



**IN THE INDUSTRIAL COURT OF ESWATINI**

**HELD AT MBABANE**

Case No.11/2022

In the matter between:

**NOMCEBO MSIBI**

Applicant

And

**ESWATINI CIVIL AVIATION**

1<sup>st</sup> Respondent

**AUTHORITY SIMO SHONGWE N.O.**

2<sup>nd</sup> Respondent

**Neutral Citation:** Nomcebo Msibi v Eswatini Civil Aviation Authority and Another (11/2022) [2022] SZIC 11 (21 February 2022)

**Coram:**

**MSIMANGO-ACTING JUDGE**

*(Sitting with Mr. S. Mvubu and Ms. N. Dlamini - Nominated Members of the Court)*

**DATE HEARD:** 06<sup>th</sup> December, 2021

**DATE DELIVERED:** 22<sup>nd</sup> February, 2022

*Summary: The applicant has filed an application against the Respondents requesting the Court to overturn the chairperson's decision on the grounds that he did not exercise his discretion judiciously and fairly, by denying the Applicant permission to be represented by a union official notwithstanding that the charge sheet permitted her*

*to be represented/ assisted by a fellow employee or a representative of her choice.*

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## JUDGEMENT

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- [1] The Applicant is Nomcebo Msibi, an adult liSwati female, employed by the Respondent as an aviation Security officer and based at the Respondent's principal place of business in Matsapha.
- [2] The 1<sup>st</sup> Respondent is Eswatini Civil Aviation Authority (ESWACAA) a category a public enterprise established in terms of **Section 4 of Civil Aviation Act No. 10 of 2009**. A body' corporate, capable of suing and being sued in its own name and having its principal place of business in Matsapha, in the Manzini Region.
- [3] The 2<sup>nd</sup> Respondent is Simo Shongwe who is the manager of Aerodrome and Navigation Services in the 1<sup>st</sup> Respondent employ and is cited in his capacity as the chairperson of the disciplinary hearing.
- [4] The Applicant has instituted the present legal proceedings under a certificate of urgency for an order in the following terms:-
- 1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.*
  - 2. That a rule nisi do issue with immediate and interim effect, calling upon the Respondent to show cause on a date to be appointed by this Honourable Court, why an order in the following terms should not be final:-*

*2.1 That the decision of the 2<sup>nd</sup> Respondent's ruling that the Applicant is not entitled to be represented by an unrecognized union official at the disciplinary hearing is set aside.*

*2.2 That the Applicant is permitted to be represented by her union Eswatini Transport and Allied Labour Union (ESTRALU) at the disciplinary hearing.*

*2.3 That the contemplated disciplinary hearing set for the 1<sup>st</sup> February 2022 be held on a suitable date to the representatives of both parties.*

*2.4 That service upon the 1<sup>st</sup> Respondent in these proceedings be deemed to be sufficient service on the 2<sup>nd</sup> Respondent.*

*2.5 That **prayers 2.2, 2.3 and 2.4** above operate with immediate and interim effect pending finalisation of this Application.*

*3. Costs be awarded against the Respondents.*

*4. Further and/or alternative relief*

[5] The Applicant argues that on the 11<sup>th</sup> January 2022 she was served with a charge sheet, wherein she was accused of misconduct and she was summoned to a disciplinary hearing on the 20<sup>th</sup> January 2022. She was advised that she had a right to be represented/ assisted by a fellow employee, and/or an employee representative of her choice.

[6] On the 20<sup>th</sup> January 2022, the Applicant went to the disciplinary hearing with the Secretary General of her union. The 1<sup>st</sup> Respondent objected to the union's official representation and submitted that the Applicant should get someone internal.

[7] The chairperson issued a ruling in favour of the 1<sup>st</sup> Respondent, in the process denying the Applicant permission to be represented by a union

official notwithstanding that the charge sheet permitted her to be represented by a representative of her choice.

- [8] The Applicant argues that she cannot be represented by any fellow employees of the Respondent, for the reason that they are conflicted in one way or the other.
- [9] The Applicant submitted that the chairperson failed to use his discretion judiciously for the following reasons:-
- (i) The initiator being an admitted attorney cannot be faced by any layperson.
  - (ii) The charge sheet permits representation of choice.
  - (iii) The charges being theft of stock money makes any employee conflicted.
  - (v) The charge being theft is so serious that the Applicant may be dismissed if found guilty.

