IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.273/2022

In the matter between:

MBUSO MDLULI Applicant

And

CHILDREN'S CUP ORGANISATION 1st Respondent
NCAMSILE MBINGO N.O 2nd Respondent
TAMARA BANDA 3rd Respondent

Neutral Citation	:	Mbuso Mdluli v Children's Cup Organisation and 2 Others, Case No. 273/2022
Coram	:	**MSIMANGO J** *(Sitting with Mr. S. Mvubu and Mr. E.L.B Dlamini - Nominated Members of the Court)*
DATE HEARD	:	11th October, 2022
DATE DELIVERED	:	11th November 2022

Summary : The Applicant has brought an application to court seeking an order restraining the Respondent from proceeding with any other process regarding the disciplinary hearing already instituted, on the basis that he raised a preliminary point as the hearing was proceeding that he be furnished with 3rd Respondent's work permit. However the point was dismissed by the Chairperson. The Applicant argued that the failure by the Chairperson to take into consideration the fact of having the Respondent participate in the disciplinary hearing without a work permit, is on its own an exceptional circumstance that renders the hearing a nullity.

JUDGEMENT

[1] The Applicant is Mbuso Mdluli an adult Liswati male of Ludzeludze area in the Manzini District, employed by the 1st Respondent as Operations Manager.

[2] The 1st Respondent is Children's Cup Organisation an Institution duly established in terms of the Laws of Eswatini, with limited capacity to sue and be sued in its own name, and its principal place of business situated at Mbekelweni arear in the Manzini District.

[3] The 2nd Respondent is Ncamsile Mbingo N.O an adult female Liswati cited in these proceedings as the Chairperson of the disciplinary hearing.

[4] The 3rd Respondent is Tamara Banda employed by the 1st Respondent and the Human Resources representative in the disciplinary hearing.

[5] The Applicant brought an urgent application to court seeking an order in the following terms:-

5.1 Dispensing with the usual forms and procedures as relating to time limits and service of court documents, that the matter be heard as one of urgency.

5.2 Condoning the Applicant's non-compliance with the Rules of this court as relate to service and time limits.

5.3 That a Rule Nisi do hereby issue calling upon the 1st Respondent to show cause on a date to be determined by the Honourable court why an order in the following terms should not be made final.

5.3.1 Staying the disciplinary hearing pending the final determination of the application for review.

5.3.2 3rd Respondent be declared an illegal worker/employee by virtue of not having a work permit.

5.4 Reviewing, correcting and setting aside the verdict of the 2nd Respondent of the 24th August 2022 and substituting same with the following order:-

5.4.1 Prayers 5.1, 5.2, 5.3, and 5.3.1 to operate with immediate interim effect pending finalization of the matter.

5.5 Declaring any further step that may be undertaken by the 2nd Respondent pending determination of this matter illegal.

5.6 Costs of application in the event it is opposed.

5.7 Further and/or any alternative relief.

[6] In support of his application the Applicant argued to the effect that:-

6.1 He is an employee of the 1st Respondent having been employed on or about 1st May 2021 and that the employment relationship between himself and the 1st Respondent is still subsisting.

6.2 He was suspended on or about the 14th June 2022, and was subsequently charged on the 5th August 2022. At the hearing, he raised a number of preliminary issues and points to wit duplication of charges and res judicata which were all dismissed, yet a clear reading of the charges, shows that all the charges emanate mainly from one incident that occurred on the 22nd March 2022, which he was disciplined for and issued with a verbal warning that was recorded.

6.3 He is alive to the fact that he has a right in law to seek redress from the court, in particular against the glaring unfair treatment at the hands of his employer in that, he raised the point of law that the 3rd

Respondent who is ground Operations Manager was without a work permit, hence, her participation in the disciplinary hearing was unlawful and therefore a nullity.

6.4 The 3rd Respondent investigated, appointed the Chairperson and set up the hearing, yet she is not permitted to work in the country.

6.5 He commenced challenging the authority of the 3rd Respondent who had no lawful right to work in Eswatini without authorization of some sort since she is without a work permit. The 2nd Respondent proceeded with the hearing despite the Applicant's request to be furnished with such work permit, prior to proceeding with the hearing. In that regard she denied the Applicant audience.

[7] The Applicant submitted that the Chairperson's failure to take into consideration the fact that having 3rd Respondent at the hearing without a work permit was on its own an exceptional circumstance that rendered the hearing a nullity. The refusal to even hear or determine the point also renders same an exceptional circumstance, warranting the court to intervene at this stage. Furthermore, there was no prejudice that was to be occasioned to the 1st Respondent had it produced the work permit. Lastly, that the Chairperson's failure to take into consideration in its reasoning process the application to be furnished with 3rd Respondent's work permit rendered the disciplinary hearing a sham and a fait accompli.

