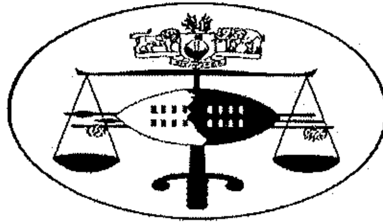

IN THE INDUSTRIAL COURT OF ESWATINI

HELD IN MBABANE **Case No 105/2021**

In the matter between:

NKOSINATHI AUBREY MAKHUBULA Applicant

and

ESWATINI COMPETITION COMMISSION 1st Respondent
MELULEKI NDLANGAMANDLA N.O. 2nd Respondent

Neutral citation: Nkosinathi Aubrey Makhubula v Eswatini Competition Commission and Another (105/2021) [2021] SZIC 58 (4 August 2022)

Coram: **Muzikayise Motsa AJ**
(Sitting with Ms. N. Dlamini & Mr. S. Mvubu Nominated Members of the Court)

Date Heard: 18 June, 2021

Date Delivered: 4 August, 2022

Summary: The Applicant being an employee of the First Respondent is facing disciplinary action by the employer - Applicant instituted the present application on an urgent basis seeking inter alia and

substantively an order reviewing and setting aside the ruling of the Second Respondent

(1) *Common law grounds for review pertaining canvased.*

Held: *The Applicant has met the requirements for common review in as far as they relate to error of law and ignoring of relevant considerations.*

(2) *Interpretation of clause 4.2.7 of the First Respondent disciplinary code. The code provides that the period of investigation and the conclusion of the case shall not exceed forty (40) working days in respect of an employee who is envisaged under the clause - Interpretation of the phrase 'conclusion of the case' under clause 4.2.7 of the code dissected.*

Held: *Clause 4.2.7 of the code applies to employees of the First Respondent whether or not they are placed on suspension pending investigation - The phrase 'conclusion of the case' under clause 4.2.7 of the code refers to conclusion of the disciplinary hearing and not conclusion of investigation.*

Held further: *The 40 working days period referred to under clause 4.2.7 of the disciplinary code, should be calculated from the date investigations are*

completed and a decision is formulated that misconduct has been committed.

(3) *Undue and /or unreasonable delay in initiating disciplinary action against the Applicant examined*

Held: Unreasonable delay in initiating disciplinary action without a reasonable explanation constitutes an irregularity sufficient to deny the Applicant a fair hearing and in appropriate circumstances may amount to a waiver.

JUDGEMENT

Salient background facts to this matter

[1] The Applicant is **Nkosinathi Aubrey Makhubula** an adult male LiSwati of Mbabane and an employee of the First Respondent.

[2] The First Respondent the **Eswatini Competition Commission**, a statutory body established in terms of the Eswatini Competition Act with its principal place of business in Mbabane in the Hhohho region.

[3] The Second Respondent is **Meluleki Ndlangamandla N.O.**, an adult male and practising attorney cited herein in his official capacity as chairperson of disciplinary proceeding instituted by the First Respondent against the Applicant.

[4] On or about the month of December 2019 and February 2020 respectively First Respondent instituted investigations into allegations of misconduct against the Applicant. The first investigation (December 2019) pertained to an allegation that he submitted a false medical certificate (sick note) in November 2019. The second investigation (February 2020) related to an allegation that he submitted an unauthentic and/or fraudulent letter of confirmation of employment to Standard Bank in December 2019 and January 2020 respectively.

[5] According to the Applicant the investigation into the alleged acts of misconduct against the Applicant was concluded in March 2020. During the course of the investigation the Applicant remained on duty, he was later suspended from

work with full pay in November 2020 and charges of misconduct were ultimately preferred against him in January 2021.

[6] When the disciplinary hearing commenced in February 2021, the Applicant raised a preliminary objection before the Second Respondent. His contention was that the charges against him and the disciplinary proceedings were time barred owing to the fact that the employer's own disciplinary code (**hereinafter referred to as the code**) enjoins the First Respondent to conclude a disciplinary case within a period of forty (40) working days from the date of beginning of investigations into alleged misconduct.

[7] In this regard Applicant was relying on the provisions of clause 4.2.7 of the disciplinary code which provides thus:-

4.2.7 The suspension will be for the duration of the investigation. The period of investigation and the

conclusion of the case shall not exceed forty (40) working days. (**Underlining is my own emphasis**).

[8] Specifically the Applicant's contention was that at the time when he was charged with misconduct (19 January 2021), alternatively when the disciplinary hearing began (February 2021); following the conclusion of investigations in March 2020, a period of ten (10) months had elapsed. He contends that this period was by far in excess of the envisaged forty (40) working days, thus in contravention of the provisions of clause 4.2.7 of the disciplinary code.

[9] In this context therefore, it was argued on the Applicant's behalf before the Second Respondent at the disciplinary enquiry that in the circumstances both the charges and the disciplinary proceedings were time barred and in the alternative it was further argued that in view of the inordinate delay in instituting the disciplinary proceedings the First Respondent must be deemed to have waived its rights to institute the same.

[10] In a ruling of the Second Respondent dated 4 March 2021 the Applicant's preliminary objection was dismissed and in particular at paragraph 21 of the ruling he stated thus, to wit;-

> *Clause 4.2.7 is inapplicable herein, it squarely applies in suspension during investigation. The time bar objection is dismissed. If there was any undue delay in the charging of the employee and in the commencement of the disciplinary hearing, it is condoned, covid-19 has hit hard all over the world, no one was spared from this brutal virus effects. There is no prejudice which the employee suffered and no plausible or real prejudice was submitted as having been suffered by the employee. If anything, his rights are guarded by a representative of his choice. So far, the hearing is fair, the scales are balanced.* [**Sic**].

[11] Pursuant to the dismissal of the preliminary point, the Second Respondent ruled that the disciplinary hearing must proceed to the merits.

[12] Dissatisfied with the ruling of the Second Respondent, the Applicant approached this Court in the present application, seeking relief in the following terms-:

"1. Dispensing with the usual procedures, forms and time limits for service and enrolment of this matter on the basis of urgency.

2. Stay of the disciplinary proceedings initiated by the First Respondent as against the Applicant and scheduled to commence on the 24th March 2021 pending the finalization and/or determination of these review proceedings.

3. Reviewing, correcting and setting aside, the ruling of the Second Respondent dated 4th March 2021.

4. Declaring the disciplinary hearing proceedings instituted against the Applicant by the First Respondent as unlawful and irregular for failure to comply with clause 4.2.7 of the First Respondent's disciplinary code

and/or for undue delay to institute the disciplinary proceedings against the Applicant.

5. Cost of suit in the event of opposition thereto."

[13] At the time we heard this matter, prayers 1 and 2 prayers had previously been addressed at an initial hearing and had since become academic. Our focus fell squarely on the substantive prayers 3 and 4 respectively.

Applicant's basis for the review of the Second Respondent's ruling

[14] As can be gleaned from the papers and gathered from the oral submissions of Applicant's Counsel, it is alleged that Second Respondent misdirected himself in the following respects:-

14.1 He failed to give a proper interpretation to the provisions of clause 4.2.7 of the disciplinary code when he held that the time bar objection is not applicable in this case but it only applies in the instance when an employee has been suspended;

14.2 He also failed to give a proper interpretation to the phrase 'conclusion of the case' as captured and envisaged in clause 4.2.7 of the disciplinary code;

14.3 In condoning the undue and/or inordinate delay on the part of the First Respondent in charging the Applicant and/or holding that it was reasonable to do so notwithstanding the lapse of over ten (10) months since the investigations had been concluded; and

14.4 He ignored relevant considerations which were placed before him at the hearing with regards to the question when investigations into the alleged misconduct against the Applicant were concluded; as a result this affected his calculations when considering the point at which the forty (40) working days period began to run.

Alleged failure to give a proper interpretation to Clause 4.2.7

[15] In support of the grounds based on which the Second Respondent's ruling is being sought to be reviewed, it was submitted for the Applicant that clause 4.2.7 of the code

provides that the period of investigation and the conclusion of the case shall not exceed forty (40) working days.

[16] According to the Applicant this clause makes it mandatory that the period inclusive of investigations into any alleged misconduct up to the conclusion of the disciplinary proceedings against an employee must not exceed forty (40) working days. In this context therefore, it was argued for the Applicant that the First Respondent has not only failed to institute disciplinary action against the Applicant within the envisaged 40 working days but has also failed to conclude the disciplinary action within the same period. It was submitted that in fact First Respondent has instead preferred charges of misconduct against the Applicant at the minimum ten (10) months after the conclusion of the investigations into the alleged misconduct against him.

[17] In this context the Applicant contended that as soon as the investigations were concluded in March 2020 (as evidenced in the First Respondent's letter of suspension addressed to the Applicant); the First Respondent ought to have preferred

charges on the Applicant and doing this was not hinged on whether or not the Applicant was suspended from work.

[18] It was argued that what the First Respondent has done is a violation of the intended purpose and/or mischief which was sought to be arrested by the provisions of clause 4.2.7 of the code thus constituting an unfair labour practice. According to the Applicant, the manner in which the First Respondent conducted itself in handling his disciplinary process makes it susceptible to a valid preliminary objection of time bar.

