IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 74/2022

In the matter between:

DENNIS SIFUNDZA Applicant

And

UNITED HOLDINGS LIMITED Respondent

Neutral Citation: Dennis Sifundza vs. United Holdings Limited (74/2022) [2022] SZIC 62 (27 May 2022)

Coram: **V.Z. Dlamini – Acting Judge**
(Sitting with D. Mmango and M.T. E Mtetwa – Nominated Members of the Court)

LAST HEARD : 01 April 2022

DATE DELIVERED : 27 May 2022

Summary: *Applicant instituted an urgent application seeking an order setting aside as invalid a letter of dismissal issued by the Respondent after substituting a verdict of guilty subsequent to deviating from the ruling*

of the chairperson of the disciplinary hearing who had found the Applicant not guilty. Application is premised on the cause of action of invalid dismissal which involves a determination whether the Respondent complied with its Disciplinary Code before terminating the Applicant's services. Applicant argued that Respondent's conduct of substituting the verdict was prohibited by its Code.

Held: The Respondent's Disciplinary Code expressly provides that both the finding of fact and sanction imposed by the chairperson of a disciplinary hearing are recommendations to the Employer, who reserves the right to make a final decision.

JUDGMENT

INTRODUCTION

[1] On the 11th March 2022 the Applicant, an adult male of Manzini formerly employed by the Respondent as Anti-Money Laundering and Risk Officer, instituted an urgent application against the latter, a company duly registered and incorporated in terms of the Company laws of Eswatini and sought orders in the following terms:-

1. **That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as one of urgency;**

2. **Condonation for the failure to adhere to the rules of the above Honourable Court as they relate to time limits and service of Court process;**

3. **Setting aside as invalid the letter of dismissal issued by the Respondent to the Applicant and dated the 25th February 2022;**

4. **Directing the Respondent to accept the Applicant back into its employment forthwith or on a date as determined by the above Honourable Court;**

5. **That the Respondent be prohibited from employing any person to replace the Applicant pending determination of this matter;**

6. **Costs of suit; and**

7. **Such further and/or alternative relief as the above Honourable Court may deem fit.**

BACKGROUND FACTS

[2] On the 7th December 2021, the Respondent preferred disciplinary charges (gross insubordination, serious disrespect, imprudence or insolence) against the Applicant in terms of which it was alleged that on the 2nd December 2021 he intentionally damaged company property (branded face mask) in front of the Human Resources Officer (HRO), who had handed it to him, thus disrespecting the HRO's authority and by doing so contravened **offence no. 28** of the Respondent's Disciplinary Code (the Code).

[3] A disciplinary enquiry chaired by a practising attorney was convened by the Respondent to investigate the aforementioned allegations. The Applicant and Respondent were represented by practising attorneys in their respective roles during the hearing. After hearing the evidence of both parties' witnesses, the

chairperson issued a ruling on the 10th February 2022 in terms of which he exonerated the Applicant of all the charges.

[4] What then transpired after the Applicant was acquitted of all charges is the genesis of the dispute that ultimately found its way to this Court. Being dissatisfied with the outcome of the disciplinary hearing, the Respondent wrote to the Applicant on the 21st February 2022 asking him to show cause why the chairperson's findings/recommendations should be adopted by it.

[5] In the aforementioned letter, the Respondent also disclosed its reasons for being disgruntled with the ruling of the chairperson. Furthermore, the Applicant was advised that should the Respondent not adopt the chairperson's findings and substitute a finding of guilty, he is afforded the opportunity to make representations on an appropriate sanction albeit without prejudice to his defence on the merits. The reasons for the Respondent's dissatisfaction with the chairperson's findings are not material to the determination of this matter.

[6] In a response written on the 23rd February 2022, the Applicant decried the short notice he had been afforded to address the issues raised by the Respondent. He further denounced the course adopted by the Respondent as being grossly irregular and constituting an unfair labour. He then sought clarity regarding the applicable procedure. The Applicant further held the view that the clause in the Code relied upon by the Respondent did not sustain the course it took.

[7] The Applicant nevertheless went on to answer each factual issue raised by the Respondent as being the cause of its dissatisfaction with the chairperson's ruling. He objected to submitting mitigating factors prior to an adverse finding by a properly constituted process and asserted that such representations would be made orally while being assisted by his legal representative. Similarly, the Applicant's submissions on the issues raised by the Respondent are immaterial in deciding this case.