[8] The 1st Respondent is opposing Applicant's application whereby an opposing affidavit was filed thereto and a preliminary point of law was raised and pleaded over on the merits. The point of law and merits were argued simultaneously and the matter was heard holistically. The point of law is to the effect that the Applicant has failed to set out the jurisdictional

facts to warrant that this Honourable court intervenes in the ongoing disciplinary hearing. In this regard the 1st Respondent argued that:-

8.1 The Applicant's contention is that the decision was incorrect and unreasonable, this is an attack on an outcome rather than the decision making process. It is trite that the remedy of review is directed at the decision making process rather than the outcome. Accordingly, the application is bad in law as it purports to guise what should be an appeal as a review. In the circumstances the application should fail on that basis.

8.2 The second Respondent applied her mind to the matter in that she considered the submissions made by the Applicant and the reasons for the objection and ruled that the 3rd Respondent has been part of the hearing since inception. The objection especially after the evidence has been led is not genuine. The test is not whether she came to the right conclusion but whether she applied her mind to the issues that were before her for determination.

8.3 The Second Respondent delivered a reasoned ruling for declining the request and in the circumstances, the court does not have jurisdiction to intervene and interfere with the Second Respondent's conduct of the disciplinary hearing, particularly because, the disciplinary hearing is presently incomplete. It is an established principle that the courts are reluctant to intervene and interfere in incomplete disciplinary proceedings where no exceptional circumstances to warrant such intervention have been established. Hence it is submitted that in the present matter there are no exceptional circumstances that have been set out and the failure to demonstrate any exceptional circumstances is fatal to the

Applicant's case. The application ought to fail and be dismissed with costs.

[9] This court has always expressed itself in such matters that it has no power to interfere in incomplete disciplinary processes except where there are exceptional circumstances. This principle was canvassed by the court in the case of **STEPHEN NGOBENI V PRASA CRES AND OTHERS CASE NO. 514/2016**, where the court expressed the principle concerned in the following words:-

"The urgent roll in this court has become increasingly and regrettably populated by applications in which intervention is sought, in one way or another in workplace disciplinary hearings. The present application is a prime example, and is exacerbated by the preceding application to review and set aside advocate Cassim's ruling on recusal. To grant the applicant the final relief he now seeks would obviously put an end to that component of the review, as well as the referral to the CCMA. All of this is indicative of an attempt to use this court and its processes to frustrate the workplace proceedings already under way. The abuse goes further - what the Applicant effectively seeks to do is to bypass the statutory dispute resolution structures in the form of the CCMA and bargaining councils. One of the primary functions of these structures is to determine the substantive and procedural fairness of unfair dismissal disputes. Applicants who move applications on an urgent basis in this court for orders that effectively constitute findings of procedural unfairness, bypass and undermine the statutory dispute resolution system. The court's proper role is one of supervision over the statutory dispute resolution bodies, it is not a court of first instance in respect of a conduct of a disciplinary hearing, nor is its function to micro-manage discipline in work places. In

my view, the Applicant has no clear right to the relief that he seeks and the application stands to fail for that reason".

[10] The court in the same judgement stated further that:-

"Litigants should be warned that it is not often that this court will intervene in incomplete workplace disciplinary hearings and that similar abuses of the right to urgent relief that this court affords in appropriate circumstances, will be met with punitive orders for costs, including orders to the effect that the legal representatives concerned should forfeit their fees in respect of the application".

[11] It is important to also record that there are instances where the intervention by the court in incomplete disciplinary proceedings would be allowed. This would be in those matters where the basis for the intervention are so well articulated such that there are established exceptional circumstances in the matter necessitating the intervention. In **JIBA V MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS (2010) 13 TLJ 112,** the position was expressed in the following manner:-

"Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on an allegation of unfair dismissal and if necessary by this court in review proceedings under Section145".

