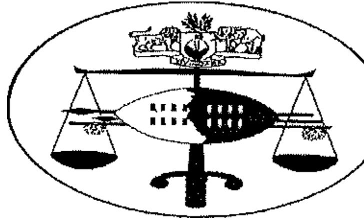

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 170/2021

In the matter between:

SWAZILAND UNION OF FINANCIAL INSTITUTIONS & ALLIED WORKERS 1st Applicant

CHARLES MTHETHWA 2nd Applicant

And

STANDARD BANK ESWATINI I st Respondent

LIMITED NOMFUNDO MYENI N.O. 2nd Respondent

Neutral Citation: Swaziland Union of Financial Institutions & Allied Workers and Another vs. Standard Bank Eswatini Limited and Another (170/2021) SZIC 46 (21 April 2022)

Coram: **V.Z. Dlamini -Acting Judge**
(Sitting with A. Nkambule and MT E Mtetwa - Nominated Members of the Court)

LAST HEARD: 23rd December 2021

DATE DELIVERED: 21st April 2022

Summary: Applicants instituted an urgent application seeking an order interdicting a disciplinary hearing against the 2nd Applicant pending the determination of a prayer for a declaratory order that the hearing was time-barred in terms of the Disciplinary Code.

Held: The Respondent's Disciplinary Code and Procedure binds the parties for whom it was concluded, however, in casu the disciplinary hearing is *not time-barred as the dies for commencing disciplinary action is reckoned from the day the misconduct is brought to the attention of the employer, in writing and the latter was still within the stipulated period when it initiated the process.*

JUDGMENT

INTRODUCTION

[1] The 1st Applicant is a trade union incorporated and registered in terms of the **Industrial Relations Act, 2000 (as amended)** and the 2nd Applicant, a member of the 1st Applicant is employed by the 1st Respondent, a financial institution registered in accordance with the laws of the Kingdom of eSwatini. The 2nd Respondent is the chairperson of a disciplinary hearing established to investigate disciplinary charges preferred against the 2nd Applicant.

[2] The Applicants instituted an urgent application in tenns of **Rule 15** of the Court on the 26th May 2021, seeking orders in the following tenns:-

I. *That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis.*

2. *That a rule nisi be and is hereby issued calling upon the Respondents to show cause why:*

   2.1 *An order should not be issued temporarily stopping the ongoing disciplinary hearing against the 2nd Applicant pending finalization of this matter in Court;*

   2.2 *That the rule nisi issued in terms of prayer (2.1) above operates with immediate interim relief pending finalization of this matter.*

3. *That an order be and is hereby issued declaring that the disciplinary hearing is time barred in terms of Clause 1.11 to 1.12 of the Collective Agreement entered into by and between the parties on the 2 pt October 2005.*

4. *That an order be and is hereby issued declaring that the 1st Respondent is precluded in terms of Clause 1.11.2 of the ,Collective Agreementfi"om proceeding with the hearing having reported a criminal case against the 2nd Applicant.*

ALTERNATIVELY

5. *That an order be and is hereby issued reviewing and setting aside as being grossly improper and/or unreasonable the decision issued by the 2nd Respondent in the matter on or around the 2?" April 2021.*

6. *Costs of application against the Respondents.*

7. *Further and/or alternative relief*

BACKGROUND FACTS

[3] The facts which are predominantly common cause are that on the 25th November 2020, the 1st Respondent became aware of an incident that caused financial loss to the business. Investigations were conducted by the 1st Respondent and on the 16th April 2021 it formed an opinion that a disciplinary offence had been committed. The findings of the investigations identified the 2nd Applicant as the employee that had committed the alleged misconduct.

[4] The 1st Respondent preferred disciplinary charges against the 2nd Applicant on the 16th April 2021 following further extensive investigations by the Royal Eswatini Police, which entailed the search and seizure of certain items at the 2nd Applicant's private residence. At the commencement of the disciplinary hearing on the 27th April 2021, the pt Applicant acting on the 2nd Applicant's instruction raised a preliminary point that the disciplinary process was time barred as thirty-five (35) days had lapsed since the pt Respondent became aware of the issue.

[5] After hearing arguments of the preliminary point, the 2nd Respondent dismissed it. Dissatisfied with the 2nd Respondent's ruling, the Applicants appealed, but the 1st Respondent declined to convene an appeal hearing to determine a preliminary ruling and advised the Applicants that the disciplinary hearing would resume on the 24th May 2021; hence the Applicants lodged the urgent application.