[8] On or about the 25th February 2022, the Respondent countered the Applicant's reply by disputing the latter's interpretation of the clause that the former relied upon and mentioned its understanding of the section. Furthermore, the Respondent advised the Applicant that it had considered the chairperson's findings/recommendation and the employee's further submissions and resolved not to adopt the said findings. The reasons for Respondent's decision were mentioned in that rejoinder. Ultimately, the Respondent advised the Applicant that he was found guilty as charged and having failed to mitigate, a sanction of summary dismissal was imposed.

[9] The Applicant consulted his attorneys concerning the latest developments; his attorneys wrote to the Respondent demanding the withdrawal of the letter that summarily terminated the former's services. When the Respondent refused to accede to the Applicant's demand, the latter then launched the application serving before the Court.

ARGUMENTS

[10] On the one hand, the Applicant contends that the Respondent's decision to substitute the chairperson's findings was based on a misreading of **Clause 3** of its Code. Unlike the Respondent, the Applicant's interpretation of **Clause 3** is that, it does not allow the employer to interfere with the findings of the chairperson, but only authorizes the Respondent to modify the recommended sanction on good cause shown. This interpretation has been endorsed by the Courts.

[11] According to the Applicant, his proposition resonates with a sensible and purposive interpretation because the converse would mean that the disciplinary hearing is a superficial exercise devoid of intrinsic value. In essence, the disciplinary hearing is akin to a Court trial where the chairperson is tasked to make a determination of the guilt or innocence of an employee facing disciplinary charges. The employer was therefore not in a logical position to lawfully issue a verdict.

[12] It was Applicant's further contention that the Respondent was too conflicted to judge his guilt or innocence because she was the accuser and prosecutor. The Respondent's conduct was repugnant to the concept that a disciplinary enquiry must be held before an employer may dismiss an employee. The post-hearing process undertaken by the Respondent was therefore unlawful and culminated in an invalid dismissal. Invalid dismissals need not be equated to unfair dismissals, as the appropriate remedy in the former is that the employer should accept the employee back at work.

[13] The Applicant also argued that only a holistic reading of the Code could lead the parties to assign the correct meaning to **Clause 3**. For instance, a reading of **Clause 4** clearly entails that an employee may only be dismissed if the disciplinary hearing recommended such action. The provisions of **Clause 4** were inimical to the meaning Respondent accords to **Clause 3**. The Code may not espouse two mutually exclusive positions on the same issue.

[14] The Applicant further submitted that the Respondent committed an irregularity and an unfair labour practice by requiring him to mitigate while in the same breath calling upon him to submit why it should adopt the chairperson's verdict. In support of his arguments, the Applicant's counsel referred the Court to the following legal authorities: **Eswatini Civil Aviation Authority v Sabelo Dlamini (13/2021) [2021] SZICA 01 (9 February 2022); Maswangayi v Minister of Defence and Military Veterans and Others (2020) (4) SA 1 (CC).**

[15] Other authorities that Applicant relies on are: **Thandile Gubevu v National Credit Regulator Case No. 21151/2018 High Court of South Africa (Gauteng division); Gugu Fakudze v The Swaziland Revenue Authority and 3 Others (08/2017) [2017] SZICA 01; Avenge Infraset Swazi (Pty) Ltd v Cleopas S. Dlamini (16/2017) [2018] SZICA 88.**

[16] Conversely, the Respondent submitted that it was plain in terms of **Clause 3** that the findings of the chairperson of a disciplinary enquiry as to guilt or

innocence were not final, but a recommendation; the final decision vests with the Respondent's management. According to **Clause 3** both the findings as to guilt or innocence and sanction were recommendations and no distinction is envisaged.

[17] It was further contended by the Respondent that the Courts have recognized an employer's right, where the Code permits same or does not prohibit it, to substitute the chairperson's findings on guilt and sanction. Nevertheless, the Courts have equally held that the employer may curtail its right through either a unilaterally formulated disciplinary code or a collective agreement negotiated with a recognized employee organization. The present case was distinguishable because no such limitation exists.

[18] The Respondent also argued that on the question whether the employer was legally bound to adopt the decision of the chairperson of the disciplinary hearing, the Applicant relied on foreign judgments yet there was a plethora of decisions in this jurisdiction that have established legal principles on the question.

