IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 98/2022

In the matter between:

THABISO MAPHALALA Applicant

And

SHISELWENI FORESTRY COMPANY LIMITED 1st Respondent

SIPHO MNISI N.O. 2nd Respondent

Neutral Citation: Thabiso Maphalala vs. Shiselweni Forestry Company Limited & Another (98/2022) [2022] SZIC 64 (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 : 05 May 2022

DATE DELIVERED : 27 May 2022

Summary: *Applicant instituted an urgent application seeking to review and set aside a ruling of the chairperson of a disciplinary enquiry denying him*

external representation on the basis that there were no exceptional circumstances warranting him to exercise his discretion in his favour.

Held: The chairperson failed to apply his mind to the issues before him; consequently, his ruling was susceptible to review. Furthermore, reviewable irregularity warrants intervention of Court in uncompleted disciplinary proceedings. Further, that it was undesirable to refer the matter to the chairperson for reconsideration.

JUDGMENT

INTRODUCTION

[1] The Applicant is a liSwati male of Mbekelweni employed by the 1st Respondent as Financial Controller. The 1st Respondent is a company registered and incorporated in terms of the Company laws of Eswatini with its principal place of business in Nhlangano. The 2nd Respondent is a practising attorney who has been appointed by the 1st Respondent to chair the disciplinary enquiry established to investigate disciplinary charges preferred against the Applicant.

BACKGROUND FACTS

[2] The Applicant was suspended on the 11th February 2022 and subsequent to the suspension, charges were preferred on the 9th March 2022 and a disciplinary hearing was scheduled to commence on the 15th March 2022. On that date, the Applicant applied for external representation due to the fact that

colleagues of equal status had declined to represent him. After hearing arguments, the 2nd Respondent adjourned to consider the application. He reconvened the hearing to deliver his ruling on the 24th March 2022 in which he dismissed the application.

[3] The ruling of the 2nd Respondent is what triggered the present application that was launched on the 31st March 2022, in which the Applicant seeks the following orders:

1. *Dispensing with the normal forms of service and time limits and hearing this matter on the basis of urgency.*

    1.1 Pending finalization of this application, continuation of the disciplinary hearing of the applicant be stayed.

2. *Reviewing and/or setting aside of the decision of the 2nd Respondent denying applicant external representation.*

3. *Directing the 1st Respondent to pay costs of this application.*

4. *Granting the applicant further and/or alternative relief.*

ARGUMENTS

[4] The matter was first enrolled for hearing on the 1st April 2022 and on that day; the Court granted prayer **1.1** by consent after the 1st Respondent abandoned its point of law on urgency. For his part, the 2nd Respondent filed a notice to abide by the decision of the Court. Only the prayer for review of the 2nd

Respondent's ruling remained contested between the Applicant and 1st Respondent. The question at the heart of the factual dispute is whether the Applicant had engaged all his colleagues who qualified to represent him prior to pursuing external representation before the 2nd Respondent.

[5] The Applicant submitted that the 2nd Respondent's decision to refuse him external representation and directing him to find an internal representative was grossly unreasonable and irregular because he had brought it to his attention that some colleagues who were managers had refused to represent him citing various reasons, while others were 1st Respondent's witnesses at the hearing.

[6] It was the Applicant's allegation that during the disciplinary hearing, the company representative suggested five (5) colleagues for him to approach for representation. In response, the Applicant indicated that out of the five (5) employees suggested, two worked for other companies and were unknown to him; another two did not inspire confidence because he had openly questioned their qualifications to management and the one employee had already refused. He then contended that the 2nd Respondent did not interrogate all these issues.

[7] The Applicant also submitted that the 2nd Respondent failed to take into account that the Complainant/Initiator was the 1st Respondent's Managing Director, a factor that probably had a bearing on his failure to secure an internal representative. Additionally, the Applicant argued that the

seriousness of the charges, which are potentially threatening his job security and career, should have been considered as well by the 2nd Respondent.

[8] The Applicant further impugned the 2nd Respondent's conclusion that the disciplinary charges were not complex. Lastly, the Applicant contended that he had established exceptional circumstances that warrant the Court to intervene in uncompleted disciplinary proceedings.

[9] In support of his submissions, Applicant's counsel referred the Court to the following legal authorities: **Ndoda H. Simelane v National Maize Corporation (Pty) Ltd Case No. 453/2006 SZIC; Sazikazi Mabuza v Standard Bank of Swaziland Limited & Another Case No. 311/2007 SZIC; Lungile Masuku v National Agricultural Marketing Board & Another (313/08) [2018] SZIC 115 (26 October 2018).**

[10] In opposition, the 1st Respondent submitted that there was no legal principle stating that an employee should only be represented by a colleague of equal or higher rank. The Applicant was at liberty to request any co-worker to represent him. In addition, the 1st Respondent argued that the Applicant was fully aware that there were twenty-four (24) employees in the Respondent's Group of companies whom he could request to represent him and in fact had already approached some. Consequently, the Applicant had not exhausted the list of employees who could potentially represent him; instead he had prematurely approached the Court.