[6] A reading of the Court's file reveals that since the matter was enrolled on the 26th May 2021 until it was argued on the 23rd December 2021, the parties have never argued for the grant of a *rule nisi,* but at the same time it appears that the disciplinary hearing was stayed by the Respondent pending the determination of the matter by the Court. In the Court's view, prayers **1, 2, 2.1** and **2.2** captured at **paragraph 2** above have become academic and as such, the Court will not determine the preliminary points that were raised by the Respondents.

[7] In our view, the determination of the remaining prayers **3, 4** and **5** tuins on a proper interpretation of **Clauses 1.11, 1.11.1, 1.11.2, 1.11.3, 1.12, 1.13** and **2.1** of the Disciplinary Code **(the Code)** annexed to Collective Agreement and found on pages **54 to 78** of the **Book of Pleadings.**

ARGUMENTS

[8] The Applicants argued that since it was common cause that the matter involving the 2nd Applicant was reported to the police for criminal investigations, the police subsequently exonerated the 2nd Applicant from criminal liability; consequently, in terms of **Clause 1.11.2 of the Code** the 1st Respondent was prohibited from instituting disciplinary proceedings against him.

[9] It was also submitted by the Applicants that there was no debate that it took the 1st Respondent five (5) months to prefer disciplinary charges against the 2nd Applicant from the date the 1st Respondent became aware of the incident

giving rise to those charges. Accordingly, the disciplinary hearing was in breach of **Clause 1.11,** which provided that disciplinary action must be commenced and completed within thirty-five (35) days of the employer becoming aware of the incident giving rise to the disciplinary charges.

[10] The Applicants further contended that the provisions of **the Code** were not only peremptory, but were also binding on the parties; as such the disciplinary hearing against the 1st Applicant was unlawful and improper. In the premises, the 2nd Respondent's ruling dismissing the Applicants' preliminary points was susceptible to 'being reviewed and set aside.

[11] Conversely, the Respondents submitted that to properly interpret **Clause 1.11** of **the Code** a purposive approach must be applied by the Court and the question as to when does the conduct come to the attention of the employer has already been answered by the Court. The Court in **Thembinkosi Fakudze v Nedbank Swaziland Limited (76/2018) [2018) SZIC 27** and **Patrick Ngwenya and Another v Swaziland Development and Savings Bank (IC Case No. 536/2008),** held that the date on which misconduct is brought to the attention of management is the date when investigations are completed and a rep01t brought to management containing a finding that an offence had been committed.

[12] It was also argued by the Respondents that for the Applicants to succeed in the declaratory orders sought, they must demonstrate that they had a right not to be disciplined and they may do so by showing that the disciplinary process

contravened **the Code** in that it was initiated outside the thirty-five (35) days, which was not the case.

[13] The Respondents further submitted that the relevant provisions of **the Code** were merely directory as opposed to being peremptory and in any event, any presumption of waiver of the employer's prerogative to discipline its employees could not benefit the Applicants as the 2nd Applicant delayed the conclusion of the investigations by giving misleading information to the investigators. Consequently, the disciplinary hearing against the 2nd Applicant was lawful and valid.

[14] Lastly, the Respondents contended that the police had not exonerated the 2nd Applicant and in any event the police were investigating a different criminal offence altogether as such the provisions of **Clause 1.11.2** did not apply.

ANALYSIS

[15] It is trite law that Courts are loathe intervening in uncompleted disciplinary enquiries, but will do so in exceptional circumstances where grave injustice might result if the disciplinary hearing chairperson's decision is allowed to stand. See: **Graham Rudolph v Mananga College (IC Case No. 94/2007)** and **Sazikazi Mabuza v Standard Bank and Another (IC Case No. 311/2007).**

[16] Regarding the requirements for granting declaratory orders, the Supreme Court in **Martha Nokuthula Makhanya and Others v Sarah B. Dlamini (23/2016) [2017] SZSC at paragraphs 32, 39-40** observed as follows:

> *"The Roman Dutch Law sanctioned declaratory orders only where there has been an interference with the right sought to be declared .....It is a trite principle of our law that the Courts in exercising their jurisdiction to determine declaratory orders should have regard to two factors. Firstly, the applicant should be a person interested in an existing, future or contingent right or obligation. Secondly, the particular case before Court should be a proper one for the exercise of the judicial discretion. Whatever the position of the law in South Africa may be, it is clear that in this country that Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, and not to pronounce upon questions which are abstract, hypothetical or academic or to advise upon differing contentions of law."*

[17] The proper approach to interpretation was espoused in the celebrated case of **Natal Joint Municipality Pension Fund v Endumeni Municipality (910/2010) [2012] ZASCA 13 (15 March 2012) at paragraph 18,** in the following terms:

> *"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provifions in the light.of the document qs.,a whole and the circumstances attendant upon its coming into existence.*

Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is *directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument* is *to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

[18] Now, **Clauses l'.11, 1.11.1, 1.11.2, 1.11.3** and **1.11.4** read as follows:

"All disciplinary action shall be taken and finalized (this including the issuance of the sanction) as soon as possible after the misconduct has been brought to the attention of management, in any case not later than thirty-five calendar days. <u>This must be clearly understood not to mean</u>, <u>once management is of the view that a hearing must be conducted, but</u> <u>once the issue has come to the attention ofmanagement, in writing.</u>

The Employer must adduce evidence as to when the matter came to the attention of management, with regard being had to the provisions of Article 1.7 above. However, the thirty-jive calendar day period refers to matters dealt with by management. Matters such as those involving police investigations and/or litigation may take longer periods as circumstances may demand.

Further, where the Bank maintains that the police were involved and their report exonerates the employee, no charge against the employee in respect of that offence, shall be subject to an enquiry.

Where the Bank makes any reference to the police report and does not make it available to the employee or his Union as the case may be, such report shall be disregarded.

Where an offence is not the subject matter of a police investigation, it shall be treated as such and no reference shall be made to any subsequent police investigation. " [Emphasis added].

[19] Before we proceed to interpret **the Code,** we agree with Mr. Dlamini that its provisions are binding on the parties and **Clause 1.11** in particular, is mandatory. See: **Freeman Luhlanga v Standard Bank Swaziland Limited (156/2021).** Now, the purpose of similar provisions to **Clause 1.11** was propounded by the Court in **Thembinkosi Fakudze v Ned bank Swaziland Limited (supra) at paragraph 43** as follows:

"The pwpose of clause 1.11 of the code is to protect an employee (who is suspected to have committed an offence at the workplace), from an undue delay in the prosecution of the charge/s against him/her. An

employer will not be able to charge an employee with any offence unless the employer forms an opinion that misconduct has been committed at the workplace and that opinion is a product of investigation. "

See also: **Patrick Ngwenya and Another v Swaziland Development and Savings Bank (supra)**

[20] We embrace the above pronouncement as correct and apply it with equal force to the provisions of **Clause 1.11 of the Code** in the present case despite the extended underlined portion of **the Code at paragraph 18** above. Regarding the underlined portion, we agree with Mr. Jele that the term *issue* must be taken to mean *misconduct.* A distinction must be drawn between an employer forming an opinion that misconduct occurred and that employer subsequently taking a decision that the employee responsible should face a disciplinary hearing; these are connected yet distinct phenomena.

[21] Conversely, if Mr. Dlamini's interpretation were correct, then the employer's prerogative to investigate any incident that poses a business risk would be severely curtailed. The Applicants' interpretation is therefore unreasonable, insensible, and unbusinesslike. It would also lead to an absurdity. For instance, to c9mply with the provisions of the clause as postulated by the Applicants, the 1st Respondent would have to assume without conducting proper investigations that the incident or discrepancy was caused by misconduct and further assume that every employee is liable then through a process of elimination try to identity the real culprit.

[22] Besides, the Applicants' approach conflicts with **Clause 2.1.1** which provides that a manager must investigate all alleged disciplinary issues to establish the nature and extent of the offence and where possible, the cause thereof. Where a charge is laid as a result of investigations, the documentation (Investigation Report) developed in that regard shall be made available to the employee or his/her union. This provision is consistent with the requirement that the *issue* or *misconduct* has to be brought to the employer's attention, <u>in writing;</u> this presupposes that the employer forms its opinion after perusal of the investigation report.

[23] The Applicants also rely on the prov1s10ns of **Clause 1.11.2** quoted in **paragraph 18** above. During argument, the Court drew Counsel's attention to the inherent deficiencies that hindered the Court from determining this issue. None of the parties disclosed the particulars of the charge/s that the 2nd Applicant faced. Secondly, no investigation repmt from the police was annexed in the Applicants' Founding Affidavit. These facts and document are imperative in determining whether the police exonerated the 2nd Applicant from the same offence for which he is charged at work.

[24] In the premises, the Comt finds that the 2nd Respondent applied her mind to all relevant considerations and did not commit any irregularities when exercising her discretion.

<u>CONCLUSION</u>

[25] Based on the above reasons, the Court would dismiss the application.

[26] In the result, the Court orders as follows:

[a] The application is hereby dismissed.

[b] Each party to pay its own cost

The Members agree

V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANTS : Mr. B.S. Dlamini
(B.S. Dlamini and Associates)

FOR RESPONDENTS : Mr. Z.D. Jele
(Robinson Bertram)