[19] Furthermore, it was contended for the Applicant that the Second Respondent wrongly and erroneously interpreted the phrase 'conclusion of the case' as captured under clause 4.2.7 of the code to refer to conclusion of the investigation when in actual fact the phrase ought to be interpreted in light of the definition of disciplinary hearing as defined in the disciplinary code.

[20] In this regard it was submitted that the definition section of the code defines disciplinary hearing as '[t[he meeting where

allegations against a employee are presented and supported by evidence, following which the employee concerned is allowed an opportunity to state his or her case in response to the allegations.' In this context it was submitted therefore that the phrase 'conclusion of the case' in the language and spirit of clause 4.2.7 of the code means nothing else other than the conclusion of the disciplinary hearing and not the conclusion of the investigation. The latter being the interpretation given to the phrase by the Second Respondent in his ruling.

[21] According to the Applicant when in its entirety clause 4.2.7 of the code is given its purposeful meaning, the natural result or outcome will be that the First Respondent is time barred from instituting and/or proceeding with the intended disciplinary hearing against him. In support of this contention, the Court was referred to the case of ***Frank Mndzebele v Swaziland Development and Savings Bank***[1] where the Court inter alia state that '[D]iscipline shall mean any action initiated by management in response to unacceptable employee performance or behaviour...furthermore, article 5.1.3 of the

[1] Industrial Court Case No. 461/2007 at 3 on para 3

code and procedure states that any disciplinary action taken outside the 30 days in terms of article 1.10 shall be null and void.'

[22] It was submitted that in that case the Court paid significance to the language used by the employer in its disciplinary code and in particular the use of the word 'shall' which the Court interpreted using its literal meaning and it held both parties to its strict interpretation. This Court was also implored to interpret in the literal sense the wording of clause 4.2.7 of the code in so far as it states that 'the period of investigation and the conclusion of the case shall not exceed forty (40) working days.' It was submitted that the word 'shall' is instructive and a command which the First Respondent must strictly comply with and/or adhere to.

[23] The submission went further to state that the First Respondent failed to comply with its mandatory obligation of instituting and concluding disciplinary action against the Applicant within the prescribed timelines thus rendering its disciplinary action against the Applicant to be time barred hence it must

be declared unlawful for breaching the employer's own internal disciplinary code.

[24] In support of this argument, the Court was referred to the case of ***Manamela Nnana Ida v Department of Co-Operative Governance, Human Settlements and Traditional Affairs Limpopo Province & Another***[2] wherein the Court held that

> *A suspension would be unlawful in instances where the right or power of an employer to effect such suspension is prescribed by specific regulations and these regulations are not complied with by the employer. The unlawfulness is founded in the employer not complying with its own rules. These regulations can be done in the form of a disciplinary code and procedure, collective agreement, statutory provisions or other regulatory provisions...*

[25] The Applicant submitted that since the First Respondent failed to comply with its own rules (the disciplinary code), it then

[2] [2013] ZALCJHB 255 at para 20

waived its rights to discipline him and any action taken against him is unlawful and must be declared as having no legal bearing. It was argued that the disciplinary action taken against the Applicant is time barred and therefore unlawful and allowing it to proceed will be a miscarriage of justice.

[26] It was contended further that even though courts should ordinarily be slow to intervene in uncompleted disciplinary proceedings, however, the circumstances of this case are exceptional and require the intervention of this Court because without such intervention, the Applicant will suffer as a result of the First Respondent's unfair and unlawful disciplinary action.

[27] The Court was further persuaded on behalf of the Applicant to review and set aside the Second Respondent's ruling of 4 March 2021 and declare the same to be unfair and irregular because he incorrectly applied the principles of interpretation when interpreting clause 4.2.7 of the code. It was submitted that the Second Respondent misdirected himself in giving any other interpretation to the peremptory wording of clause 4.2.7

instead of strictly applying the literal interpretation of the wording as used in the clause.

[28] The decision or ruling of the Second Applicant was termed as irrational not only owing to his misinterpretation of the pertinent clauses of the code but also in his failure to apply the provisions of the code to the given facts in as far as it relates to the preliminary objection of time bar. Support in this regard was sought from the case of **V v V**[3] where the Court stated that:

> *The ordinary meaning of the words used when limited to the clause itself must yield to the intention of the parties as expressed in the balance of the contract as a whole, the purpose for which they were introduced and the factual matrix in which the document came into existence. To interpret otherwise would result in absurdity and not make commercial sense in the context of the relationship established by the parties.*

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[3] (A5021/12) [2016] ZAGP JHC 311

[29] In this regard the submission was that the Second Respondent's interpretation of the disciplinary code fell outside the scope of its intended intention and therefore constituted an absurdity that will unfairly prejudice the Applicant.

[30] The Applicant contended therefore that when clause 4.2.7 of the code is correctly interpreted and given its purposeful meaning it will yield a result that First Respondent is time barred from instituting and/or proceeding with the intended disciplinary hearing against the Applicant.

Inordinate or undue delay by First Respondent to discipline Applicant

[31] It was further submitted on behalf of the Applicant that even from a common law perspective owing to the inordinate or undue delay in instituting the disciplinary hearing against the Applicant, First Respondent had waived its rights to discipline the Applicant.

[32] The submission here was that First Respondent failed to conclude the disciplinary case within 40 working days either from the conclusion of the investigation in March 2020 and/or within 40 working days from the date of suspension of the Applicant in November 2020 but only instituted the disciplinary action through the charges in January 2021 with the first date of the hearing being on 9 February 2021.

[33] The Applicant argued that notwithstanding the fact that investigations into the alleged misconduct of the Applicant were concluded in March 2020; the First Respondent took no positive steps to institute disciplinary action against the Applicant, until at least some ten (10) months later (January 2021) this being when charges were then preferred.

[34] The Applicant stated that from the beginning of investigations, beyond the conclusion of the investigations and until the date of his suspension (16 November 2020) which came some eight (8) months later; he continued coming to work as usual and even attended work events. From his date of suspension in November 2020 to the time he was eventually charged on 19

January 2021, the Applicant argued that the employer did literally nothing which according to him is an indication of a waiver on the part of the First Respondent.

[35] It was submitted that for the First Respondent to then charge the Applicant ten (10) months after the conclusion of investigations and/or beyond 40 working days after his suspension was an unfair labour practice and amounted to a gross violation of his right to a fair hearing and due process.

[36] It was strongly contended for the Applicant that disciplinary hearings ought to be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly and that when an employer fails to do so within a reasonable time, it loses that right by virtue of a waiver and cannot seek to enforce such right at a later stage.

[37] According to the Applicant the First Respondent has no reasonable explanation why it waited for ten (10) months after the conclusion of investigations to prefer charges of misconduct against him other than to arrive at the only

reasonable and logical conclusion that it waived its right to take any disciplinary action against him.

[38] It was argued for the Applicant that it is common cause that COVID-19 and lockdown measures affected operations of many an employer but notwithstanding that work operations were not completely halted. Work operations were indeed disrupted but were not completely stopped. In the circumstances, it was argued that with investigations into all the allegations of misconduct having been completed in March 2020, despite lockdown measures having been put in place; there was nothing that could have reasonably prevented the First Respondent from preferring charges of misconduct against the Applicant swiftly thereafter to make him aware of the employer's intentions and enable him to put his affairs in order.

[39] According to the Applicant what prevented the First Respondent from charging him could not have been COVID-19 lockdown restrictions in the entire period between March 2020 and January 2021. It was stated that the delay was too

long and there cannot be any reasonable explanation why the employer had to wait for ten (10) months to charge him. It was submitted for the Applicant that while it is true that at some point in time COVID-19 lockdown measures which suspended disciplinary hearings were put in place; however, the suspension was temporary and was immediately lifted.

[40] It was argued further that if the First Respondent did not know that the suspension of disciplinary hearings had since been lifted soon after it had been imposed can which must be dealt with under the legal idiom that ignorance of the law is no excuse and which cannot be blamed on the Applicant and should not unnecessarily prejudice him.

[41] The argument went on to say that even if the argument that the delay was occasioned by lockdown restrictions on disciplinary hearings was to have any substance, it would not assist much. This is so because First Respondent received clarification from the Ministry of Labour and Social Security in September 2020 that the suspension of disciplinary hearings was relaxed in May 2020. However, it still went into slumber.

Instead of swiftly laying charges, they waited to only suspend the Applicant in November 2020 and did not charge him until January 2021.

[42] It was submitted that the conduct of the Respondent in preferring charges of misconduct against the Applicant ten (10) months after the conclusion of investigations amounts to a waiver. According to the Applicant if the First Respondent had not waived its right it would have charged the Respondent immediately after the conclusion of the investigations.

[43] In support of this proposition we were referred to the judgement in ***Van Eyk v Minister of Correctional Services***[4] wherein the employee was charged about two years after the alleged misconduct had had taken place notwithstanding that the disciplinary code required the charges to be brought within three-and-a-half months after the transgression had come to the attention of the employer. The Court in that case held that the disciplinary charges had

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[4] (2005) 6 BLLR 639

fallen away. This Court was asked on behalf of the Applicant to make a similar finding in this matter because likewise the First Respondent had failed to institute and conclude disciplinary action against the Applicant within the 40 workings days as envisaged in its own disciplinary code.

