IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT
MBABANE

Case No: 302/21

In the matter between:-

PETROS GCINA MNDZEBELE APPLICANT

And

YKK SOUTHERN AFRICA (PTY) LTD RESPONDENT

Neutral citation: Petros Gcina Mndzebele v YI<I(Southern Africa (320/21) [2021] SZIC 82 (10 November 2021)

Coram: **MSIMANGO, ACTING JUDGE**
(Sitting with Mr M.P. Dlamini and Ms N. Dlamini nominated Members of the Court).

Date Heard: **22nd OCTOBER 2021**

Delivered: **10th NOVEMBER 2021**

Summary: Applicant has brought an urgent application to comi seeking to interdict the employer from proceeding with a disciplinary hearing, for the reason that there is a matter currently pending before the Conciliation Meditation Arbitration Commission (CMAC) between him and his employer. The Applicant argues that the matter at CMAC has a direct bearing on the charges he is currently facing.

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I. The Applicant is Petros Gcina Mndzebele an adult male of Gebeni in the Manzini District, currently employed by the Respondent as a production supervisor.

2. The Respondent is YKK Southern Africa (Pty) Ltd, a company duly incorporated in terms of the laws of the country.

3. The Applicant brought an urgent application to comi seeking an order in the following terms:-

(a) Dispensing with the Rules of Court in respect of forms, manner of service and time limits and hearing the matter as one of urgency.

(b) That a Rule Nisi do hereby issue calling upon the Respondent to show cause why an order in the following terms should not be made final.

(b)(1) Suspending and /or staying the disciplinary proceedings brought against the Applicant by the Respondent pending an Arbitrator's Award on whether the Applicant is currently employed as a production Co-ordinator or Supervisor.

(c) That prayers (b) and (b1) operate with immediate effect pending finalization of this matter.

(d) Costs of application.

(e) Fmiher and/ or alternative relief.

4. The Applicant alleges that on the 05th October 2021 he was served with a letter of suspension from duty pending a disciplinmy hearing. The letter gave notice of a hearing date together with charges. One of the charges being gross insubordination.

5. The disciplinary charges faced by the Applicant emanated from the fact that he requested that his appraisal be delayed pending an Arbitrator's award, wherein his job title is being disputed.

6. The Applicant alleges that he is employed as a supervisor, and he has been doing duties of a supervisor contrary to the Respondent who is alleging that the Applicant was never promoted to be a supervisor but to be a production co ordinator.

7. On the O1st day of October 2021 the Respondent wanted to appraise the Applicant as a production co-ordinator and disregarding the pending award on whether the Applicant is a supervisor or a production co-ordinator. The Applicant argues that the Respondent's action have a direct potential of circumventing the pending dispute between the pmiies, and that the Respondent by trying to appraise the Applicant as a production co-ordinator will put the Applicant in an estopped position, and this is an unfair labour practice.

8. The Applicant contends that the Respondent is abusing its disciplinary prerogative over the Applicant, and that the Applicant is being victimized for standing up for his rights, should therefore the disciplinary proceedings continue and the Applicant be dismissed, the outcome of the arbitration which currently awaits an award will become moot and purely academic. The court's failure to intervene will result in an injustice that would not be addressed by any subsequent unfair dismissal remedy.

9. The Respondent argued that the employer has the sole prerogative of disciplining its employees, hence, the comi has no powers to intervene unless there are exceptional circumstances alleged. However, in this Application none have been alleged by the Applicant, and on that basis the application stands to be dismissed with costs. Fmihermore, the Applicant should appear before the Chairperson and make his objections and a decision be taken.

I 0. The question whether the Industrial Court has power or jurisdiction to interfere in incomplete disciplinary proceedings; by making such orders as an interdict to such proceedings or ce1iain declarations having the effect of interfering with a disciplinary hearing has been a subject of several judgements of this court. It has been widely agreed that, the comi should be slow in doing so except in exceptional circumstances. The premise for this comi being slow in interfering in incomplete disciplinary proceedings is a realization that discipline at work place is a preserve of management in exercise of its Managerial Prerogative.

11. In **Gugu Fakudze vs The Swaziland Revenue Authority and Others Industrial Court Of Appeal** Case No.08/2017, the position was expressed as

follows:-

"It is a trite position of the law that the court cannot come to the assistance of an employee before a disciplinmJ' enquiry has been finalized. The reason being that the court does not want to inte1fere with the prerogative of an employer to discipline its employees, or even to anticipate the outcome of an incomplete disciplinmJ' process. This would be the case even if the employee is in a situation where his pre- dismissal rights have been inji·inged or where there have been unfair labour practices. In such a case the court would only be able to grant relief after the fact. Conversely, the court has jurisdiction to interdict any unfair conduct including disciplinary action in order to avert irreparable harm being siiffered by an employee, put differently, where exceptional circumstances exist for the court to intervene it will".