[19] It was the Respondent's contention that the word *"ruling"* in **Clause 3** encompasses both the verdict and sanction in the context. The clauses preceding **Clause 3** in terms of which the Applicant argues preclude the employer from interfering with factual findings are subject to **Clause 3**; the chairperson is empowered to make rulings on questions of fact subject to management's final decision on the matter.

[20] The Respondent further submitted that the same principles which apply to the interpretation of contracts must be employed in this case. That is to say, the Court must examine the intention of the parties, the nature, character and purpose of the Code. When one applies the purposive approach, it is apparent that the intention of the Code was to confer management with the power to make final decisions on findings of fact.

[21] The Respondent's counsel relied on the following legal authorities: **Swaziland Television Authority v Lwazi Hlophe and Others Case No. 9/2002 SZICA; Lynette Groening v Standard Bank and Another Case No. 2/2011; Gugu Fakudze v Swaziland Revenue Authority & 3 Others Case No.8/2017; Nedbank Swaziland Limited v Sylvia Williamson & Another Case No. 17/2017 SZICA; Kenneth Ngwenya v Eagles Nest Case No. 37/2003 SZIC.**

[22] Other authorities are: **Lynette Groening v Standard Bank & Another Case No. 184/2008; Lynette Groening v Standard Bank Swaziland & Another Case No. 293/2010 SZIC; Mbongiseni Dlamini & Others v Swaziland Electricity Company Case No. 138/2017 SZIC; Swaziland Electricity Company v Mbongiseni Dlamini & Others Case No. 722/2017 SZHC; Sithembiso Nyawo v Mananga Sugar Packers Case No. 317/2019.**

ANALYSIS

[23] No sooner had the Industrial Court of Appeal declared in the case of **Eswatini Civil Aviation Authority v Sabelo Dlamini (supra)** that the common law

concept of invalid dismissal is part of our law and is justiciable by this Court, than the present dispute found its way to the Court based on the same cause of action. In essence, the question for determination is whether the Respondent acted *ultra vires* the provisions of its Code, in particular **Clause 3** when it substituted its decision for the findings of the chairperson of the disciplinary hearing.

[24] The determination of the question before the Court turns on the correct interpretation of the provisions of the Code mainly **Clause 3.** During arguments, we were emphatic that the Court would not embark on a course to reinvent the wheel. Since the Applicant's cause of action is premised on the common law concept of invalid dismissal, which was expounded by the Industrial Court of Appeal in **Eswatini Civil Aviation Authority v Sabelo Dlamini (supra),** it stands to reason that this Court is bound to follow the reasoning of the superior Court.

[25] In the Court's view, the *ratio decidendi* of **Eswatini Civil Aviation Authority v Sabelo Dlamini (supra)** appears at paragraphs 19-22 and reads as follows:

> *"It then follows that the common law concept of invalid dismissal forms part of our law and is justiciable by the Industrial Court.*
>
> *Reverting to the case under consideration, the Disciplinary Code, which forms part of the terms and conditions of employment, requires certain steps to be followed; the starting point of most cases involving dismissal is the prevailing Code. The failure by the employer to comply*

with the dictates of the Code prior to a dismissal may constitute a procedurally unfair dismissal but a dismissal may be both procedurally unfair and invalid, in which case it is for the aggrieved party to elect which cause of action and consequent remedy to pursue.

In casu the Employee elected to rely on invalid dismissal, and there being no dispute that the Employer had jumped the gun in dismissing without prior submissions on sanction, contrary to the Code, the Employee was entitled to rely on invalid dismissal as his cause of action in the Court a quo, and seek appropriate relief in the form of the letter of dismissal being set aside(as opposed to unfair dismissal and reinstatement), the dismissal itself being a nullity in the circumstances.

It follows that the "unfair dismissal" and "reinstatement" bases of the appeal were misplaced and cannot be considered and as such, that the appeal is bound to fail." [Our emphasis].

[26] The correct approach to the interpretation of documents such as contracts or statutes was articulated in the celebrated case of **Natal Joint Municipality Pension Fund v Endumeni Municipality (910/2010) [2012] ZASCA 13 (15 March 2012)** at **paragraph 18,** in the following terms:

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

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

[27] The principles of interpretation expressed in **Endumeni (supra)** form part of our law as they were pronounced in the case of **Nedbank Swaziland Limited v Sylvia Williamson & Another (supra)** at **paragraphs 15** to **18**.