[44] Reference was also made to the case of ***Duiker Mining Limited v CCMA& Others***[5] wherein the Court opined that the bringing of disciplinary charges should not be delayed unnecessarily. This Court was persuaded to hold that the intended disciplinary action against the Applicant in this case has similarly been unnecessarily delayed. It was submitted that the undue delay makes the disciplinary action both unlawful and irregular and signifies an express waiver on the part of the First Respondent.

[45] Moreover, the Court was told that the undue delay in instituting disciplinary action constitutes an unfair labour practice as the Court noted ***in Toyota SA Motors (Pty) Limited***

[5] (2003) 6 BLLR 550

v CCMA & Others[6] when it stated that '[t]here comes a time in any case where a party's disregard for procedure and delay in pursuing the matter is so extensive that they will be penalized irrespective of the merits of the case.' The submission here was that the undue delay caused by the First Respondent in taking disciplinary action against the Applicant rendered any subsequent legal action procedurally unfair and unlawful and should be of no consequence to the Applicant.

[46] According to the Applicant, to do proper calculations for purposes of establishing the duration of the alleged inordinate and/or undue delay the counting neither starts from the date of suspension of the Applicant nor from date on which charges were preferred against him; but it must start from the time the First Respondent formed an opinion that there is prima facie evidence of misconduct by the Applicant and that time was in March 2020.

[6] [2015] ZACC 40 para 191

[47] It was also submitted on behalf of the Applicant that one of the grounds upon which Second Respondent's ruling is being reviewed and sought to be set aside is that he failed to take into account relevant considerations which had been placed before him at the hearing hence he could not do the appropriate calculations when it comes to when the forty (40) working day period began to run.

[48] In support of this contention it was submitted that at paragraph 16 of his ruling which appears on page 36 of the Book of Pleadings, Second Respondent stated that there were no submissions as to when the investigations were concluded by the First Respondent. He stated further that an investigation report which had been presented at the hearing had no date as to both when it was prepared and when it was submitted to management of First Respondent. He added that both the Initiator and Applicant's representative could not offer any help regarding the question of when the investigations were concluded. He then came to a conclusion that it was safe to conclude that it is not known when the investigations were concluded.

[49] According to the Applicant what the Second Respondent stated in his ruling in as far as ascertaining the date on which the investigations were concluded was both inaccurate and misdirected on his part for two reasons. Firstly, the Applicant's suspension letter which explicitly stated when investigations were concluded was placed before the Second Respondent at the hearing. Secondly, submissions on when the investigations were concluded were made by Applicant's representative at the hearing to the Second Respondent on the strength of the suspension letter.

[50] It was submitted therefore that the Second Respondent in making his ruling he ignored both the contents of the suspension letter and the submissions made before him in as far as they relate to the conclusion of investigations and for that it was submitted he could not make the proper calculations regarding when the 40 working days period began to run.

[51] In the end this Court was asked to declare the disciplinary action against the Applicant to be unlawful on account of it

being time barred and to review and set aside the ruling of the Second Respondent dated 4 March 2021.

Applicant alleged to have failed to satisfy common law grounds for review

[52] The application is opposed by the First Respondent. From the outset the First Respondent raised a point in *limine* contending that the Applicant has failed to meet the requirements for review. In this regard it was submitted that the Applicant has neither alleged nor meet any grounds for review. It was stated that an Applicant who wishes to have a decision reviewed by the Courts has to make certain allegations relating to the conduct of the trier of the facts and/or the decision he wishes to have reviewed.

[53] In this regard it was contended for the First Respondent that the Applicant has failed to demonstrate and/or allege that the Second Respondent failed to apply his mind in accordance with the tenets of natural justice or that he arrived at his decision arbitrarily, capriciously or mala fides. Alternatively, that he misconceived the nature of the

discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones.

[54] As authority for this proposition, this Court was referred to the case of ***Johannesburg Stock Exchange v Witwatersrand Nigel Limited***[7] where that Court laid down the grounds for review as follows:

> *Broadly, in order to establish review grounds, it must be shown that the President failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice...such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the President misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the President was so grossly*

[7] 1988 3 SA 132 at 152 A - E

unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforesaid ... some of the grounds tend to overlap.

[55] According to the First Respondent it is material that any of these allegations are made by an Applicant in a review application. It was submitted that in the present application the Applicant has not demonstrated any of the grounds for review as laid down in the abovementioned judgement. In the circumstances, it was submitted that the Applicant has not made out a case warranting the Court's intervention for review hence the review application should be dismissed.

[56] Coming to the merits of the matter, there appears to be common cause between the parties regarding the period when investigations against the Applicant began (December 2019 and February 2020), when they were concluded (March 2020), when he was suspended (November 2020) and when he was eventually charged with misconduct (January 2021).

First Respondent's contention regarding the interpretation of clause 4.2.7

[53] Concerning the ruling of the Second Respondent and the interpretation of clause 4.2.7 of the code, the First Respondent argued that the clause falls under the heading **Suspension** which can only mean that the provisions of this clause are not applicable in Applicant's case because the clause only applies in circumstances where the employee is placed on suspension pending investigation of the suspected misconduct. It is common cause here that the Applicant was not suspended during the investigations.

[54] According to this argument, clause 4.2.7 does not apply where an employee of the First Respondent has not been placed under suspension. Rather it only applies where the employee is placed on suspension for investigation and in such a case the period of investigation and the disciplinary hearing must run contemporaneously. This means that both processes, that is, the investigation and the hearing must be concluded with forty (40) working days.

[55] It was submitted for the First Respondent that for clause 4.2.7 to apply there must be a suspension, an investigation and a hearing all within 40 working days. To invoke the provisions of the clause the suspension and the investigation must be contemporaneous.

[56] In this case it was submitted that the Applicant's suspension did not take place at the same time with the investigation since he was only suspended after the conclusion of the investigation. It was submitted for the First Respondent that in the circumstances the Second Respondent correctly found that the provisions of clause 4.2.7 are not applicable in Applicant's case but they apply only where the employee is suspended for investigation.

First Respondent alternative argument in connection with clause 4.2.7

[57] In the event clause 4.2.7 is found to be applicable to the Applicant's case, First Respondent's alternative argument was that it can only apply from the date that the employer received a report indicating prima facie misconduct and

formulated the decision to discipline the Applicant. It was stated that such date fell on 16 November 2020 when the Applicant was suspended.

[58] It was submitted in this regard that in such a case the 40 working days ran from 17 November 2020 until the first sitting of the hearing which was scheduled for 29 January 2021. It was stated that considering that the First Respondent's disciplinary code defines a day as any normal working day excluding weekends and public holidays; then the employer was within the 40 working days time to prosecute and conclude the Applicant's disciplinary hearing.

[59] In support of this alternative argument, the Court was referred to the case of ***Patrick Ngwenya & Another v Swaziland Development & Savings Bank***[8] where it was stated thus:

> *It is the Court's view that the thirty (30) day period should start at the time Management forms the opinion that a misconduct has occurred and that the*

[8] Industrial Court Case No. 536/2008

employee must answer for such misconduct - that is at the time that charges are laid against the employee. In respect of this matter, the Court finds that the thirty (30) day period would have started to run from the 15th July 2008 when the Respondent took the decision to prefer charges against the Applicant following the finalization of the initial investigations.

[60] The Court was also referred to the case of ***Thembinkosi Fakudze v Nedbank (Swaziland) Limited &Another*** [9] in that case the relevant clause was clause 1.11 of the disciplinary code which read thus:

> *In the case of misconduct, the Bank undertakes to apply or execute and finalize the appropriate disciplinary action within 40 (forty) days of such misconduct having been brought to the attention of management...*

[9] (76/18) [2018] SZIC 27 delivered on 12 April 2018

[61] His Lordship **Mazibuko J** (as he then was) stated that the 40 (forty) day stipulation starts operating from the day the misconduct is brought to the attention of management. He stated further that the date on which misconduct is brought to the attention of management is the date when an investigation is completed and a report is brought to management which contains a finding that an offence has been committed.

[62] His Lordship said that is the stage when the bank can institute disciplinary action against the employee who is implicated in the report. The Court added that the 40 (forty) day rule regulates not the investigation itself but the process that follows the investigation. The Court in that matter went further to state that 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 an investigation.

[63] In his ruling the Second Respondent did not only find that clause 4.2.7 applies only in the case of an employee who is

suspended during an investigation; he also found that the phrase 'conclusion of the case' under the same clause did not refer to the conclusion of a disciplinary hearing but to mean closure or conclusion of the investigation.

First Respondent's on interpretation of 'conclusion of the case' by Second Respondent under clause 4.2.7

[64] It was submitted on behalf of the First Respondent that the Second Respondent correctly found that 'conclusion of the case' under clause 4.2.7 mean the closure of the investigation. It was contended that had the drafters of the disciplinary code intended 'case' under this clause to mean conclusion of the disciplinary hearing, they would have made specific mention of the forty (40) working days period under clauses 4.3 to 4.5 which specifically deals with a disciplinary hearing. The submission here was that there is nowhere in the code and especially under clauses 4.3 to 4.5 where it is provided that the chairperson must conclude the hearing within forty (40) working days.

First Respondent addressing alleged inordinate and/or undue delay in instituting disciplinary action against Applicant

[65] In explaining why disciplinary action against the Applicant was not taken until 19 January 2021, First Respondent relied on the contents of Applicant's suspension letter dated 16 November 2020. It was submitted that pursuant to the conclusion of investigations into two incidents of alleged misconduct against the Applicant which were initiated in December 2019 and February 2020 respectively, the employer came to the conclusion that there was basis for the Applicant to be charged with misconduct in relation to those two incidents.