[12] The Applicant suggests that the decision of the Chairperson was unreasonable, hence, his call for it to be reviewed. A matter would in law be unreasonable if there is no basis for the decision, if the decision does not meet the purpose of the law for the exercise of that power or where the decision leads to harsh, arbitrary, unjust or uncertain consequences. These facets of review were covered in the following manner in **STANDARD BANK SWAZILAND LIMITED V THEMBI DLAMINI, HIGH COURT CASE NO. 3420/2000:-**

"Where one is called on to judge whether a decision is unreasonable, the decision might be viewed from various perspectives. For convenience these have been grouped into three categories, and it is under these heads that the principles ..... will be expounded:

(i) ***Basis*** *– if a decision is entirely without foundation it is generally accepted to be one to which no reasonable person could have come to..... decisions will also be set aside when considerations that are deemed relevant have not been taken into account, or where irrelevant considerations that are deemed relevant have not been used to support the decision.*

(ii) ***Purpose and motive*** *– It is considered to be unacceptable for a public authority to use its powers dishonestly. Equally unreasonable, though possibly less reprehensible, is the use of power for purposes that are not contemplated by the enabling legislation. In both cases the decision and the action in consequence of it will be set aside.*

(iii) ***Effect*** *– reasonable people do not advocate a decision which would lead to harsh, arbitrary, unjust or uncertain consequences. Hence it would be unreasonable to act in a manner that would have consequences".*

[13] The Applicant has repeatedly argued that the Chairperson further failed to take into consideration in its reasoning process that the dismissal of his application to be furnished with the 3rd Respondent's working permit rendered the disciplinary hearing a sham and a fait accompli. Furthermore, the Applicant submitted that the Chairperson failed to apply her mind to the legal point raised during the disciplinary hearing. However, no facts supporting such a conclusion have been put forward by the Applicant. It is in fact noted that such phrases are at times used to suggest that the Chairperson came to a wrong conclusion than an irregular one.

[14] Dealing with a similar matter the court in the case of **LONDIWE MALAMBE V MUNICIPAL COUNCIL OF MBABANE AND ANOTHER, HIGH COURT CASE NO. 1777/2019**, held as follows:-

"..... If it used to depict his alleged coming to a wrong decision, that is a matter for appeal and not one for review which we are here about".

[15] It must be mentioned that there is a difference between a review and an appeal. A review is concerned with the regularity or validity of the decision, whereas an appeal is concerned only with the correctness of the decision. In so far as it is clear that the Applicant's contention is that the Chairperson of the disciplinary hearing came to an incorrect decision, that cannot be a matter for review but one for appeal. This would mean that the application before this court is founded on a wrong basis and can therefore not be sustained.

[16] Accordingly, the point of law raised by the 1st Respondent is hereby upheld on the basis that the Applicant has failed to establish exceptional circumstances necessitating the court's intervention.

[17] In **GUGU FAKUDZE V THE SWAZILAND REVENUE AUTHORITY AND OTHERS – INDUSTRIAL COURT OF APPEAL CASE NO. 08/2017**, the court held that:

"It is a trite position of the law that the court cannot come to the assistance of an employee before a disciplinary enquiry has been finalized. The reason being that the court does not want to interfere with the prerogative of an employer to discipline its employees, or even to anticipate that outcome of an incomplete disciplinary process. This would be the case even if the employee is in a situation where his pre-dismissal rights have been infringed 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 suffered by an employee. Put differently, where exceptional circumstances exist for the court to intervene, it will".

[18] On the merits the 1st Respondent argued that:-

18.1 The first hearing of the matter was on the 5th August 2022, the parties present at the hearing introduced themselves and further stated their roles in the hearing. The Applicant was also present and with him was a certain Mr. Gcina Hlatshwayo who introduced himself as the external legal representative of the Applicant. After the introductions there was only one objection from the parties particularly the First Respondent who objected to the external legal representation. Following the objection the Second Respondent after considering the submissions by the parties then allowed the external legal representation.

18.2 The First Respondent then proceeded to present its case, after the presentation by the First Respondent, the Applicant requested for

an adjournment to the 10th August 2022, however, the matter then proceeded on the 16th August 2022 wherein the First Respondent presented its evidence against the Applicant. During this proceeding, and on the 5th August 2022 still the Applicant had not raised any objection to any of the parties sitting in the hearing.

18.3 Following the adjournment on the 16th August 2022, on the 18th August the Applicant through its Attorneys then made a request to the Chairperson to be furnished with a work permit of the Third Respondent to render services for the First Respondent within Eswatini. This request was made via email to the Second Respondent, on the same date the Second Respondent responded to the request and advised that the objection and/or request had no basis as the Third Respondent has been part of the proceedings since the 5th August 2022, further that the hearing would continue on the 18th August 2022 as planned.

18.4 On the 18th August 2022 the Applicant attended the hearing and once again made the request to be furnished with the work permit. The Second Respondent once again declined the request and further advised that any objection to the presence of the Third Respondent's presence at the hearing should have been raised at the commencement of the hearing. Following the dismissal of the request the Applicant then proceeded to present its case in defence. After the close of the defence case the Second Respondent reserved her ruling.

