the Applicant had it in mind in July 2018 that the Respondent had no authority to discipline him but waited until 11th September to move his application.

The point is misdirected. On the facts of this matter, Applicant rightly put his argument on the issue of the authority of the Employee Relations Manager to the chairperson of the disciplinary enquiry. That issue was within the

discretion of the chairperson to decide and the applicant was correct in waiting to place the matter before the chairperson and await a decision before approaching the court. Having received the chairperson's decision on the matter the applicant was then at liberty to approach the court. In our view there was no inordinate delay in the applicant launching the application after the chairperson had given his oral ruling. Having regard to the entirety of the founding affidavit particularly the paragraphs addressing urgency we find that sufficient averments are made by the applicant to persuade us to enrol the matter as one of urgency.

[4] The Applicant's complaint in a nutshell, is that the chairperson of the disciplinary enquiry failed to apply his mind to the complaint applicant placed before him that the disciplinary enquiry had been initiated by an employee subordinate to the Applicant without authority to do so and was therefore unlawful, and that his decision to proceed with the enquiry had fettered his discretion unreasonably and was therefore liable to be set aside. Applicant complained that if the chairperson's decision was allowed to stand, he would stand to suffer a great injustice being the potential of being dismissed without due process.

In response the Respondent argued that this court has no jurisdiction to interfere with an internal incomplete disciplinary inquiry. It has been long

established that the court has the jurisdiction to in incomplete disciplinary proceedings. That the Court does so reluctantly and in exceptional circumstances does not deprive it of that jurisdiction. In numerous judgements of this court, this Court has acknowledged and upheld the management prerogative to discipline employees. However, the Court has made it clear that it will act accordingly in those “*rare or exceptional cases where a grave injustice might result if the chairperson’s decision is allowed to stand.*”

(Ndoda Simelane v National Maize Corporation IC Case No. 453/2006; Sazikazi Mabuza v Standard Bank of Swaziland Limited IC Case No. 311/2007).

[5] In the **Sazikazi Mabuza** (supra) matter **Dunseith J.P.** stated that “*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 law....No more is required of the chairman than that he should properly apply his mind to the matter.*”

[6] In the present matter, the chairperson was asked to apply his mind to the following questions;

(i) was the Employee Relations Officer, Mr. Mfanafuthi Maphumulo, a subordinate of the applicant and if so,

(ii) did he have the requisite authority to discipline the Applicant?

[7] The chairperson, in dealing with the matter before him seems to have taken the view that Mr. Maphumulo was either subordinate to the applicant or his equal in rank and that he indeed needed to be authorised to institute the disciplinary proceedings against the Applicant. We say this because the said Mr. Maphumulo would need no authority to institute the disciplinary proceedings if he was in a superior position to the applicant and the chairperson would have said so. Instead the chairman decided that the disciplinary enquiry would continue and the Respondent was put to terms to furnish him with the requested authority. It is apposite to state that the Applicant had questioned the ability of the Employee Relations Manager to discipline him by letter dated 23rd August and indicated that he would raise the point at the hearing scheduled for 27th August 2013. The Respondent attended that hearing without the said authority and without, it appears, any document providing any sort of proof that the Applicant was not in a superior position to the Employee Relations Manager. The chairperson directed that the Respondent provide the authority on the following day – the 28th August 2018.

[8] The Applicant complains that it was irregular for the chairperson of the disciplinary inquiry to decide to proceed with the hearing without seeing the letter authorising Mr. Maphumulo to institute the disciplinary proceedings against him; that by so doing the chairperson had failed to properly apply his mind to the facts before him.

[9] The authority was eventually provided to the chairman and the Applicant in the form of a letter dated 28th August 2018 which, in part, reads;

“This letter serves to confirm that Mfanafuthi Maphumulo – ID number 7711285548082 – has been duly authorised in his capacity as Employee Relationship Manager to represent DHL Swaziland in the matter pertaining to Solomon Maina, Country Manager Swaziland.

[10] This letter quite clearly does not give Mr. Maphumulo the authority to institute disciplinary proceedings against the Applicant. It merely states that he may represent the Respondent in the matter pertaining to the applicant. No indication is made as to what that matter in which Mr. Maphumulo was given authority to represent it relates to. It is significant, in our view that the chairperson had not seen this letter when he decided that the disciplinary hearing should proceed.

[11] It is our view that the chairperson failed to apply his mind at all to the issue before him as raised by the applicant. The legitimacy of the whole disciplinary process was being questioned by the Applicant who was alleging that his right to procedural fairness was being compromised by the process undertaken by the Employee Relations Manager in that he had been investigated and was now being disciplined at the instance of a subordinate employee. To proceed with the hearing without that issue being decisively finalised points to us to a failure to apply his mind to the real issue.

[12] It may be proper to comment on an annexure to the Respondent's answering affidavit – annexure DHL 5. This annexure is a letter dated 29th August 2018 and appears to confirm that Mr. Maphumulo is delegated to institute disciplinary proceedings against the applicant. There is no indication that this letter came to the attention of the disciplinary inquiry chairperson **before** he made the decision to proceed with the hearing. While it delegates authority to Mr. Maphumulo to "*institute disciplinary proceedings including and not limited to suspending, issuing charges and representing DHL Swaziland in a disciplinary enquiry*" it does not appear to give him retrospective authority. The letter simply reinforces the view that the chairperson, even if he had seen this letter, could not have exercised his discretion judiciously in coming to

the decision to continue with the disciplinary hearing in the absence of the required authority.

[13] In the circumstances the court will come to the conclusion that the application succeeds. We point out however that the employer's right to discipline its employees remains alive and it can still do so provided procedural fairness is upheld. The application is upheld and the rule nisi issued on 14th September 2018 and varied on 20th September 2018 is confirmed. There is no order as to costs.

The Members agree



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr M. Ndlangamandla

For Respondent: Mr. P.K. Magagula