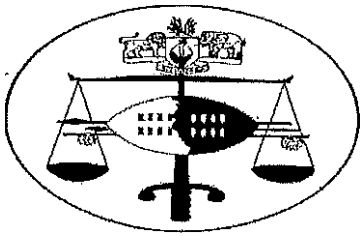

IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No. 248/2020

In the matter between:

THANDI ZIKALALA - KUNENE Applicant

And

STANDARD BANK OF ESWATINI LIMITED First Respondent

SKHUMBUZO SIMELANE Second Respondent

Neutral citation: Thandi Zikalala-Kunene v Standard Bank of Eswatini (248/2020) [2021] SZIC 12 (05 May 2021)

Coram: **NSIBANDE S. JP**

(Sitting with Nominated Members of the Court Mr. M. Dlamini and Mr. E.L.B. Dlamini)-

Last Heard: 12 March 2021

Delivered: 05 May 2021

JUDGMENT

[1] The applicant approached the Court by way of notice of application under a certificate of urgency seeking an order in the following terms:

1. *Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.*
2. *Condoning any non-compliance of this application with the rules of this Honourable Court in terms of Rule 14 and waiving the provisions of Part VIII of the Act, on grounds of urgency set out in the Founding Affidavit filed herewith;*
3. *Staying the Disciplinary Hearing of the Applicant instituted by the 1st Respondent pending finalisation of these proceedings;*
4. *A rule nisi hereby issue, pending finalisation of this matter, calling upon the Respondents to show cause on a date to be determined by this Honourable Court, why the following order should not be made final;*

   4.1 Reviewing and setting aside the decision of the 2nd Respondent refusing to recuse himself,·

4.2 The 2nd Respondent be and is hereby removed for acting (sic) as *the chairperson in the ongoing disciplinary hearing of the Applicant;*

4.3 The 1st Respondent be and is hereby ordered to appoint a *new Chairperson of the ongoing disciplinary hearing of the applicant;*

4.4 The disciplinary hearing of the Applicant shall commence de nova under the chairperson to be appointed in terms of prayer 4.3 above;

4.5 Declaring that the Applicant's disciplinary hearing is an unfair labour practice.

5. The 1st Respondent pays the costs of these proceedings on a *scale applicable to attorney and client;*

6. Such further and/or alternatively relief as *the Honourable Court may deem fit.*

[2] The matter was initially heard on the 30th September 2020 when certain points *in limine* were argued. **The** Court dismissed the points on 26th November 2020 and the matter thereafter appeared before us on 15th February 2021, when the merits of the application were argued.

[3] The applicant seeks to review and set aside the second respondent's decision not to recuse himself as chairperson of the applicant's disciplinary hearing. She further seeks the removal of the second respondent (the chairperson) as chairperson of the hearing and that he be replaced in that position. Finally she seeks a declarator that the applicant's disciplinary hearing is an unfair labour practice.

[4] The Applicant wishes that the second respondent's decision refusing to recuse himself be reviewed and set aside on the basis that the chairperson committed gross irregularities that vitiate the disciplinary hearing and support applicant's contention that he is biased against her. The first irregularity complained of is that the chairperson failed to apply the correct test that ought to be used in determining recusal application. It was submitted that the chairperson used a subjective test, in terms of which the applicant was asked to show the chairperson's actual bias instead of the objective test which requires a demonstration of reasonable apprehension of bias. The Court was referred to the matters of **Graham Rudolph v Mananga College IC Case No.94/2007** and **Swaziland Industrial Development Company v Friedlander and Others (1681/200600) [2006] SZHC 146** as authority in respect of the test for bias.

[5] In her effort to show that the wrong test for recusal was used, the applicant regurgitates paragraph 6.1, part of paragraph 6.2 and part of paragraph 6.3 of the chairperson's ruling dated 17th August 2020. It was submitted, on behalf of the applicant, that these paragraphs demonstrate that the chairperson used the subjective test as the appropriate test for his recusal, alternatively, that he sought that the applicant show actual bias.

[6] The record filed with the applicant's application shows that the applicant moved a recusal application prior to this one that is subject of this judgement. That application was dismissed by the second respondent by ruling dated 25th June 2020. In that ruling the second respondent stated that *"the fundamental principle is that the applicant for recusal must show that* a *chairperson has conducted himself in* a *manner that gives rise to* a *reasonable apprehension of bias in the mind of* a *reasonable person."*

The second respondent set out in great detail the test to be applied in an application for recusal (see paragraphs 10.5, 13 and 14 of the ruling on recusal application being annexure TZ5).

[7] Turning to the complaint that second respondent used the wrong test to decide on the recusal application, it seems to us that that submission is far fetched. The paragraphs complained of - 6.1 to 6.3 of the ruling of 17th August 2020 do not in our view show that the second respondent applied the wrong test. The paragraphs seem to us to simply state the factual grounds upon which the second respondent based his decision not to recuse himself. In our view there is nothing untoward with the quoted paragraphs particularly when one has regard to the ruling of 25th June 2020 which shows clearly that the second respondent was well aware what the test for bias is. As indicated above, the recusal ruling of 25th June 2020 forms part of the record filed in these proceedings and we are enjoined to consider the full record in coming to a decision in this matter. In light of that ruling, the assertion that the second respondent used the wrong test to come to the conclusion that he could not recuse himself is unsustainable. This is more so because the ruling itself does not reveal any subjectivity in the second respondent's ruling, in our view.