[66] It was stated that the intended disciplinary action against the Applicant was then delayed by the introduction of COVID-19 lockdown measures by the Government of Eswatini which took effect on 27 March 2020 and as a result of which the First Respondent experienced operational disruptions. Making submissions on this point and referring to paragraph 3 of the suspension letter, First Respondent's Counsel submitted that 'there was intention on the First Respondent to deal with this

matter as at March 2020' but COVID-19 lockdown measures intervened.

[67] It was submitted further that while the First Respondent was dealing with the frustrations of the COVID-19 general lockdown measures in as far as they affected the smooth flow of work operations and gatherings generally, during the month of May 2020 the Ministry of Labour and Social Security issued a statement suspending disciplinary hearings pending the relaxation or lifting of the partial lockdown measures.

[68] The submission continued and stated that noting that the lockdown regulations were not being lifted or relaxed on 24 September 2020 First Respondent wrote to the Ministry of Labour and Social Security requesting for a special dispensation to proceed with the disciplinary action which was contemplated against the Applicant. The Ministry responded on 28 September 2020 clarifying to the First Respondent that the suspension of disciplinary hearings had been relaxed on 11 May 2020.

[69] It was submitted that the First Respondent went out of its way to get this matter prosecuted notwithstanding challenges posed by the lockdown restrictions on disciplinary hearings. In this regard the Court was referred to ***UPMW v Stasraad van Pretoria***[10] where that Court stated that 'delay is not by itself a waiver but an element in determining whether the conduct of the innocent party was such that a reasonable person would conclude that that he has waived his accrued right to cancel...'

[70] According to the First Respondent waiting from May 2020 to September 2020 before seeking special dispensation from the Ministry of Labour in the midst of COVID-19 lockdown restrictions was not unreasonable. Following the clarification from the Ministry, the Applicant was then suspended in November 2020.

[71] In as far as the First Respondent is concerned the sequence of events between March 2020 and September 2020 demonstrates that the intention on the employer's side to take

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[10] 1992 ILJ 1563 (NH) at 1567 - 1568 B

disciplinary action against the Applicant was always there. It was actuated or put into motion by suspending the Applicant in November 2020 and later by preferring the charges in January 2021.

[72] It was contended that it is grossly unfair for the Applicant to say First Respondent is guilty of ignorance of the law by not learning much earlier that the suspension of disciplinary hearings had since been uplifted because the relaxation on disciplinary hearings was not published through the conventional manner.

[73] Moreover, First Respondent's Counsel conceded that Applicant's letter of suspension was placed before the Second Respondent at the disciplinary hearing and that submissions on the date of conclusion of investigations were made before the Second Respondent at the disciplinary hearing. He contended though that these had not been pleaded in the Applicant's papers before this Court.

[74] It was submitted that efforts were consistently made by the First Respondent to get the contemplated disciplinary action against the Applicant underway. In the end the submission was that there was no unreasonable and/or inordinate delay on the part of the First Respondent in prosecuting the disciplinary action against the Applicant hence it did not waive its rights to discipline him.

ANALYSIS AND APPLICABLE LAW

Point in *limine* – Requirements for common law grounds for review

[75] It was submitted in *limine* on behalf of the First Respondent that the Applicant has failed to meet the requirements for a review application in this matter. In fact, it was stated that the Applicant has failed to demonstrate and/or allege in this application that the Second Respondent has either failed to apply his mind in accordance with the tenets of natural justice, that his decision was arrived at arbitrarily, capriciously or mala fide or that his decision is a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose, or that he misconceived the nature of the discretion conferred upon him and took

into account irrelevant considerations or ignored relevant ones or that his decision was grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. (Vide ***Johannesburg Stock Exchange v Witwatersrand Nigel Limited***[11]).

[76] It was submitted that these are the common law grounds for review and any Applicant in a review application must demonstrate that his/her application is based on at least one or more of these grounds for his application to be entertained. It appears to this Court that according to the First Respondent, none of these common law grounds were pleaded in the Applicant's Founding Affidavit.

[77] It is common cause as stated in First Respondent's heads of argument that the common law grounds for review in our jurisdiction were indeed adopted from the ***Johannesburg Stock Exchange v Witwatersrand Nigel Limited*** case and a plethora of case law exists which lays down the grounds upon which a litigant may rely on in a review application. The

[11] See (n7) above at 152 A-E

leading case or the so-called *locus classicus* in our jurisdiction on common law review grounds is the case of ***Takhona Dlamini v President of the Industrial Court of Swaziland & Another***[12] where **Tebbut JA**, stated that:

> *Those grounds embrace, inter alia, the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive or improper purpose or that the Court took into account irrelevant considerations or ignored relevant ones, or that the decision was grossly unreasonable as to warrant an inference that the Court had failed to apply its mind to the matter... The grounds are, however, not exhaustive. It may also be that an error of law may give rise to a good ground for review.* **(Underlining is my own emphasis).**

[78] This landmark case has been relied upon and quoted with approval in many other cases, inter alia, ***Swaziland***

[12] Civil Appeal Case No. 23/1997 (Unreported)

Government v Khanyisile Msibi N. O. & 2 Others[13] and ***Swaziland Nazarene Health Institutions v Velaphi Z. Dlamini & 2 Others***[14] to name just a few.

[79] As highlighted earlier on in this judgement, Applicant's grounds for review inter alia, are that Second Respondent in his ruling dated 4 March 2021misdirected himself in law by failing;

79.1 to give a proper interpretation to the provisions of clause 4.2.7 of the disciplinary code when he held that the time bar objection is not applicable in this case but it only applies in the instance when an employee has been suspended;

79.2 to give a proper interpretation to the phrase 'conclusion of the case' as captured and envisaged in clause 4.2.7 of the disciplinary code; and that

[13] (787/2014) [2015] SZHC (25 November 2015)
[14] (22/2015) [2015] SZSC 13 (9 December 2015)

79.3 he ignored relevant considerations which were placed before him at the hearing with regards to the question when investigations into the alleged misconduct against the Applicant were concluded; as a result this affected his calculations when considering the point at which the forty (40) working days period began to run.

[80] In scanning the Applicant's papers serving before this Court to establish whether any of the stated common law grounds for a review application have been alleged and/or pleaded in this case, we find as follows. Firstly, that it is pointed out in the Applicant's papers that the Second Respondent failed to give a proper interpretation to the provisions of clause 4.2.7 of the disciplinary code when he held that the time bar objection is not applicable in this case and also when he ruled that the phrase 'conclusion of the case' refers to a closure of the investigation and not the conclusion of the disciplinary hearing. This ground, if proven, may tend to be *an error of law* which may give rise to a valid ground for review as noted from

the case of ***Takhona Dlamini v President of the Industrial Court of Swaziland & Another.***[15]

[81] Secondly, we find that the Applicant also alleged that Second Respondent ignored relevant considerations (namely facts) which were placed before him at the disciplinary hearing with regards to the question when investigations into the alleged misconduct against the Applicant were concluded. This again if proven, may suggest that the Second Respondent ignored relevant considerations, which is another valid ground for review.

[82] Moreover on the same subject matter, this Court in ***Sazikazi Mabuza v Standard Bank & Another***[16] reiterated the same principle when it stated thus:

> *The duty resting on the chairman of a disciplinary enquiry to exercise his discretion 'judiciously' means that he is required to listen to the relevant evidence, weigh it to determine what is probable, and reach a*

[15] Se (n12) above
[16] Industrial Court Case No. 311/2007 at para 45

conclusion based on the facts and the law. The court cannot interfere with his decision where he has applied his mind to these matters, even if the court disagrees with his conclusions on the facts or the law. No more is required of the chairman than that he should properly apply his mind to the matter. However, where he fails to properly apply his mind at all to one or more of the issues, he commits a gross irregularity, because he has failed entirely to perform the function which was required of him. He has failed to exercise his discretion judiciously, his decision will be reviewable.

[83] In this matter the Applicant contends that the Second Respondent did not properly his mind to the two issues, to wit; in the interpretation of clause 4.2.7 of the code and in that he failed to take into account certain facts or considerations which had been placed before him. Applicant in essence argues that had Second Respondent properly applied his mind to these issues, they would have enabled him to reach a conclusion based on the law and facts and owing to that failure his decision is reviewable.

[84] We must hasten to point out though that by stating that we find that these two grounds of review were pleaded by the Applicant, we are by no means making a finding on the veracity of these averments at this stage. All we are saying is that these allegations were made by the Applicant and therefore the prerequisites for a review application were met. It follows therefore by necessary implication that the First Respondent's preliminary point must fail.

[85] Now we proceed to interrogate each of the grounds for review as relied upon by the Applicant both in his Founding Affidavit and heads of argument to establish their veracity or otherwise.

Ad merits

[86] Did the First Respondent misdirect himself by interpreting the provisions of clause 4.2.7 of the disciplinary code when he found that the time bar objection is not applicable in this case but it only applies in instances when the investigated employee has been suspended?