[28] Now, **Clause 3** of the **Code** read as follows:

"Presiding Officer

In general a person appointed to serve as the Presiding Officer should be a member of the senior management in the The Company. However

if this is not possible or desirable, any other suitably qualified person from within or outside the The Company may be appointed. During the conduct of the enquiry the employee may make application on good cause shown for the recusal of the Presiding Officer. The presiding officer shall not consult, confer or have casual contact with any of the parties or their representatives while handling a matter without the presence or consent of the other party. The ruling of the presiding officer shall be a recommendation to The Company which will then make a final and binding decision. The employee will still have a decision to appeal whatever decision is made." [Emphasis added].

[29] The Code has nine parts, which are numbered in Roman numerals. **Clause 3** is located under **Part VIII** with the heading *Disciplinary Procedure.* **Clause 3** is preceded by **Clause 2** (*Conduct of the enquiry*). **Clause 2** contains procedures and functions of the Presiding Officer for conducting a disciplinary enquiry; there are twenty (20) procedures listed in alphabetical order (*a to m),* with *k* having seven (7) bullet points.

[30] **Clause 2 (m)** prescribes the procedure to be followed by the Presiding Officer after the disciplinary hearing has been completed. This provision is significant in solving the conundrum serving before Court and for that reason we shall quote it verbatim. **Clause 2 (m)** reads as follows:

"The presiding officer shall have the power and responsibility to within ten (10) days of the last day of the hearing confirm in writing the findings of fact, sanction imposed and the reason in support thereof and

provide a copy of the ruling to the Human Resources Manager." [Our underlining].

[31] It is evident from **Clause 2 (m)** that the term '*ruling*' encompasses both findings of fact and sanction imposed. It was deliberate for the drafters of the Code not to use the conjunction '*and*' between the phrases "*findings of fact*" and "*sanction imposed*". Instead, the use of a *comma* connotes separation between the expressions "*findings of fact*" and "*sanction imposed*". This is to instruct the reader that not only is there a distinction between the two, it also means a ruling may consist either findings of facts and sanction or only a finding of fact.

[32] Furthermore, there is a reason for the arrangement of **Clauses 2 (m)** and **3** in the Code. Whereas the former instructs us what a ruling may encompass; the latter informs us of the legal effect of that ruling on the employer. Apart from **Clauses 2 (m)** and **3**, the term "*ruling*" is also used in **Clause 2 (k)** in reference to preliminary decisions of the disciplinary hearing chairperson, but the decision of the Appeal hearing chairperson is called a "*determination*" (**Clause 6 (g)**).

[33] The provisions of **Clause 2 (m)** read with **Clause 3** eliminates conjecture in the interpretation of the term "*ruling*" in the context of the Code. We agree with Mr. Tsambokhulu that **Clause 3** must be read with **Clauses IV, VI (2), VI (4), VII (2) (d), VII (2) (k), VII (2) (l)**. Nevertheless, there is nothing express or implied in those clauses that is inconsistent with the provisions of

Clauses 2 (m) and **3** of **Part VIII** of the Code. The clauses do not provide that the ruling of the presiding officer on findings of fact shall be final.

[34] Let us closely examine **Clause VI (4)** (*Disciplinary sanction-Dismissal*), which was one of the main pillars of the Applicant's argument. We agree with Mr. Sibandze that the Applicant's contention would hold sway if the aforesaid clause had provided that an employee may only be dismissed where a disciplinary hearing has recommended such a sanction.

[35] The use of the term *may* in **Clause VI (4)** simply reinforces the principle that the prerogative to impose disciplinary action vests with the employer. Put differently, the employer exercises discretion to dismiss or not to dismiss an employee even where there has been no improvement in behaviour and a disciplinary hearing has recommended such a sanction.

[36] Although **Clause IV** *(definitions)* defines the phrase *"disciplinary sanction"* as sanctions that can be imposed by the chairperson, the term *impose* in the aforesaid clause must be understood to connote a sanction recommended. This interpretation resonates with the provisions of **Clause 3**.