[8] The applicant's second pillar upon which this application leans is that she has established exceptional circumstances to warrant the

intervention of the court in her incomplete disciplinary hearing. The

circumstances are that - the first respondent was allowed to lead evidence via audio visual link (AVL) without any application being made and the parties being heard; that evidence via AVL may only be led upon proper application being made and the requirements thereon being met.

[9] The respondents deny that the leading of evidence by AVL was allowed without an application being made and the applicant being heard. They point out that the record shows that the chairman invited both the initiator and the applicant's representative to make submissions on the matter in January 2020.

[10] The Court, in its interim ruling of 26th November 2020, made a *prima facie* finding that the applicant had shown that the second respondent had been prepared to proceed with the hearing on the 19th February 2020 without having satisfied himself that indeed a ruling on the AVL evidence had been made on 15th January 2020; and that no application was made by the initiator for respondent's witnesses residing in South Africa to give evidence via AVL. The Court further states the following - *"If the court's prima facie view is not dispelled by the respondents at the hearing of the matter on the merits, and it is*

actually proved that the second respondent insisted in his subsequent rulings that the issue was debated and decided by him, then his decision to have the first respondent's witnesses give evidence via AVL without having heard the applicant's objection on the issue would result in a *miscarriage of justice that would not be countenanced by the court. Furthermore this would seriously compromise his impartiality."*

[11] In its answering affidavit the respondent points out that the issue of evidence being given by AVL was raised at the hearing of the 15th January 2020 as borne out at page 3 of the record where he says the following - *"Another alternative that the Chair may consider if you feel* so *inclined is to have them testify through closed circuit television. That would be less costly to us. It is just* a *matter of arranging time, we convene, they are on the screen, it is* a *live broadcast, they can be cross-examined. The chairman can have* a *look at their demeanour in the screen. That would be my submission in that regard Mr Chairman."*

It is apparent from the record that the applicant's representative was invited to respond to the initiator's submissions. At page 8 of the record the Chairman addressees the applicant's representative thus:

"There is that aspect where Mr. Mngomezulu says if I am *inclined or if those witnesses do come and testify and he decides that they should testify he talks about an alternative of using CCTV where we all see them, they testify, you cross examine them and I also see their demeanour and all that."*

The applicant's representative replies as follows: *"It all boils down to the same thing that they are now testifying except that it is through* a *different mode so it doesn't take away from the objection that we* ma*de...* "

After various submissions by the parties the Chairman eventually comes to a decision and this is captured from page 10 of the record where he says the following; *"We are talking about two documents which are written by two people who are based in South Africa and the documents contain information which will have to be tested by cross examination and those two witnesses will have to testify.* ***The manner in which they will testify will depend on the arrangements that will be made by the prosecution*** (my emphasis) .. *.and if it will be convenient and acceptable that they testify through either video link or skype or whatever way still that will be fine..."*

[12] From the exchange captured above, it appears to us that the applicant's representative was given an opportunity to address the chairperson on the possibility of the South African witnesses giving their evidence by video link. He did not pay much attention to that aspect of the issue being raised but was more concerned about the witnesses being allowed to testify in the first place which the applicant objected to.

[13] However the issue appears fo have been revisited at pages 12 and 13 of the record where the initiator asks to ascertain, through the chairman, *"from the respondent if they have got any objections to making arrangements for an audio visual link because it's less costly and less time consuming. It is* a *matter of knowing that on this day at this particular time they will be testifying through that audio visual link and we will pose questions and they can be testified through· audio visual link.'*

The Chairman then asks Mr. Simelane (for the applicant) if there would be any problem with that and his response is that he would give an answer at a later stage because *"we also need to verify certain things and look at implications."*

[14] It appears therefore, from the record that while the possibility of the South African witnesses giving their evidence by AVL was raised by the initiator and the applicant's representative was given an opportunity to respond to it, there was never any formal application for the use of AVL nor was there a formal ruling on the matter. The record reveals that the chairman left the matter in the hands of the initiator when he said that the manner in which the witnesses would testify would depend on the arrangements that would be made by the prosecution.

[15] It is not clear to us why the matter was revisited nor is there an explanation given for same. Our view is that the explanation given by the respondent regarding the ruling on evidence being given via AVL should dispel the Court's prima facie view that the second respondent had been prepared to proceed without satisfying himself that a ruling on the AVL had indeed been made on 15th January 2020. There is no doubt in our minds that Mr. Simelane was given the opportunity to address the issue of the AVL on two occasions and he chose not to do so. It appears to us that he was more preoccupied with preventing the witnesses from giving evidence and missed the opportunity to address the second respondent on the leading of evidence by AVL.