[87] A recitation of clause 4.2.7 is imperative once again at this stage and it provides thus:

4.2.7 The suspension will be for the duration of the investigation. <u>The period of investigation and the conclusion of the case shall not exceed forty (40) working days.</u>

[88] As part of his ruling the Second Respondent stated that clause 4.2.7 is not a stand-alone or independent clause but it must be considered in the context of the entire clause 4.2 which is titled **Suspension.** Essentially and by implication, the Second Respondent meant that clause 4.2.7 is merely a sub-clause under clause 4.2 and it cannot have a different meaning separate from the import of the entire clause.

[89] He continued to explain that the entire clause 4.2 provides a guideline to the First Respondent on how to invoke its power to suspend an employee, it describes the types of suspension (with or without pay), it spells out the reasons or basis for

suspension and further provides a guide for implementing a suspension of an employee pending an investigation.

[90] In focusing on clause 4.2.7, the Second Respondent noted that this clause permits the employer to suspend an employee pending an investigation into the alleged misconduct. He stated that the first part of the clause permits the employer to suspend an employee suspected of misconduct for the duration of the investigation. Regarding the second part of the clause, the Second Respondent noted that the clause provides that the period of the investigation and the conclusion of the case shall not exceed forty (40) working days.

[91] Second Respondent explained that the word 'case' is not defined in the disciplinary code. He then made a finding that notwithstanding that the word 'case' is not defined in the code but it cannot be read as a synonym of 'disciplinary hearing' because the latter is defined in the code and where the drafters of the code intended to refer to disciplinary hearing they did so with ease.

[92] He then stated that the word 'case' in the Oxford Dictionary is defined as 'an incident or a set of circumstances under official investigation by the police' pursuant to which the Second Respondent then concluded that the words 'investigation' can be imputed to the words 'and conclusion of the case' to be meaning 'closure of the investigation.' This finding effectively means that the second part of clause 4.2.7 must be understood to be saying that the period of investigation and the conclusion of the investigation in the context of an employee placed on suspension pending investigation shall not exceed the forty (40) working day period.

[93] In our understanding, the Second Respondent's finding says that for an employee who is suspended pending an investigation, such suspension, investigation and the conclusion of the investigations shall not exceed 40 working days.

[94] According to the ruling of the Second Respondent, clause 4.2.7 has nothing to do with the duration of a disciplinary

hearing which the employee may be subjected to pursuant to the conclusion of an investigation in the event the employer finds that there is prima facie evidence that misconduct was committed.

[95] In support of this analysis, the Second Respondent in his ruling highlighted that clause 4.4 of the code specifically regulates the conduct of disciplinary proceedings. He stated that had the drafters of the code intended that the disciplinary hearing must be concluded within forty (40) working days, they would have said so under clause 4.4 and effectively this would have placed a time bar to curtail the duration of disciplinary hearings.

[96] In the end therefore, the Second Respondent finding was two-fold. Firstly, that clause 4.2.7 of the disciplinary code does not apply in the case of an employee such as the Applicant who had not been placed under suspension pending investigation but only applies to an employee who is suspended pending investigation. Secondly, that in the case of the latter employee, the duration of his suspension up to the conclusion

of the investigation must not exceed 40 working days because he interpreted the phrase conclusion of the case to refer to closure of the investigation. Ultimately he found that the time bar objection was not applicable in this case.

[97] The Applicant contends that the Second Respondent misdirected himself by both holding that clause 4.2.7 only applies to an employee who was suspended pending investigation and not to a case of an employee who was not suspended during investigation. He contends further that the second part of clause 4.2.7 applies to both categories of employees, that is, it applies even to an employee who is not suspended while being investigated.

[98] It was argued for the Applicant that even in the case of an employee who is not placed on suspension while under investigation (like his case), the period between the conclusion of the investigation and the conclusion of the disciplinary hearing must not exceed 40 working days. It was contended that the First Respondent failed to conclude Applicant's disciplinary case within the 40 working days but

only laid charges some ten months after the conclusion of the investigations.

[99] The Applicant also argued that the usage of the phrase 'conclusion of the case' was erroneously interpreted by the Second Applicant to refer to the conclusion of the investigation when in actual fact it ought to be interpreted to refer to a disciplinary hearing in line with the definition of a disciplinary hearing in the disciplinary code.

[100] According to the Applicant had the Second Respondent given a proper interpretation to clause 4.2.7, the correct outcome would have been that it applies firstly to an employee placed under suspension pending investigation; in which case the period of investigation and the conclusion of the disciplinary case shall not exceed 40 working days. Secondly, that it also applies to an employee who is investigated for alleged misconduct without being suspended; in which case the period between the conclusion of the investigation and the conclusion of the disciplinary hearing shall also not exceed 40 working days.

[101] It was stated that the Applicant belongs to the latter classification. It was submitted in this regard that with investigations having been completed in March 2020 his disciplinary hearing ought to have been concluded within 40 working days from the latter date, failing which the objection of time bar is valid and should have been upheld by the Second Respondent.

[102] First Respondent aligns itself with the ruling of the Second Respondent although on a slightly different angle. First Respondent contends that clause 4.2.7 falls under the heading '**Suspension**' and henceforth it only applies to an employee who is placed on suspension pending investigation. It is contended further that for this clause to apply the suspension of the employee and the investigation must be contemporaneous. It is therefore argued that the Applicant was not suspended during the investigations into the alleged misconduct against him but was only suspended in November 2020 and as such the provisions of clause 4.2.7 cannot apply in his case.

[103] First Respondent also aligns itself with the ruling of the Second Respondent in as far as it relates to his interpretation of the phrase 'conclusion of the case.' It was contended that the only interpretation which can be given to this phrase is none other than that it means the completion of the investigation. Moreover, it is the First Respondent's contention that had the drafters of the disciplinary code intended to prescribe the 40 working days timeline for the conclusion of all disciplinary hearing cases, they would have done so under the heading **Disciplinary Hearing Proceedings** under clause 4.4 of the code.

[104] Now here comes the slight different angle which the First Respondent adds to the twist in aligning itself with the finding of the Second Respondent and specifically as it relates to his finding that the phrase 'conclusion of the case' refers to the conclusion of the investigation.

[105] While on the one hand First Respondent agrees with the finding that 'conclusion of the case' means conclusion of the investigations and not conclusion of the disciplinary hearing,

however on the other hand, it was submitted for the First Respondent that for the provisions of clause 4.2.7 to apply in the case of an employee who is suspended pending investigation, the period of the suspension, investigation and the disciplinary hearing must be kept within 40 working days. (**Underlining is my own emphasis**).

[106] This submission appears to us to amount to either a contradiction on the part of the First Respondent or a concession that indeed the phrase 'conclusion of the case' means the conclusion of the disciplinary hearing. The First Respondent cannot in the same voice contend that the phrase refers to the conclusion of investigations and yet still through the same voice contend that clause 4.2.7 speaks to a disciplinary hearing which all together with the suspension and investigation must be concluded within 40 working days in the case of a suspended employee.

[107] The only conclusion that can be discerned or comprehended from this submission is an acknowledgement on the part of the First Respondent that the phrase

'conclusion of the case' refers to a conclusion of the disciplinary hearing. It cannot therefore be logical for the First Respondent to persist in its contention that the Second Respondent's interpretation of the phrase was correct yet simultaneously conceding that the same phrase speaks to a disciplinary hearing.

[108] Pursuant to a careful perusal of the provisions of the First Respondent's disciplinary code, we accept that clause 4.2.7 falls under clause 4.2 with the heading **'Suspension'** and that under that heading the code provides for the manner, basis and conditions under which an employee suspected of alleged misconduct may be placed under suspension pending investigation.

[109] It is common cause that under the first part of clause 4.2.7 once an employee is suspended pending investigation, the suspension will last for the duration of the investigation. We have not found any provision in the disciplinary code which provides for circumstances or an instance where an

employee suspected of alleged misconduct is investigated without being placed under suspension.

[110] We envisage that there will from time to time be such instances but the code does not deal specifically with them. As such there is no provision regarding what should be the duration of an investigation in respect of an employee who is being investigated for misconduct yet he/she is not suspended. There is also no provision specifying the duration of the investigation and the conclusion of the disciplinary case or hearing in the context of an employee who is not suspended during the investigation, in the event the employee is then charged after the conclusion of the investigation.

[111] It is unlikely that the drafters of the disciplinary code would have intended to leave this aspect as a lacuna in the context of an employee not placed on suspension during an investigation. They would also not have intended not to prescribe or place timelines for the duration of the process from either the start of the investigation or the completion

thereof and the conclusion of the disciplinary hearing in the context of the employee who is not suspended. They could not have provided for a suspended employee and then provide absolutely nothing for an employee who is not suspended pending an investigation.

[112] In the absence of any other provision in the disciplinary code which provides for the duration of an investigation and the conclusion of the disciplinary hearing in respect of an employee who is being investigated without being suspended, then we are of the firm view that the second part of clause 4.2.7 applies to both categories of employees. In other words, whether an employee is suspended or not pending an investigation, the period of investigation and the conclusion of his or her disciplinary case shall not exceed forty (40) working days.

[113] Now coming to the phrase 'conclusion of the case', the definition section of the disciplinary code does not provide a definition of the word 'case'. However, it does define the phrase 'disciplinary hearing' as '[t]he meeting where

allegations against an employee are presented and supported by evidence, following which the employee concerned is allowed an opportunity to state his or her case in response to the allegations.' The word 'case' in Black's Law Dictionary[17] is defined as 'A civil or criminal proceeding, action, suit or controversy at law or in equity.'