[37] All the procedures and functions to be exercised by the chairperson are a precursor to the final step that the presiding officer has to take, which is to provide a copy of the ruling that may encompass the findings of fact only or both the finding of fact and sanction to the employer as recommendations. As a matter of law, the Applicant is entitled to all the rights accorded to him by

those clauses that precede **Clause 3** and the presiding officer is enjoined to exercise all the powers prescribed in the Code, but those rights and powers are subject to the provisions of **Clause 3**.

[38] As alluded to in paragraph 23 above, the Court is called upon to determine whether the Code permitted the Respondent to act as she did. The question as to whether the employer acted fairly and/ or reasonably when she substituted the factual findings of the presiding officer with her own is not before us for determination. That question raises triable issues, which would require the Applicant to approach the Court on a different cause of action and pursuing a different remedy.

[39] In any event, the provisions of **Clause 3** accords with local jurisprudence on the question under discussion. The general principle is that an employer is not obliged to adopt the findings of fact and sanction imposed by a disciplinary hearing chairperson unless it has agreed in a Code or Collective Agreement to be so bound. The principle is well articulated in the decisions cited in paragraphs 15, 21 and 22 above.

[40] Mr. Tsambokhulu urged the Court to follow the reasoning of the South African High Court Gauteng Division in the case of **Thandile Gubevu v National Credit Regulator (supra)** because a similarly worded clause in a disciplinary code was interpreted in favour of an employee who had been exonerated of the charges by the disciplinary hearing chairperson, but the

employer rejected the verdict and substituted a finding of guilty instead, on the basis that according to that code the finding was a recommendation.

[41] We were specifically referred to paragraph 32 of **Thandile Gubevu (supra)**, where the Court remarked that it did not make sense and was contrary to the whole concept of holding a disciplinary hearing to reserve to one party the right to make a final decision as to the guilt of the other party after the process. The Court went on to state that disciplinary enquiries are meant to grant equal and fair opportunity to the employer and employee to advance whatever sentiments aimed at proving guilt or innocence.

[42] Excepting the established principles in our jurisdiction that are inconsistent with the above statement of the South African High Court, in our view the observations in paragraph 32 were made *obiter*. The *ratio decidendi* of the decision is found at paragraphs 31 and 33 of the **Thandile Gubevu (supra)** decision. The Court found that the code expressly provides that the disciplinary hearing chairperson must ask for evidence in mitigation and aggravation only if the employee is found guilty; the chairperson should then adjourn the hearing and thereafter reconvene to recommend sanction. The rest of the activities are not relevant after an employee has not been found guilty.

[43] It is our view therefore that **Thandile Gubevu (supra)** is distinguishable from the facts of the present case. The Applicant's second complaint is that the Respondent should not have invited him to make submissions in mitigation in the same letter where he was required to advance submissions on why it

should adopt the chairperson's findings of fact. This criticism is not premised on the provisions of the Code, but on the concept of unfair labour practice and therefore not justiciable in this application in its current form.

[44] We uphold also Mr. Sibandze's objection against Mr. Tsambokhulu advancing argument on the second complaint based on the Code because this was not averred by the Applicant in his founding affidavit. Notwithstanding our holding, the Court in any event finds that the Code confers the right to mitigate upon the Applicant while also enjoining the presiding officer to invite and hear submissions in mitigation and aggravation.

[45] The Code does not prescribe the form submissions in mitigation and aggravation of sanction should take. Nonetheless, it is common cause that before making the final decision in terms of **Clause 3**, the Respondent invited the Applicant to make submissions in mitigation, but the latter elected otherwise. The procedure adopted by the Respondent enjoys the endorsement of our jurisprudence.

CONCLUSION

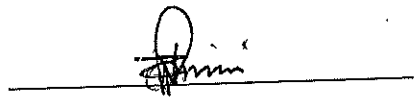
[46] In the premises, the Court finds that the Respondent did not breach the provisions of its Disciplinary Code, in particular **Clause 3** and as a consequence, the Applicant's dismissal was not invalid.

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

[a] The application is hereby dismissed.

[b] Each party to pay its own costs.

The Members agree



V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Mr. M.M. Tsambokhulu
(Maseko Tsambokhulu Attorneys)

FOR RESPONDENT : Mr. M.M. Sibandze
(Musa M. Sibandze Attorneys)