12. The position is therefore settled in our law that in ce1iain exceptional circumstances, the comi may interfere in incomplete disciplinmy proceedings. That principle having been established, the question is whether in the present case such exceptional circumstances were established. In answering this question, we have considered the Applicant's founding affidavit at paragraph 16.1 the Applicant states that:-

"The chairperson of the disciplinary hearing Mr Fred Lybrant would not be in a position to determine the issues complained of due to the fact that he is also an employee of the Respondent , he is currently holding the position of Maintenance Manager in the Respondent. Even if I can raise these concerns before him, the fact that he is an employee of the Respondent affects his independence and he cannot exercise his discretion judiciously, as expected in particular from an independent chairperson".

13. At paragraph 18.2 he continues to say:-

> **"My matter is exceptional and it warrants the stay of my disciplinary hearing in that there is a pending matter before CMAC which awaits an Arbitrator's award which has a direct bearing on the charges** I am **currently facing".**

14. The Applicant in this matter suspects that the appointed Chairperson might be bias essentially because he is employed by the respondent. The relationship existing between the employer and the Chairperson is nothing more than a professional nature and not a personal or other nature. It is regulated and governed by professional and ethical standards. Hence, both the employer and the Applicant should expect that the disciplinary hearing will be conducted in a professional, just and fair manner.

15. In the case **Lynette Groening v Standard Bank Swaziland Limited and Another** Case No. 222/2008 (I.C) the court stated that:-

> ***"The notion of "institutional bias" allows a person to chair a hearing even where his connection with the institution concerned might arouse a suspicion of inevitable bias, provided there is no probability that he is actually biased. This kind of bias is accepted as necessarily built into the employment internal disciplinary process, whilst institutional bias normally arises when a mananger from within the employer's institution is appointed to preside over a disciplina1y hearing, it may also arise when an outsider is appointed".***

16. In the context of a disciplinary enquiry between an employer and an employee, it is an accepted principle that the proceedings, though required to be fair,

independent and just, are none the less informal proceedings. The employer is by law allowed to appoint any person, usually higher in rank to the accused employee within the same organization to chair the disciplina1y hearing. The employer may also decide to source the services of an external person to chair the disciplinary hearing.

17. It is necessary to point out that the cmui will not merely grant an application for recusal against a chairperson of a disciplinary hearing simply because a paiiy has raised it. It should be made clear that a pa1iy wishing to raise a complaint of bias has to do so with the Chairperson. The Chairperson is enjoined to consider such objection and make a decision.

18. It is clear from the founding affidavit that the Applicant has not raised the issues he is complaining of to the chairperson of the disciplinary hearing. It is the chairperson that has to make a finding. The Applicant should attend the hearing, wherein, he would be in a position to voice his grievances. If the reasonable suspicion-test were to be applied, most, if not all managers appointed to chair internal disciplinary hearings would be disqualified on the basis of institutional

bias.

19. In the case of **S.A Commercial Catering and Allied Workers Union vs Truworths 1999 (20) ILJ 639 LC,** the court had this to say:-

*"**Jt** is for the employer, not the court to decide whether the employee is guilty of misconduct. The court is loathe to usurp the discretion of the chairperson of disciplinary enquiries, particularly where they have not had the opportunity to exercise same".*

20. Professor Grogan in his book titled **"WORKPLACE LAW",** 9th Edition, at page 91 expressed the position as follows:-

> **"The power to prescribe standards of conduct for the workplace and to initiate disciplinary steps against transgressors is one of the most jealously guarded territories of managers everywhere, forming as it does an integral part of the broader right to manage, or managerial prerogative".**

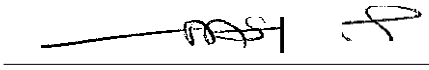
21. This excerpt does no more than underscore the significance of the employer's right to deal with disciplinary matters without interference from such structures as the comts, so as to enable him or her manage the workplace by ensuring adherence by employees to the standards of conduct set, thus ensuring that there is observance of discipline by the employees.

22. In the circumstances the court is accordingly of the view that the Applicant has not established any exceptional circumstance warranting the court's intervention, furthermore, he has not shown that the chairman of the disciplinary hearing would not be able to determine the issues raised in his founding affidavit.

23. By way of co1m11ent, the Applicant states in his founding affidavit that he was served with a letter of suspension on the 05th October 2021. The hearing date was set for the 08th October 2021, and it was postponed to the 11th October, where again it was postponed to the 19th October 2021. The postponements were at the instance of the Applicant who filed sick notes each time the hearing was to c01m11ence. At the time the application was brought to comt, the hearing had not yet commenced.

24. In the result the application is accordingly dismissed,.and there is no order as to costs.

The Members Agree.



L.MSIMANGO

ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicants : Mr Ginindza. (N.E. Ginindza Attorneys)

For Respondents : Mr N.D. Jele. (Robinson Be1iram Attorneys)