[114] In interpreting statutes, phrases or words in a statute courts often resort to the canons of statutory interpretation. They usually begin the process by applying the literal rule which requires that the words of a statute must be interpreted in their ordinary or literal meaning. In the case of ***Venter v R***[18] **Innes CJ** had this to say in explaining the literal rule:

> *In construing the statute the object is, of course, to ascertain the intention which the legislature meant to express from the language which it employed. By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument ... as a whole, and, when the words are clear and*

[17] BA Garner Black's Law Dictionary (1990) 228 Eighth edition

[18] 1907 TS 910 at 913

unambiguous, to place upon them their grammatical construction, and to give them their ordinary effect. (**Underlining is my own emphasis**).

[115] In ***Volschenk v Volschenk***[19] the Court stated that '[T]he cardinal rule of construction is that words must be given their ordinary, literal, grammatical meaning.'

[116] Where the literal rule does not assist in determining the true intention of the legislature, the courts may have regard to the mischief rule, by ascertaining 'the mischief' that the Act was designed to remedy. In ***Union Government v Tonkin***[20] **Innes CJ** stated that '[t]he court may look not only at the language of the statute, but also 'at the surrounding circumstances, and may consider its objects, its mischief and its consequences.'

[19] 1946 TDP 486 at 487
[20] 1918 AD 533

[117] In ***Attorney-General v HRH Prince Ernest Augustus of Hanover***[21] **Viscount Simonds** had this to say on the mischief rule:

> *For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense ... as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.'*

[118] We find the words in the phrase 'conclusion of the case' under clause 4.2.7 of the code to be clear and unambiguous. When we subject this phrase to the literal rule of statutory interpretation under which they are given their ordinary, literal and grammatical meaning; we are convinced that the drafters of the code could only have

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[21] (1957) 1 All ER 49 at 53

intended this phrase to refer to the conclusion of the disciplinary case or hearing and they could not have assigned any other meaning to it.

[119] Moreover, even when the true intention of the drafters of the disciplinary code is sought through the employment of the mischief rule, we once again find that the mischief' that the phrase was designed to remedy is to regulate the duration of the disciplinary process within the First Respondent's enterprise.

[120] The mischief essentially being to place a time bar in relation to the conclusion of disciplinary hearings calculated from the point of investigation with respect to all scenarios, that is, whether or not the employee in question is placed on suspension. Namely, being that the period of investigation and the conclusion of the disciplinary hearing shall not exceed 40 working days.

[121] In the final analysis, whether we apply The Black's Law Dictionary definition of the word 'case', the literal rule or the

mischief rule in ascertaining the true intention of the drafters of the code in as far as the interpretation of the phrase 'conclusion of the case' in our view the phrase has nothing whatsoever to do with the conclusion of the investigation.

[122] It refers to a formal legal process or proceeding. It can only be interpreted in light of the definition of disciplinary hearing as captured in the disciplinary code. We therefore find that the phrase 'conclusion of the case' when given a proper interpretation in the context of this matter using its literal, ordinary and grammatical meaning as well as looking at the mischief the phrase was designed to remedy, it can only refer to the conclusion of the disciplinary hearing.

[123] For the foregoing reasons we therefore find that the Second Respondent misdirected himself when he found that clause 4.2.7 of the disciplinary code is inapplicable in Applicant's case and only applies in the instance when an employee has been suspended pending investigation and thereby dismissing the Applicant's time bar preliminary objection.

[124] Likewise we find that the Second Respondent misdirected himself in holding that the phrase 'conclusion of the case' refers to conclusion of the investigation instead of finding that the phrase meant conclusion of the disciplinary hearing. In the circumstances a proper interpretation of the second part of clause 4.2.7 should be read and understood to mean that the period of investigation and the conclusion of the disciplinary case shall not exceed forty (40) working days.

Completion of investigations

[125] On the strength of the contents of the suspension letter, the Applicant contents that First Respondent concluded investigations on all the charges in March 2020. Applicant argues that at that time, the employer was in possession of a report indicating prima facie misconduct on his part henceforth it formulated a decision to take disciplinary action against him.

[126] On the other hand and specifically at page 79 of the Book of Pleadings (paragraph 14 of the Answering Affidavit), First Respondent concedes that investigations in relation to one

of the charges (namely charge 3) was concluded in March 2020. The Deponent then goes on to state that investigations relating to Charges 1 and 2 had not been completed in March 2020. Furthermore, at page 80 of the Book of Pleadings (paragraph 17 of the Answering Affidavit), First Respondent reiterates that investigations into charge 3 were concluded in March 2020.

[127] Save for stating that investigations relating to Charges 1 and 2 had not been completed in March 2020, the First Respondent does not say when investigations into these two charges were then concluded. Besides, nowhere in the Answering Affidavit, heads of argument and/or during the oral submissions on behalf of the First Respondent is it stated when investigations into charges 1 and 2 were completed.

[128] At paragraph 3 of the Notice of Suspension Pending Disciplinary Action (hereinafter referred to as the letter of suspension) which is dated 16 November 2020, the First Respondent writes to the Applicant as follows:-

The Commission came to the conclusion that there is a basis for you to be charged with dishonesty in respect of the alleged fraudulent letters to Standard Bank and the submission of a false or forged sick note. However, the COVID 19 lockdown measures took effect on the 27th March 2020 and resulted in operational disruption which delayed the necessary action being taken. (Sic) (**Underlining is my own emphasis**).

[129] What the First Respondent is saying in that paragraph is expressed in very clear and unambiguous language. The alleged fraudulent letters submitted to Standard Bank referred to in the suspension letter relates to the investigations commenced in February 2020 which now appear in the form of charges 1 and 2. The alleged false sick note referred to in the suspension letter relates to the investigations commenced in December 2019 which now appears in the form of charge 3.

[130] In simple, clear and unequivocal language, the First Respondent informs the Applicant through the suspension

letter that in relation to all these allegations against him, it came to the conclusion that there was basis for him to be charged with misconduct based on these allegations. First Respondent explains further that the implementation of the disciplinary action in this regard was delayed by the COVID-19 lockdown restrictions which were put in place on 27 March 2020 which disrupted their operations.

[131] It is clear from this passage that prior to the implementation of the COVID-19 lockdown measures which came into effect on 27 March 2020 First Respondent had already formulated a decision to prefer charges of misconduct against the Applicant based on all the allegations for which he was being investigated.

[132] In essence this means that investigations on all the allegations which have given rise to the current three charges had been concluded prior to 27 March 2020. Management formed the opinion that misconduct has occurred following the finalization of the investigations and hence the decision to charge the employee. 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 an investigation.[Vide ***Patrick Ngwenya & Another v Swaziland Development & Savings Bank & Thembinkosi Kunene v Nedbank (Swaziland) Limited and Another (supra)***].[22]

[133] On the basis of the above analysis, we therefore come to the conclusion that investigations into all three charges of misconduct against the Applicant were concluded by the First Respondent in March 2020. Put differently, the alleged misconduct against the Applicant came to the attention of First Respondent's management in March 2020; this being after investigations had been finalized.

First Respondent alternative argument

[134] In the alternative, the First Respondent also argued that in the event this Court was to find that clause 4.2.7 of the code applies to the Applicant's case, it can only apply from the

[22] Se (notes 8 & 9) above

date the employer received a report indicating prima facie misconduct against the Applicant and formulated the decision to discipline him. It was contended that such a date can only be when the Applicant was suspended; namely on 16 November 2020.

[135] Essentially the alternative argument says that the alleged misconduct against the Applicant came to the attention of First Respondent's management on 16 November 2020 and on the even date it formulated the decision to discipline him as demonstrated by its first action which was to suspend him from work on the same day.

[136] So, effectively in terms of this alternative argument the period of investigation and the conclusion of the case which must not exceed 40 working days as envisaged under a properly interpreted clause 4.2.7 (as per the literal rule and as per our finding hereinabove) should begin to run from 16 November 2020 to 29 January 2021, the latter date being the date which was scheduled for the first sitting of the disciplinary hearing. According to the First Respondent, the period within

these two dates is less than 40 working days. As such it was contended therefore that First Respondent was still within the prescribed timelines to prosecute and conclude the hearing when the time bar objection was initially raised and it was correctly dismissed by the Second Respondent.

[137] Even if this Court was to give the First Respondent the benefit of the doubt on this argument and proceed on the assumption that it is correct (when in fact it is incorrect as will be demonstrated hereunder), the alternative argument would nonetheless still fall short. Our calculations for working days from 17 November 2020 to 29 January 2021 amount to a whooping fifty (51) working days. This is excluding three (3) public holidays which fell during that period, to wit; Christmas Day, Incwala and New Year's Day.

[138] It was pleaded and argued for the First Respondent that the latter closed shop for the festive break sometime in December 2020 and opened in January 2021 but no specific dates or any proof to substantiate such proposition was provided. In the circumstances, this Court concluded that in

the absence of any proof, the First Respondent closed shop during the designated public holidays which have already been accounted for in these calculations.

[139] In the end the period from 16 November 2020 to 29 January 2021 equates to fifty (51) working days which is way in excess of the 40 working days period of investigation and conclusion of the case as envisaged under clause 4.2.7 of the code. We note therefore that even if this alternative argument was correct, it would still fail to escape the cunning jaws of the time bar objection.