[11] It was further argued by 1st Respondent that the fact that other employees were stationed at another operational points or were employed by a sister company did not detract from the fact that these employees were employed by the Respondent which forms part of a Group of companies. According to the 1st Respondent, the disciplinary process did not involve matters of public interest, which would warrant external representation.

[12] The 1st Respondent also submitted that allowing external representation would set a precedent that was in conflict with its Disciplinary Code. While the disciplinary charges were serious, they were not complex as to merit that the Applicant be externally represented, in particular by an attorney because the serious nature of disciplinary charges alone is insufficient. Allowing an attorney to represent the Applicant during the hearing would unfairly tilt the scale in favour of the Applicant because the complainant/initiator lacked legal training.

[13] Moreover, the 1st Respondent contended that allowing an attorney to represent the Applicant would not only result in a prolonged disciplinary process, it would also entail unnecessary costs and administration on its part. In any event at common law, an employee had no automatic right to legal or external representation.

[14] The 1st Respondent also submitted that the Applicant had failed to establish exceptional circumstances for the Court to intervene in an ongoing disciplinary enquiry as the 2nd Respondent had a discretion to allow or not to

allow external representation and had exercised his discretion judiciously. The Applicant had not shown that the 2nd Respondent had misdirected himself or committed any other irregularity in respect of the application for representation.

[15] The 1st Respondent's counsel referred to the following cases in support his arguments: **Lungile Masuku v National Agricultural Marketing Board & Another (supra); Groening v Standard Bank Swaziland and Another (184/08) [2008] SZIC 37; Ndoda H. Simelane v National Maize Corporation (Pty) Ltd (supra).**

ANALYSIS

[16] This Court has held that *"the right to representation is a central aspect of fairness, in respect of unsophisticated employees and senior managers alike"*. Furthermore, the Court has held that *"an unfair procedural decision which has so pervasive and fatal an effect upon all phases of the disciplinary proceedings qualifies"* as exceptional circumstances that warrants the intervention of the Court in incomplete disciplinary proceedings. See: **Sazikazi Mabuza v Standard Bank of Swaziland Limited & Another (supra).**

[17] It is trite law that, in the context of the workplace there is no general right of an employee to legal representation; the chairperson of the disciplinary enquiry has to exercise his or her discretion to decide whether legal representation is *"indispensable to ensuring a procedurally fair disciplinary*

hearing". See: **Ndoda H. Simelane v National Maize Corporation (Pty) Ltd (supra)** and **Sazikazi Mabuza v Standard Bank of Swaziland Limited & Another (supra).**

[18] In the case of **Sazikazi Mabuza v Standard Bank of Swaziland Limited & Another (supra)** at **page 17, paragraphs 43-44,** the Court said the following:

> *"The Court will not come to the assistance of the Applicant unless it is satisfied that the chairman did not exercise his discretion judiciously.*
>
> *The duty resting on the chairman of the 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 conclusion based on the facts and the law. The Court cannot interfere with his discretion where he has applied his mind to these matters, even if the Court disagrees with his conclusions on the facts and 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 then he has failed entirely to perform the function which was required of him. He has failed to exercise his discretion judiciously. His decision will then be reviewable."*

[19] The 2nd Respondent's decision was based on his reasoning that is found at **paragraph 17** and **18** of his ruling, which reads as follows:

> *"Now the charges are clearly not complex. The employer is represented by an internal person. There are a number of fellow employees who are*

in his rank who may represent him. The disciplinary code it is common cause is binding.

The employee has not presented any exceptional circumstances to warrant a departure from the code."

[20] The above reasoning was partly premised on submissions the 2nd Respondent attributed to the Applicant (who is referred to as the Respondent at the hearing). The submissions are at **paragraph 5 (a)** and **(b)**, which read as follows:

"The application for external representation was motivated as follows:

a. The Respondent alleges that he could not find any employee of the Employer or its sister companies or its subsidiaries who can represent him as most employees are afraid to represent him he alleges.

b. The Respondent contends only a few employees are available or willing to represent him. Now the Respondent says he has no confidence in these employees to the extent that he did not approach them." [Our emphasis].