18.5 On the 29th August 2022 the Second Respondent delivered her ruling in terms of which she found the Applicant guilty in some of the charges, following the findings of the Second Respondent, the

Applicant launched the present proceedings fundamentally seeking to set aside the findings of second Respondent.

18.6 What the Applicant seeks in this present application is not to challenge the decision making process but the decision itself. A review is not aimed at the decision itself but rather the decision making process. Where the decision maker has applied herself in reaching the decision, this court cannot intervene and set aside the decision even if the court were convinced it were to come to a different conclusion.

18.7 There is no irregularity which invalidates the decision of the Second Respondent, further it is not for the Applicant to question the status of the Third Respondent, for the reason that the grant of work permits and questioning thereof is the preserve of Governmental Authorities. Discipline is the prerogative of management not of an individual. The decision to discipline has been taken by management not an individual. Lastly, the Third Respondent has the necessary documentation to work in the Kingdom of Eswatini, and has been working for the 1st Respondent since 2011. The Third Respondent is also married to a local, the allegation therefore that she has no work permit is without any basis.

[19] At the outset, the court shall address the Applicant's argument that 3rd Respondent has no lawful right to work in Eswatini, or without authorization of some sort since she is without a work permit, hence this renders the hearing a nullity.

[20] The 3rd Respondent submitted that she has been at all times in the country legally, and has been working for the 1st Respondent since 2011. In this regard the court observes that this she could only do whilst she held a valid

pass/work permit. It is trite that if a person's employment is prohibited by law it is not possible for such a person to perform his or her work lawfully. However, people are employed despite failing to comply with statutory requirements. One such class of persons consists of unauthorized foreign nationals. This arises in circumstances where they are employed without work permits or where their work permits expire during employment. However, the labour court in **DISCOVERY HEALTH LIMITED V CCMA 2008 7 BLLR 633 (LC)** has affirmed that the absence of a valid work permit does not invalidate the contract of employment, thereby endorsing the fact that unauthorized foreign nationals are regarded as employees.

[21] Dealing with a similar matter the court in the case of **WILLEM JACOBS DE KOCK AND ANOTHER V U.S.A DISTILLERS (PTY) LIMITED IC COURT CASE NO. 97/2002**, held as follows:

"The Employment Act defines an employee under Section (2) as any person to whom wages are paid or are payable under a contract of employment .... The employment Act was specifically enacted to consolidate the law in relation to employment and to introduce new provisions designed to improve the status of employees in Swaziland. Nowhere does the Act make reference to the provisions of the immigration Act with respect to validity or otherwise of contracts of employment. The Immigration Act is for a different purpose and is enforced by different Government agencies, the Industrial Court is not one of those".

[22] The court aligns itself with the findings in the above cited cases and accordingly holds that the 3rd Respondent is an employee of the 1st Respondent, even if she was not in possession of a valid work permit at the time the disciplinary hearing commenced.

[23] In support of his application the Applicant cited the case of **SOLOMON MAINE V DHL SWAZILAND AND ANOTHER INDUSTRIAL COURT CASE**

NO. 282/2018, it is the court's considered view that this case is distinguishable from the present matter in that the Applicant was challenging the disciplinary enquiry on the basis that it was initiated by an employee subordinate to him, whereas the subordinate employee was without authority to do so and the proceedings were therefore unlawful. In the present matter the Applicant is challenging the participation of the 3rd Respondent in the disciplinary hearing on the basis that she does not possess a valid work permit, which is not the preserve of this Honourable court.

[24] It must also be pointed out that by the Applicant agreeing to proceed with the hearing after his point of law was dismissed by the Chairperson he acquiesced to the continuation of the proceedings. Therefore in law he cannot be allowed to challenge them.

[25] It is an established position of our law that a party cannot agree to abide by a judgement of a court only for him to turn around later on and challenge it. Such conduct is against the principle of acquiescence or peremption which is firmly entrenched in our law. The principles of the doctrine of acquiescence were canvassed by the court in the case of **BOTHA V WHITE 2004 (3) S.A 184** where the court stated as follows:-

"The doctrine of acquiescence is competent to halt cases where its application is necessary to attain just and equitable results. The test for inferred acquiescence is the impression created by the plaintiff or applicant on the defendant or respondent. It can be proven by some act, conduct or circumstances on the part of the plaintiff or applicant, for example, by the applicant's delay in taking action, so that the Respondent is lulled into a false sense of security. Then in such circumstances the enforcement of a right would cause a real inequity and the Applicant's conduct in issue amounts to unconscionable conduct".