[10] Hence, the Honourable Court must review and set aside the decision of the chairperson.

[11] The Respondent submitted that there is a pending dispute at Conciliation Mediation and Arbitration Commission (CMAC) on the recognition of Eswatini Transport and Allied Labour Union (ESTALU). Thus the Court has on numerous occasions held that an employee is entitled to be represented by a union official in internal disciplinary proceedings, provided the collective agreement between the parties specifically provides for that.

[12] Furthermore, **clause 3.12 of the Disciplinary Code** and procedure of the 1<sup>st</sup> Respondent states that:

*"At each stage of the formal disciplinary process, individuals have the right, if they so wish to be accompanied by a fellow member of staff or by an appropriate representative of an independent trade union (recognised by ESWACAA). Individuals may not, however, be accompanied by any external person acting as a legal representative at any stage of the procedure."*

[13] It was not in dispute that the Applicant has a right to be represented at the hearing. The only question that arose was whether she could be represented by a trade union official, as she is not a trade union official or trade union bearer.

[14] The Respondent argued that a union/union official does not have *locus standi* to represent workers in the absence of a Recognition Agreement, and submitted that this principle should apply in equal force to internal disciplinary hearings. The case of **SMAWU and Others v LEO Garments (Pty) Ltd Case No. 387/2008 (IC)** was relied upon in support of this argument. In that case the Court held that:

*"It is (herefore clear to the Court that the JS<sup>1</sup> Applicant has no locus standi in judicio, firstly because there is no valid binding collective agreement between the parties."*

[15] In the present case there was no collective agreement or recognition agreement between the parties that was produced in Court. The Applicant herself admitted in her founding affidavit that the aspect of recognition between the parties has not been finalised, it is a pending dispute before CMAC.

[16] His the Court's view that unless express provision is made in a collective agreement for the right to representation by a union official at disciplinary hearings, an employee has no entitlement as of right to such

representation. An employee does however have a right to be represented by a fellow employee or a workplace representative, such as a shop steward or a works council representative.

[ I 7] It must also be mentioned that the disciplinary hearing is guided by a disciplinary code, specifically **clause 3.12**. Where the disciplinary process is governed by an agreed disciplinary code, then the parties should strictly comply with the provisions thereof (or the reason that it is binding on the parties).

[18] This principle was emphasized by the Court in the case **of Denel (Pty) Ltd v Voster (2004) 25 ILJ 659 SCA**, where it was held that:-

- (a) **The disciplinary code ,as incorporated int!) the contract of employment is binding between the employer and an employee.**
- (b) **Neither the employer nor employee is at liberty to disregard the obligations imposed in the code since those obligations have a contractual effect.**
- (c) **Where there is a breach of the code, the innocent party is entitled to enforce compliance by Court Order if necessary.**

[19] In simple terms, when parties agree on the provisions of the code, they also intend to be bound by its contents. That being the case, the Court is inclined to find that the chairperson was acting in terms of the disciplinary code which empowered him to refuse that the Applicant be represented by an external person at the hearing. In that case the decision of the chairperson is not subject to review.

[20] In this regard the Court aligns itself with the ruling in the matter of **Jiba v Minister of Justice and Constitutional Development and 16 Others ZALC JHB Case No. J167/2009**, where the Court held that:-

*"Urgent applications to review and set aside preliminary rulings made in the course of enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged."*

[21] In the circumstances we come to the conclusion that the Applicant has not made out a case for the intervention of the Court in her incomplete disciplinary hearing. The following order is hereby made:-

- (i) The application is dismissed.
- (ii) Each party is to pay its own costs.

The Members agree.

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**L. MSIMANGO**

**ACTING JUDGE OF THE INDUSTRIAL COURT**

FOR APPLICANT: Mr. B.K. Thwala  
Eswatini Transport and Allied Labour Union

FOR RESPONDENT: Mr. S. Masuku  
Howe Masuku Nsibande Attorneys