[21] In his application to Court, the Applicant annexed minutes of the disciplinary hearing dated 15th February 2022, which show the parties' submissions on the preliminary issue. He pointed out that the minutes were produced from his own recording pursuant to the fact that the Respondent failed to furnish him with minutes to prepare for the application to Court. The Respondent did not

challenge the accuracy of the minutes; accordingly, they are deemed to be a true record of what transpired that day.

[22] The 2nd Respondent's summation of the Applicant's submissions at the hearing and the reasons for his decision should be juxtaposed with what is recorded in the minutes as having been submitted by the parties. At **page 1** of the minutes, the following is recorded:

> *"...The respondent answered that he is not ready to proceed because he could not get a representative from the Company. He explained that he asked Quinton Collins the manager for Sawco Mining Timber, Martin Vandrhyde the manager for STTP also asked Sabelo Khoza Forestry Manager for SFC and further went to ask from the subsidiaries company that is Thoko Shiba Financial Controller at Peak Timber.*
>
> *So all the approached employees could not make it to represent him. He then requested from the chairperson that he should get the external representative and that person will be available at anytime convenient to them [time] said [by] the respondent."* [Emphasis added].

[23] The Complainant/Initiator who is the Respondent's Managing Director demanded more details from the Applicant to demonstrate that he had approached those employees and they had refused. The Applicant stated that one employee said he had recorded a statement in connection with the case, another had pending issues with the Respondent and yet another was a witness when the suspension letter was served on the Applicant. The Complainant

disputed that the employee who witnessed the letter of suspension being served on the Applicant would play any role at the hearing. He further denied that Thoko Shiba would be prejudiced by representing the Applicant. He however had no answer to the reasons that disqualified the others.

[24] The Complainant then suggested that the Applicant should approach the following colleagues: Wessel Maritz, Dollos Uys, Martin Motsa, Maxwell Mthethwa and Nhlanhla Nxumalo. The Applicant's response is recorded in the minutes at **page 2** as follows:

> *"The respondent replied that he made a phone call to Martin Motsa who replied that he was busy at that time and he will come back to him. Then Martin Motsa came back to the respondent. The respondent narrated his story then Mr. Martin Motsa also turned him down by saying he is afraid to be against the company so he cannot afford to represent him.*
>
> *The respondent further said that with Dollos Uys and Wessel Maritz he does not have confidence with them. The other two who is Maxwell Mthethwa and Nhlanhla Nxumalo for Peak Timber, he does not know them and never met them since we newly acquired Peak Timber in 11 March 2021 and he does not know them at all so it is impossible to ask them to represent him."*

[25] Now, according to the above excerpts and the entire record, nowhere does the Applicant allege that there are some employees of equal status who are available and willing to represent him, but he has no confidence in them. In fact, it seems incongruous to say employees are willing to represent the

Applicant but at the same time accept that he has not approached them. Availability and willingness presuppose that the employees have been approached to discuss the case and have indicated their willingness to represent the Applicant.

[26] The 2nd Respondent did not interrogate the reasonableness of each explanation that was given by the Applicant. The Applicant did not just make bare allegations that no colleague was willing to represent him; he mentioned specific names and stated their reasons for turning him down. Even those he did not approach, he stated the reasons for his decision. It was for the 2nd Respondent to assess if each explanation was reasonable. For instance, this would have entailed a further probing as to why he said he had no confidence in Wessel Maritz and Dollos Uys. As it turns out, in his founding affidavit, the Applicant mentions why he had no confidence in his colleagues.

[27] While the 2nd Respondent correctly captured the applicable legal principles, it is the Court's view that his conclusion was not based on facts placed before him. Put differently, the 2nd Respondent failed to properly apply his mind to the issues before him; in the premise his ruling is susceptible to being reviewed and set aside.

[28] Although we note that the 2nd Respondent is an experienced attorney and is thus capable of disabusing his mind of his previous ruling and apply his mind to issues he overlooked, it is our view that it is fair and proper for the Court to determine the issue and not remit it to him for reconsideration. This is to

avoid circuitous and back and forth litigation because disciplinary enquiries by their nature should be determined expeditiously.

[29] In its answering affidavit the 1st Respondent avers that there are twenty –four (24) employees from who the Applicant may choose a representative. In reply, the Applicant alleges that in the list only eight (8) are employed by the 1st Respondent. Regarding the rest, he avers that besides the fact that they are not employed by the 1st Respondent, he has had no contact with them nor seen them before and the others are junior in status to him.

[30] We do not consider as persuasive the Applicant's contention that he cannot approach employees from the 1st Respondent's sister companies because the notice to attend disciplinary hearing only extended to him the right to be represented by fellow employees. Our reason for holding that view is that the very minutes that were exhibited by the Applicant reveal that he had already approached employees from subsidiary companies. He is not allowed to approbate and reprobate at the same time.