[26] In **HARTLEY ROEGSHAW AND ANOTHER V FIRST RAND LIMITED AND ANOTHER, HIGH COURT CASE NO. 276/2020**, the court held that:-

"According to the Common Law doctrine of peremption a party who has acquiesced to a judgement cannot subsequently seek to challenge the judgement because he cannot be allowed to opportunistically endorse two conflicting positions or both approbate and reprobate, or to blow hot and cold. In other words, a party cannot be allowed to have his cake and eat it too. The conduct of the Applicant must be unequivocal and inconsistent with any intention to appeal".

[27] On the question whether the principle of acquiescence is only limited to appeals, that it to say whether it is applicable to matters whose decisions are being reviewed, the **HIGH COURT IN THE CASE OF COMMISSIONER OF LABOUR AND 3 OTHERS V JUDGE OF THE INDUSTRIAL COURT AND ANOTHER HIGH COURT CASE NO. 770/2016**, cited with approval an excerpt from **VENMOP 275 (PTY) LTD AND ANOTHER GLD, CASE NO. 14286/2014** where it was stated as follows:-

"Although the doctrine of peremption has its genesis in relation to appeals, it has been extended to applications for rescission of default judgements, and to the exercise of statutory authority. Although there appears to be no precedent for peremption in the context of an application to set aside an arbitration award, there appears to be no reason either in policy or principle, not to apply the doctrine of peremption to such a right".

[28] Coming back to the present matter, the court observes that the Applicant had specifically agreed to continue with presenting his defence in the disciplinary hearing after his request to be furnished with the Third Respondent's work permit was dismissed by the Chairperson, for the following reasons:-

28.1 The 1st Respondent submitted in his answering affidavit that on the 18th August 2022 the Applicant through its Attorneys made a request to the Chairperson and the First Respondent to be furnished with a work permit of the Third Respond to render services for the First Respondent within Eswatini. The request was made via email to the Chairperson. On the same date the Chairperson responded to the request and advised that the objection and/or request had no basis, as per annexure "MM3", being the email response dated 18th August 2022 attached to Applicant's application and reads as follows:-

"Good day Mr. Ndlangamandla

Your email is well received.

Please note that the hearing will continue today at 12:30p.m as scheduled.

Ms Tamara Banda has been in the hearing since the hearing began in August 5th 2022, any comments on her participation would have been submitted then. Today we continue with your outstanding presentation on charges.

Regards".

28.2 The Applicant submitted further that following the dismissal of the request the Applicant then proceeded to present its case in defence. After the close of the defence case the Second Respondent (Chairperson) then reserved her ruling, as per annexure "CCO" being the bundle of the minutes of the hearing attached to 1st Respondent's answering affidavit.

28.3 On the 20th August 2022 the Chairperson delivered her ruling in terms of which she found the Applicant guilty on some of the

charges, following the findings of the Chairperson the parties were then invited to submit their aggravating and mitigating factors. Dissatisfied with the findings of the Chairperson the Applicant launched the present proceedings fundamentally seeking to set aside the findings of the Chairperson. Annexure "MM3" an email addressed to all parties of the disciplinary hearing attached to Applicant's application reads as follows:-

"Good day all.

Kindly receive the attached report, and as agreed the defence team send mitigating factors and the initiating team send aggravating ones to me by end of day tomorrow, Tuesday 30th August 2022.

Regards

Ncamsile Mbingo

Chairperson."

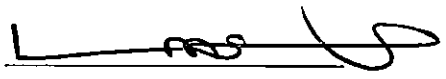
[29] The turnout of events as pointed out was consented to by the Applicant, notwithstanding the existence of whatever irregularities there may have been as alleged by the Applicant. However, he now seeks to challenge the disciplinary hearing his reason is that the failure by the Chairperson to furnish him with the 3rd Respondent's working permit rendered the disciplinary hearing a sham and a fait accompli. It is the court's considered view that the Applicant is not allowed in law to challenge the proceedings of the disciplinary hearing given that he had expressly given his defence thereto. Which means that he had acquiesced to the decision of the Chairperson dismissing the point of law raised in the disciplinary hearing, hence he can no longer challenge same in law.

In the result the application cannot succeed, consequently the court makes the following order:-

(i) The Application is hereby dismissed.

(ii) There is no order as to costs.

The Members agree.



L. MSIMANGO

JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT	:	**MR G. HLATSHWAYO** **MLK NDLANGAMANDLA ATTORNEYS**
FOR RESPONDENT	:	**MS. J. DLAMINI** **ROBINSON BERTRAM**