IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 317/2019

In the matter between:

SITHEMBISO NYAWO Applicant

And

MANANGA SUGAR PACKERS Respondent

Neutral Citation: Sithembiso Nyawo vs Mananga Sugar Packers [317/2019] [2020] *SZIC 03* [03 February 2020]

CORAM: **T.L. DLAMINI A.J.**
(Sitting with E.L.B. Dlamini and D.P.M Mmango Nominated Members of the Court)

Heard: 14 November 2019

Delivered: 03 February 2020

Summary – Labour Law – Employer substituting decision of external chairperson – Employee challenges power of Employer to do so.

JUDGEMENT

[1] In this matter the Applicant has brought an urgent application seeking the following orders:

1. Dispensing with the rules of this court relating to manner of service procedures and time limits and hearing the matter urgently.

2. That the Respondent be and is hereby ordered and directed to stop with immediate effect any intended rehearing of the Appeal that was concluded in the matter between the parties.

3. Setting aside any decision by the Respondent to reconstitute an appeal hearing of the concluded disciplinary hearing against the Applicant.

4. Ordering and directing that the decision of the chairperson of the Appeal, Maduduza Zwane be and is hereby confirmed.

5. Ordering and directing that the Applicant be and is hereby re-instated back to work with full pay and all benefits with immediate effect.

6. Ordering and directing that Applicant be paid back all arrear salary benefits and bonuses effective July 2019.

7. Costs of suit against the Respondent at a punitive scale.

8. Granting such further and/or alternative relief.

[2] The Respondent is opposing Applicant's application whereby an opposing affidavit was filed thereto and preliminary points of law were raised and pleaded over on the merits.

[3] The points of law and the merits were argued simultaneously and the matter was heard holistically.

[4] The facts in this matter are largely common cause with very few points of divergence.

[5]

5.1 A brief summary of Applicant's case is that the Applicant was previously employed by the Respondent as a maintenance foreman

since August 2009. During the month of April 2019 the Applicant was suspended from his employment by the Respondent and was charged with various counts of fraud and dishonesty. He was thereafter brought before a disciplinary hearing presided over by an external chairperson.

5.2 At the conclusion of the disciplinary hearing the Applicant was found guilty of all charges and a recommendation by the external chairperson was that the Applicant's services be terminated. Consequently the Respondent proceeded to terminate the Applicant's services.

5.3 Dissatisfied with the outcome of the disciplinary hearing the Applicant noted an appeal in terms of the Respondent's industrial relations policies, Rules and procedures manual. The Respondent duly appointed an external chairperson to preside over the Appeal.

5.4 The external chairperson of the appeal heard both parties and made his ruling which will not be reproduced herein and the full text of same is found at 75 and 76 of the Book of Pleadings dated the 29th October, 2019.

[6] The Respondent has raised the following points of law: viz;

6.1 That this honourable lacks the necessary jurisdiction to hear any

grievances without adherence to part VIII of the **Industrial Relations Act 2000** because the Applicant was dismissed by the Respondent upon acceptance of the recommendation of the chairperson of the initial disciplinary hearing.

6.2 That this honourable court being a creature of statute hence its jurisdiction is limited to **Section 8 of the Industrial Relations Act of 2000**. Therefore the court does not have inherent or original powers and only exercises powers that are conferred on it by statute.

6.3 The law regarding the jurisdiction of the Industrial court in the Kingdom of Eswatini has undergone a metamorphosis from what it was exposte facto the celebrated case of **Alfred Maia vs Chairman of the Civil Service Commission and others – High Court Case No. 1070/2015**. The Maia case ousted the jurisdiction of the Industrial court where there was non compliance with part VIII of the Industrial Relations Act.

6.4 With the advent of the following decision in the matter of **Ministry of Tourism and Environmental affairs and The Attorney General vs Stephen Zuke and Swaziland Environmental Authority - Supreme**

Court Case No: 96/2017, the Supreme court stated as follows at page 38 paragraph 37;

"The time has come for the Judgement in the Alfred Maia case to be set aside as having been wrongly decided. When the Industrial Court determines a labour dispute between an employer and an employee it does so within the ambit of its jurisdiction in terms of **Section 8 of the Industrial relations Act.** This does not constitute review proceedings.

In determining whether the dispute falls within the ambit of **Section 8 of the Industrial Relations Act,** the test is whether the dispute between the parties arises solely from a contract between employer and employee during the course of employment."

6.5 From the above stare decisis the Industrial court now has jurisdiction to hear and determine matters between an employer and employee where part VIII has not been followed with the caveat that the principle of fairness has not been followed.

6.6 In the light of the above it is the considered view that Applicant's

complaint is one of fairness. Hence this court is of the view that it does have jurisdiction to entertain the matter. Therefore Respondent's points of law on jurisdiction are hereby dismissed.