[31] Having said that, we also observe that from the Applicant's subjective viewpoint, he approached those employees he knew. It has been held by the Courts in this jurisdiction that the practical difficulty in identifying a representative entails determining a colleague's equal status, competence, independence, suitability of character and experience in industrial relations. It is unfair for an employer to expect an employee who faces dismissible charges to entrust the defence of his livelihood to a virtual stranger. See: **Sazikazi Mabuza v Standard Bank of Swaziland Limited & Another (supra)** and

Swaziland Airlink vs. Nonhlanhla Shongwe N.O and Two Others (29/2020) [2020] SZSC 26 (19/08/2020).

[32] The Applicant's reason for lacking confidence in his two colleagues is that he had raised questions about their job qualifications to management in the past. While lack of job qualifications alone, even if confirmed, may not be a disqualifying ground for representing a colleague; its effect is that rightly or wrongly, the employee facing disciplinary action may lack confidence in that colleague.

[33] The Court has also held that the benefits of representation go beyond technical advice and assistance; they include moral support and objective guidance. See: **Sazikazi Mabuza v Standard Bank of Swaziland Limited & Another (supra)**. It is not farfetched to infer that the Applicant's reservations about his colleagues' job qualifications may have reached their ears; it is therefore unfair to expect the Applicant to entrust his livelihood on colleagues he has criticized before; moreover, it is unreasonable to expect the impugned colleagues to agree to represent someone who has expressed doubts about their job credentials.

[34] In as much as the Applicant did not deny that the colleague who was a witness to the letter of suspension would not be a witness during the hearing; it appears at least according to the minutes that it was the colleague that refused to represent the Applicant. Even if that was not the position, these being lay people, it is not improbable for an employee to have an apprehension that

when the witness to the suspension letter was approached by management some facts about the case may have been shared; hence, that colleague might be conflicted. Nevertheless, we are not making a conclusion that such an event occurred.

[35] It is common cause that the Applicant is facing serious charges wherein an element of dishonesty is alleged. As a person with a background in the field of accounts and finance, if he is found guilty and dismissed, that would mark the end of his career. So he ought to be afforded the opportunity to engage a suitably qualified person to assist him in his defence.

[36] Whether or not the charges are legalistic may only arise at the hearing when evidence is led, but should that arise, there would be no need for the 2nd Respondent to adjourn the hearing to afford the Applicant the opportunity to engage an attorney since one would already be involved.

[37] It has been contended by the 1st Respondent that its Disciplinary Code, which is binding on the Applicant, prohibits external or legal representation of an employee at a disciplinary hearing. Firstly, the Code was not produced in Court for us to examine it. Secondly, we can imagine that its provisions are not immutable; in fact, that seems to have been the approach adopted by the 2nd Respondent.

[38] The 1st Respondent also decried the fact that if an attorney was permitted, the scales would not be balanced because the Complainant was a lay person.

Moreover, it would entail the company incurring administrative costs. The Court has a duty to consider the likelihood of prejudice on both parties and the balance of convenience. The Complainant is the Managing Director whose presence at the hearing is the likely cause of the senior managers' reluctance to represent the Applicant; they will probably be more reluctant after this case.

[39] There is no guarantee that if the Applicant who risks being dismissed were to be directed to continue seeking internal representation, one or two colleagues who have not been approached would agree. If they do not agree, the corollary is that the Applicant should conduct his own defence. That cannot be countenanced by this Court.

[40] On the other hand, while instructing an attorney to be the initiator would entail financial implications, the 1st Respondent is a huge company with subsidiaries and as such has the capacity to afford an attorney. But to deny the Applicant an option simply because the 1st Respondent will incur legal costs is unreasonable. The less said about attorneys causing delays in the disciplinary process the better. We can only observe that the 2nd Respondent has the right and duty to control the disciplinary process in a manner he considers appropriate to complete it within a reasonable time.

CONCLUSION

[41] In the premises, the Court holds that the 2nd Respondent's ruling is susceptible to being reviewed and set aside. We further hold that the 2nd Respondent should be directed to permit the Applicant external representation of his choice.

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

[a] The 2nd Respondent's decision denying Applicant external representation is reviewed and set aside. The Applicant is to be allowed external representation of his choice.

[b] Each party to pay its own costs.

The Members agree

V.Z. DLAMINI
ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Mr. S. Madzinane
(Madzinane Attorneys)

FOR RESPONDENT : Mr. B. Dlamini
(B.C. Dlamini Attorneys)