[140] We now come back to demonstrate why we say that the First Respondent's alternative argument was after all incorrect. Firstly, the Court is alive to the fact that the 40 working days period envisaged under clause 4.2.7, includes the period of investigation up to the conclusion of the disciplinary hearing. However, throughout this judgement we have consistently linked the 40 working days period with the finalization of investigations and the conclusion of the case.

[141] This we have done consciously so because the existing and binding legal jurisprudence on this subject holds that whatever stated period within which an employer is required to prosecute and conclude any disciplinary action starts operating from the day the misconduct is brought to the attention of management.

[142] This date on which misconduct is brought to the attention of management is the date when an investigation is completed and a report is brought to management which contains a finding that an offence has been committed. It is at that time that the employer forms an opinion that misconduct has been committed and someone must be charged. The stipulated time frame or period such as the 40 working days in the present matter; regulates not the investigation itself but the process that follows the investigation. The stipulation begins to run from the conclusion of the investigation. [Vide ***Thembinkosi Kunene v Nedbank Swaziland*** as well as ***Patrick Ngwenya & Another v Swaziland Development & Savings Bank (supra)***].

[143] We have already made a finding that the investigations in this matter were concluded in March 2020 and this was the date on which the Applicant's misconduct was brought to the attention of First Respondent's management and it formulated an opinion that Applicant had committed misconduct and a decision to charge him was taken at that time and its implementation was only delayed by the COVID-19 lockdown restrictions which were imposed by the Government around the same period. In the Applicant's letter of suspension the First Respondent explicitly stated that it had come to the conclusion that there was basis for the Applicant to be charged.

[144] In the circumstances, there can be no doubt that the 40 working day period provided for under clause 4.2.7 within which Applicant's disciplinary case ought to have been prosecuted and concluded began running from March 2020. It is our finding therefore that the First Respondent did not formulate the decision to discipline the Applicant on 16 November 2020 but it did so in March 2020. On that basis, First Respondent's alternative argument must fail.

Was the delay by First Respondent to initiate disciplinary action against the Applicant till after ten (10) months from the conclusion of investigations unreasonable thus amounting to a waiver

[145] In a nutshell, Applicant's contention in this context is that investigations into all the charges having been concluded in March 2020, First Respondent conduct of failing to initiate the disciplinary action against him until the same was initiated at least ten (10) months after the finalization of investigations was unreasonable and amounted to a waiver. It was contended further that the Second Respondent misdirected himself in condoning the First Respondent's undue delay.

[146] It was also argued that not only did First Respondent fail to conclude the disciplinary case within 40 working days either from the conclusion of the investigation in March 2020 but also failed to conclude the case within 40 working days from the date of suspension of the Applicant in November 2020.

[147] It was submitted further that the First Respondent took no positive steps to institute disciplinary action against the Applicant, until at least some ten (10) months later (January

2021). In this regard it was stated that even Applicant's suspension was effected some eight (8) months after the conclusion of the investigations and prior to his suspension he continued doing his work as usual which according to the Applicant manifested a waiver on the part of the First Respondent.

[148] It was accepted on behalf of the Applicant that the setting in of the COVID-19 pandemic and the COVID-19 lockdown measures which were subsequently put in place indeed affected operations of many an employer but notwithstanding that work operations were not completely halted. Applicant argued that the COVID-19 lockdown measures which suspended disciplinary hearings were temporary in nature within the month of May 2020 and were immediately lifted but the employer still did nothing.

[149] Applicant also contended that even after the employer had sought and received clarification on the status of disciplinary hearings from the Ministry of Labour and Social Security in September 2020 which advised them that the suspension of

disciplinary hearings had since been relaxed in May 2020, First Respondent did not act swiftly, but continued waiting and only suspended the Applicant in November 2020 and charged him much later January 2021.

[150] According to the Applicant the First Respondent has no reasonable explanation why it waited for at least ten (10) months after the conclusion of investigations to charge him and/or eight (8) months after the conclusion of investigations to place him on suspension. It was argued that the delay was too long, unreasonable and constitutes a waiver by the First Respondent.

[151] On the other hand, it was conceded on behalf of the First Respondent that following the conclusion of investigations into the alleged misconduct against the Applicant, the employer reached the conclusion to that there was basis for the Applicant to be charged with misconduct. According to First Respondent Counsel's own words 'there was an intention to deal with this matter as at March 2020.' In fact this position is common cause.

[152] It was contended for the First Respondent that the contemplated disciplinary action against the Applicant was delayed by the introduction of COVID-19 lockdown restrictions which came into effect from 27 March 2020. It is not in dispute that the lockdown restrictions resulted in operational disruptions within the First Respondent's enterprise, which we envision would have included the management of disciplinary hearings.

[153] This is confirmation again that as at March 2020 the First Respondent had formulated an opinion to charge the Applicant pursuant to investigations having been finalized but the COVID-19 pandemic and its inherent lockdown restrictions intervened and put a spanner in the works.

[154] In support of this contention, the First Respondent pleaded and this is common cause, that in the month of May 2020 the Ministry of Labour and Social Security issued a suspending disciplinary hearings pending the relaxation of or lifting of lockdown restrictions. Later on and perhaps noting that the suspension on disciplinary hearings was still not being lifted,

on 24 September 2020 the First Respondent wrote to the Ministry and sought special dispensation to be allowed to proceed with the contemplated disciplinary action against the Applicant.

[155] On 28 September 2020 First Respondent was advised by the Ministry that the suspension on disciplinary hearings had been relaxed on 11 May 2020 and it was provided with guidelines under which a hearing may proceed. According to the First Respondent following the advice from the Ministry it then placed the Respondent under suspension with effect from 16 November 2020, closed for the festive break in December and upon returning to work in January 2021 it swiftly preferred charges of misconduct against the Applicant.

[156] According to the First Respondent the sequence of events between March 2020 and 19 January 2021 is a clear demonstration that its intention to discipline the Applicant was always there. It was also contended on behalf of the First Respondent that the fact that the latter did not

immediately become aware of the relaxation on the suspension of disciplinary hearings should not be viewed in the context of ignorance of the law is no excuse principle because the relaxation notice was not published in the conventional method. Moreover, First Respondent argues that delay by itself is not a waiver.

[157] It would appear to this Court that the conclusion of investigations which took place in March 2020 coincided with the imposition by the Government of the general COVID-19 lockdown measures which came into effect on 27 March 2020, which inter alia affected gatherings beyond a certain stipulated number. We take judicial notice though that while business operations were affected, however, there was no complete business or operational shut down.

[158] Business establishments were at the very least required to bring their staff to work on rotational basis and/or work from home. In the context of this matter it appears to us that immediately after introduction of the lockdown measures there may have been challenges for the First Respondent to

convene a disciplinary enquiry. However, it is difficult to comprehend why it could not at least charge the Applicant with the alleged misconduct since investigations had been concluded and a decision to charge him had already been made as manifested in the suspension letter.

[159] It is also common cause that on 4 May 2020 the Ministry of Labour and Social Security issued a press statement on the status of implementation of **General Notice No. 22 of 2020: Guidelines on Employment Contingency Measures in Response to the Coronavirus (COVID-19) Pandemic** wherein the Ministry suspended disciplinary hearings pending the lifting or relaxation of the then strengthened partial lockdown measures.

[160] So effectively this means that the holding or convening of disciplinary hearings was suspended with effect from 4 May 2020. It is this Court's view that the effect of this press statement was not to stop employers from initiating contemplated disciplinary action against their employees but it simply suspended the convening of disciplinary

hearings. It is common cause that between the close of investigations in March 2020 and 4 May 2020, the First Respondent did not charge the Applicant despite a decision to charge him having been already made. Notwithstanding of disciplinary hearings, First Respondent could still have preferred charges of misconduct against the Applicant.

[161] The Ministry of Labour and Social Security on 11 May 2020 (hardly a week after the initial press release) issued another press statement provide clarity on the circumstances under which disciplinary hearings may be held. This press statement became to be known as the press release which lifted the suspension on disciplinary hearings.

[162] The circumstances under which disciplinary hearings could be held in accordance with this press statement, inter alia, were that there must adequate protection from any possible exposure or spread of the coronavirus (social distancing), use of masks, availability of hand sanitizers or running water and soap, <u>there must be not more than twenty (20) people within the hearing room</u>, <u>the sitting must not be more than two (2)</u>

hours sitting at a time and other applicable safety and health measures.(**Underlining is my own emphasis**).

[163] The effect of the second press statement was basically to permit the holding of disciplinary hearings within the period of COVID-19 lockdown measures provided safe and health precautions were taken to prevent the possible exposure and spread of the virus. Most pertinent to the subject matter at hand was that employers were given the green light to hold disciplinary hearings provided there were not more than twenty people in one room and with each session not proceeding for more than two (2) hours at a time.

[164] The Court gets the sense that the First Respondent did not become aware of this second press statement from the Ministry of Labour and Social Security which lifted the suspension on disciplinary hearings. It then wrote to the Ministry in September 2020 and sought special dispensation to proceed with the contemplated hearing against the Applicant. They got an almost instantaneous response from the Ministry and were also provided with a copy of the press

statement issued on 11 May 2020 which spelt out the guidelines under which disciplinary hearings could be held.

[165] It is hard to comprehend how a whole institution of the First Respondent's stature hopefully with a functional and competent Human Resources function could have missed this critically important press statement. Their contention is that this communication was not published in the conventional manner.