[16] The applicant further contended that it was irregular for the respondent to lead its Human Resources representative as a witness; that the Human Resources representative relinquished his duties to become a witness against the applicant whereas he has the duty to ensure fairness in the proceedings. The court was referred to the case of **Max Bonginkhosi Mkhonta v Royal Swaziland Sugar Corporation and Another (04/2019) SZIC08 (2019)** where the Court commented that the non-attendance of a Human Resources Representative was irregular and a violation of the disciplinary procedure which may render the disciplinary enquiry procedurally unfair.

[17] The respondent denies that there was no Human Resources representative present at the hearing and points out that the Human Resources Officer, Mr. Muziwandile Magagula had been disclosed as a witness from the beginning of the enquiry and that there was nothing untoward about his giving evidence on issues that were within his personal knowledge. In any event, it said, there was always a Human Resources Representative present at all of the applicant's hearings. Four officers are named by the respondent as having attended the hearings as the Human Resources representative. The applicant

makes no specific denial of these officers appearing in that capacity in the disciplinary hearings.

[18] It appears to us that the case of **Max Bonginkhosi Mkhonta v Royal Swaziland Sugar Association** (supra) is distinguishable on the facts from this matter. Firstly, it appears that the respondent did not do away with the Human Resources Representative and that there was always an such officer present to play that role. There was therefore no question of there being no officer to play the role of the Human Resource Representative at the applicant's hearing as appears to have been the case in the **Mkhonta** (supra) matter. We agree with the respondents that there is nothing sinister about a Human Resources Officer being a witness for the employer as long as he/she gives evidence on matters that are within his knowledge. In the circumstances and in keeping with the facts of this matter, we find that there was nothing untoward with the Mr. Magagula giving evidence at the hearing nor was there any irregularity committed because there was always a human resources representative present when the disciplinary hearing was in session.

[19] The applicant further prayed for the Court to declare the applicant's disciplinary hearing to be an unfair labour practice, based on the victimisation of the applicant. It was alleged that the employer's prerogative to discipline its employees was being abused by the respondent in this instance; that the disciplinary action against her arises out of a grievance she raised with her employer and that the employer's action was contrary to **Section 4** of the **Industrial Relations Act 2000** as amended in that it went against fairness and equity in labour relations. The basis of this prayer is that respondent has already determined the outcome of the disciplinary enquiry by first determining that applicant should be ousted from the bank and then issuing baseless charges in order to carry-out its decision to terminate her services.

[20] The respondent submitted that the concept of unfair labour practice was not a part of our law in so far as it is a statutory creation in South Africa from whence we have imported same; that the relevant legislation there sets out instances of unfair labour practice and that in the absence of similar legislation in this country the Court is unable to grant the declaratory order sought by the applicant.

[21] In the matter of **Ben M Zwane v Swaziland Government IC Case No. 17/2003,** this Court having noted that the **Industrial Relations Act 2000** does not specifically mention or describe unfair labour practice, came to the conclusion that the provisions of that Act vest this court with power to address issues of unfairness in labour matters (see **section 4(a)** and **{b)** of the **Act).** While the Court can address issues of unfairness in the work place it would not be proper for the court to import this statutory concept and to do so would constitute judicial overreach into the legislative arena, in our view. In any event the basis on which the declarator is sought is highly contested by the respondent and cannot in our view be determined on the papers. Oral evidence would have to be led on the incidences raised by the

. applicant as a basis for seeking the declarator. In the circumstances we come to the conclusion that the declarator cannot be granted.

[22] There remains the issue of the ruling made by the second respondent on 31st July 2020. The applicant submitted that the ruling was made without her being heard; that it is premised on the wrong facts and that

the adverse finings made against her now form part of the record and may be used to influence the second respondent's final decision on

the hearing. It was submitted that the *audi alteram partem* principle

was breached and that this constitutes a gross irregularity which vitiates the proceedings.

[23] The second respondent's ruling of 31st July 2020 arises from the non attendance of the applicant and her attorneys at the hearing of the 31st July 2020 following their non-attendance also on the 30th July. The initiator was in attendance on the 31st July and had, on the 30th July, indicated to second respondent that he was ready to attend despite being in Court. While the second respondent sets out the chronology of events leading to the non-attendance of the applicant and her attorneys, he makes no actual findings against the applicant and simply sets new dates for the hearing and sets out what may happen if either party fails to attend on the said dates, including the possibility of continuing the hearing in the absence of the party not in attendance.

Our view is that nothing untoward in the conduct of the second respondent with respect to this ruling nor does it make any adverse findings against the applicant or her attorneys.

[24] Having considered the parties' submissions and the authorities cited in their heads of argument and in argument we come to the conclusion that the overall conduct of the chairman in the disciplinary hearing is

not to be faulted. In our view various allegations were made against

the chairman regarding his conduct that is not borne out by the record. On the contrary it appears that it is the applicant who has decided to create her own version of events in order to avoid the disciplinary hearing. There is no basis for the application in our view and we accordingly dismiss the application. We make no order as to costs.

The Members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT OF ESWATINI

For the Applicant:	**Mr. Z. Hlophe (Magagula Hlophe Attorneys)**
For the Respondents:	**Mr. Z.D. Jele (Robinson Bertram Attorneys)**