[7] The Applicant's complaint is found on paragraphs 13 and 14 of his founding affidavit where he states as follows;

7.1 "To my surprise and dismay on the 12th August 2019 the Respondent somersaulted on the chosen chairman of the appeal and sought to reverse his findings and totally bringing the disciplinary procedure a mockery of Justice. This I say because of the following; Mr Maduduza Zwane was unilaterally appointed by the Respondent without my involvement whatsoever. The Appeal Chairperson conducted the Appeal fairly until conclusion and pronounced his findings. This therefore meant the appeal was concluded there and there. The Respondent, out of the blue and without following procedure unilaterally sought to disagree with the findings of their own. This they do through a letter dated the 12th August 2019 without even approaching this court" (Annexure F.")

7.2 Annexure F is a letter from the Respondent to the Applicant wherein the Respondent decries the fact that Mr Maduduza Zwane "has acted outside the scope and powers of his mandate".

The said letter details how the Appeal chairperson acted outside the scope summarized as follows;

(i) He had made final findings as opposed to as per his letter of appointment being annexure "ZN2".

(ii) He has made findings which he termed procedural irregularities such as bias on the part of the disciplinary chairperson.

(iii) He proposed that a fresh disciplinary hearing proceed de novo before him.

(iv) He directed that the Respondent should re-instate the Applicant and place him on suspension with full pay pending the outcome of the Appeal hearing.

7.3 In the light of the above perceived irregularities the Respondent went on to inform the Applicant that the Respondent had resolved to commence the Appeal hearing afresh before a new and independent

chairperson.

7.4 The Applicant being unhappy with annexure “ZN2” wrote to the Respondent whereby he articulated his reasons as to why Appeal hearing should not start de novo. In a nutshell he asserts that the Appeal chairperson did not exceed the scope and powers of his mandate. Therefore the Maduduza Zwane ruling should stand.

[8]

8.1 Having listened to arguments presented by both counsel in this matter and having gone through the heads of argument the issue that has arisen is the following;

(i) Is the Respondent within its rights to substitute the decision of the Appeal chairperson?

8.2 It is settled law in our jurisdiction that in appropriate circumstances where principles of fairness dictate, an employer may, in the interests of Justice and fairness, intervene in disciplinary hearings and substitute an egregious decision by chairpersons. This was espoused by His Lordship Justice N. Nkonyane in the case of **Mbongiseni Dlamini and 4 others versus Swaziland Electricity Company – Industrial Court Case No. 138/2017**. Further Jurisprudence in the above regard is also

found in the following decided cases; **Lwazi Hlophe and others versus Swaziland Television Authority and Another – Case No. 09/2002 (ICA) Lynette Groening versus Standard Bank and Another – Case No. 2/2011 (ICA).**

8.3 Annexure D is the appointing instrument of Mr Maduduza Zwane as the chairperson of the Appeal hearing and nominee of the Respondent in accordance with clause 3.1.8 of the Industrial Relations Policies, Procedures, Rules and Regulations Manuel.

8.4 His mandate was made clear in the appointing instrument (annexure "D"), that he was required to furnish the Respondent with a recommendation as to his findings.

8.5 The ruling of the chairperson of the Appeal is found in annexure "E". The reasons for the decision are final in nature in particular uplifting the Applicant's dismissal and ordering a rehearing before him to cure the irregularities in violation of clause 1.4.3 of the Industrial Relations, Policies, Procedures, Rules and Regulations manual which states clearly that a rehearing of a disciplinary inquiry on appeal is prohibited. In the light of the fact that the Appeal chairperson was instructed to

make a recommendation of his findings to the Respondent, his ruling trespassed into the domain of the Respondent to discipline its employees.

8.6 The Industrial relations policies, procedures, Rules and regulations manual is silent on whether decisions of the external chairperson of the Appeal are binding on the Respondent. This lends credence to the fact the said chairperson was to make a recommendation of his findings to the Respondent.

8.7 In the case of **Gugu Fakudze versus Swaziland Revenue Authority and three others – Industrial court of Appeal of Swaziland – Case No. 8/2017**. It was found that the Disciplinary code vested the power of final decision in the chairperson of the disciplinary hearing. Further the chairperson was an internal chairperson and employee of the Respondent therein.

8.8 Further, the Industrial Court of Appeal stated as follows on paragraph 23 “Where exceptional circumstances exists, the code may be deviated from on condition the employee is notified of the deviation before the disciplinary inquiry starts so she can accordingly ascert her rights and

marshal her defence."

8.9 It is the Court's considered view that the Gugu Fakudze case is distinguishable from the present matter because in this instance the matter involves an external chairperson whose mandate was to make a recommendation on his findings to the Respondent, and not to make a final ruling which cannot be reversed.

8.10 In line with the Gugu Fakudze case at paragraph 23, the Respondent duly informed the Applicant of the difficulties it had with the external chairperson of the Appeal's ruling and how it intends to proceed with the matter to ensure that the rules of natural justice were followed.

[9] As stated above the findings of this court is that the external chairperson of the Appeal's ruling was egregious. Hence the Respondent acted within its rights to substitute his decision and order the appeal hearing to start before another external chairperson. No prejudice has been suffered by the Applicant to warrant this court to interfere with the disciplinary process as the principle of fairness was observed by the Respondent. In the premises the Application is dismissed and each party to bear its own costs.

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T. L. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant: Mr O. Nzima

For Respondent: Mr Z. Jele