[166] When one reads the press statement of 11 May 2020, it begins by stating that '*[I]n a Press update which was issued by the Ministry on Monday the 4th May 2020…*' From this preamble one understands that both press statements were issued via the same medium, hence the Court is not in a position to appreciate what was not conventional about the second press release.

[167] Having been put abreast by the clarification from the Ministry on 28 September 2020 and also provided with the necessary guidelines under which a disciplinary hearing may proceed,

First Respondent went into a slumber and did nothing until 16 November 2020 when Applicant was placed on suspension.

[168] Following the suspension of the Applicant, once again the First Respondent went into another state of inaction until 19 January 2021 when it eventually initiated disciplinary action against the Applicant through the laying of charges of misconduct against him.

[169] It was argued for the First Respondent that the institution closed for the festive break in December 2020 and opened in January 2021. Save for the three (3) public holidays (Christmas Day, Incwala and New Year's Day) which fell between 16 November 2020 and 19 January 2021 this Court was not furnished with proof of any other period during which the First Respondent had closed its offices.

[170] After the sequence of all these events we can only point to the period between 4 May 2020 and 11 May 2020 being the period during which there was a moratorium (figuratively) on the holding of disciplinary hearings. Other than that period

which was only six (6) working days in May 2020, all the other period spanning from March 2020 to 19 January 2021; it was always open to the First Respondent to initiate the contemplated disciplinary action against the Applicant and of course we now know that it did not happen.

[171] In addressing delay in commencing disciplinary action against employees, ***Grogan***[23] states thus:-

> *Just as employees should be afforded sufficient time to prepare for hearings, employers should not allow excessive periods to pass between the time the commission of the offence came to their attention and the time the disciplinary action is commenced. If employers are tardy about instituting disciplinary action, the courts may find that the employer has waived its right to do so or that the employer has reconciled itself to the continuation of the employment relationship and hence has waived the right to dismiss and/or discipline the employee* (**Underlining is my own emphasis**).

[23] J Grogan *Dismissal* (2010) 230 at 230 - 231

[172] The renowned author went further and added that '[i]n most cases, the period of delay must be measured from the date on which the employer becomes aware of the alleged misconduct.' This obviously is upon the conclusion of investigations and an opinion formulated that misconduct has been committed and there is a basis to charge the employee. Of course this is the yardstick which is used in our courts as per the authorities referred to in the preceding paragraphs of this judgement.

[173] According to Grogan some codes set limits within which disciplinary actions must be instituted. Delays beyond those periods have been ruled fatal, but in most cases the courts treat them as guidelines, rather than mandatory and are prepared to overlook delays if the employer is able to provide a reasonable explanation.

[174] Grogan concludes by saying that:-

> *Even if a code provides that disciplinary action must be constituted within 'a reasonable time', or if the code*

makes no reference to time, excessive delay has been held to constitute an irregularity sufficient to render dismissals procedurally unfair, especially if the employer provides no reason for the delay.

[175] In the case of ***Mabilo vs. Mphumalamga Provincial Government & Ors***[24] the Labour Court laid down the objects underlying the right to a speedy investigation and initiation of disciplinary action without unreasonable delay.

[176] The objects as aforesaid are: to prevent the unnecessary disruption in the life of the employee, to minimize the anxiety and concern of the employee, to limit the possibility that the employee will not be allowed a fair hearing and to resolve the dispute expeditiously.

[177] In ***NEHAWU v University of Cape Town***[25] **Ngcobo JA** stated that;

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[24] (1999) 20 ILJ 1818 (LC)
[25] 2003 (2) BCCR 154 (KH)

[180] However, the buck does not stop there. In ***Usuthu Pulp Company (Pty) Limited vs. Jacob Seyama & 4 Ors***[27] the Court stated that courts were reluctant to find a waiver on the part of an employer. The Court went on further to hold that the intention to waive a right cannot be lightly inferred but must clearly appear from the Respondent's (and in this case, the First Respondent's) words or conduct.

[181] The Court stated that a waiver is never presumed but must be clearly proved...and the onus was strictly on the Appellant who must show that the Respondent with full knowledge of her right decided to abandon it whether expressly or by conduct, plainly inconsistent with an intention to enforce it. In ***Road Accident Fund vs. Mothuphi***[28] the Court stated that the intention to waive a right must be adjudged by outward manifestations and any mental reservations not communicated to the other party, even if they existed, are of no legal consequence.

[27] Industrial Court of Appeal: Case No. 01/2004
[28] (2000) 3 All SA 181 (A) paras 16-18

[182] The First Respondent's explanation in this case provides the basis for the delay. Clearly the employer contends that it never abandoned its right, either by words or conduct. Instead it contends that the delay was caused by the consequences of COVID-19 lockdown restrictions and the suspension of disciplinary hearings by the Ministry of Labour & Social Security.

[183] In the present case the First Respondent was aware as early as March 2020 that the Applicant had committed the alleged misconduct. In line with the sequence of the events alluded to in the preceding paragraphs, the First Respondent had countless opportunities to initiate the disciplinary action against the Applicant.

[184] There is no justification for the First Respondent taking at least ten (10) months to bring charges and a disciplinary hearing against the Applicant. Besides, no reasonable or formidable explanation has been offered by the First Respondent for the undue delay.

[185] We do not think that it is fair and just for the employer to know that an employee has committed acts of misconduct and then go into a slumber with no real pressing and/or inhibiting constraints, then after ten (10) months wake up from the slumber and try to do what ought to have been done ten (10) months ago. Why should the Applicant be prejudiced by the First Respondent's ineptitude?

[186] A period of ten (10) months is sufficient time for an employee to plan his affairs for the long term without apprehension that his employment may be in jeopardy. The First Respondent was tardy and acted with great ineptitude in instituting the contemplated disciplinary action against the Applicant within a reasonable time.

[187] While delay is not in itself a waiver but the intention to waive a right must appear from the First Respondent's conduct. This Court is convinced that First Respondent with full knowledge of its right to discipline the Applicant decided to move with very slow pace or motion instead of moving swiftly and its conduct in this regard was inconsistent with an intention to

enforce it. This Court agrees with the ratio *decidendi* ***Duiker Mining Limited v CCMA & Others***[29] that the bringing of disciplinary charges should not be delayed unnecessarily.

[188] However, an excessive delay (as in this case) in instituting disciplinary action within a reasonable time constitutes an irregularity sufficient to deny the Applicant a fair hearing. This is especially so where the employer has not proffered any formidable or reasonable explanation for the excessive delay. In fact the First Respondent's explanation for the excessive delay was very lame, hobbling, imperfect and unconvincing, to say the least.

[189] The ten (10) months delay by the First Respondent to initiate disciplinary action against the Applicant amounts to undue delay. It is our finding therefore that as a result of the unreasonable delay the employer had reconciled itself to the continuation of the employment relationship with the Applicant and hence it has waived its right to discipline him.

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[29] See (note 5) above

[190] In the circumstances, notwithstanding the fact that the Applicant may have committed the alleged acts of misconduct and the First Respondent enjoying the prerogative to discipline him, however, the First Respondent's purported effort by the employer to take disciplinary action against him is vitiated by the undue delay in initiating and concluding the disciplinary enquiry.

[191] We are cannot agree more with the Court in the case of ***Toyota SA Motors (Pty) Limited v CCMA & Others***[30] that there comes a time in any case where a party's disregard for procedure and delay in pursuing a matter is so extensive that they will be penalized irrespective of the merits of the case.

Conclusions and Order

[192] In light of the foregoing reasons and findings, the Applicant's application for the review of the Second Respondent's ruling of 4 March 2021 must succeed.

[30] See note 6) above

[193] Accordingly, the Court makes the following Orders:-

[a] The Second Respondent's ruling dated 4 March 2021 is hereby reviewed and set aside.

[b] The Second Respondent misdirected himself in failing to give a proper interpretation to the provisions of clause 4.2.7 of the disciplinary code when he held that the time bar objection is not applicable to Applicant's case and only applies in the instance when an employee has been suspended.

[c] The Second Respondent also misdirected himself in failing to give a proper interpretation to the phrase 'conclusion of the case' as captured and envisaged in clause 4.2.7 of the disciplinary code when he held that it refers to the conclusion of investigations.

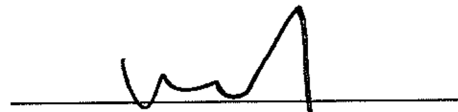
[d] The Second Respondent misdirected himself in condoning the undue and/or inordinate delay on the part of the First Respondent in charging the Applicant and by holding that it

was reasonable to do so notwithstanding the lapse of ten (10) months since the investigations had been concluded.

[e] **The disciplinary hearing proceedings instituted against the Applicant by the First Respondent are hereby declared unlawful and irregular for failure to comply with the provisions of clause 4.2.7 of the First Respondent's disciplinary code and for undue delay in instituting the disciplinary hearing against the Applicant and are henceforth time barred.**

[f] **There is no order as to costs.**

The Members agree.



Muzikayise Motsa
Acting Judge of the Industrial Court of Eswatini

For Applicant: *Mr. F. M. Tengbeh* *(S.V. Mdladla & Associates)*
For First Respondent: Mr. B. Gamedze *(Musa M. Sibandze Attorneys)*