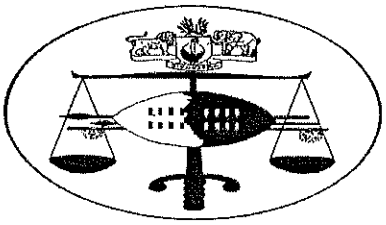

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE** Case No 205/2022

In the matter between:

**SIBUSISO GAMEDZE** 1st Applicant
And

**ESWATINI NATIONAL PROVIDENT FUND** 1st Respondent

**MICAH NKABINDE N.O** 2nd Respondent

**Neutral citation:** Sibusiso Gamedze v Eswatini National Provident Fund and Another [205/22) [2022] SZIC 96 (03 August 2022)

**Coram:** **NGCAMPHALALA AJ**
*(Sitting with Mr.M.P. Dlamini and Mr. E.L.B. Dlamini, Nominated Members of the Court)*

**Date Heard:** 25th July, 2022

**Date Delivered:** 3rd August, 2022

***SUMMARY: Urgent application-application for removal of the chairperson in disciplinary hearing on grounds of biasness - matter to start de novo before a new chairperson-Respondent disputes allegation that***

***Chairperson was bias- Court should not intervene in incomplete disciplinary hearing- Applicant should have made recusal application before Chairperson before matter referred to Court.***

*Held –* ***Application granted- Disciplinary hearing to start de novo before a new Chairperson- each part to bear its own costs.***

---

**JUDGMENT**

---

[1] The Applicant is Sibusiso Gamedze an adult Liswati male of Gege area in the Shiselweni Region, but currently resides at Ka-Shali area within the same Region.

[2] The 1st Respondent is Eswatini National Provident Fund (ENPF), a juristic entity duly registered under the laws of the kingdom of Eswatini and carrying on business at the Lidlelantfongeni Building within the Manzini Central Business District in the Manzini Region.

[3] The 2nd Respondent is Mr. Micah Nkabinde N.O, the current chairperson in Applicant's on going disciplinary hearing proceedings who is herein cited in his official capacity as such.

**BRIEF BACKGROUND**

[4] The matter has a history before the above honourable Court following the Applicant being subjected by the 1st Respondent to a disciplinary hearing on gross negligence.

[5] The matter again finds its way before this Court following the judgment of this Court under case number no. 191/22, dated the 7th July, 2022, wherein **Thwala J**, dismissed Applicant's application for the recusal of the 2nd Respondent from chairing his disciplinary hearing. The Court referred the matter back to the Chairperson for determination. The present proceedings seek to remove the 2nd Respondent from presiding over the said disciplinary hearing on allegations of biasness. Thereafter direct that the matter commences *de novo* before another Chairperson.

[6] The Applicant has now approached the Court under a Certificate of Urgency, seeking an order in the following terms:

**6.1 Dispensing with Rules of Court as relate to form, service and time limits and enrolling this matter as one of urgency.**

**6.2 That the Applicant's non-compliance with this Honourable Court's Rule be hereby condoned.**

**6.3 That the 2nd Respondent be and hereby removed as chairperson in the Applicant's disciplinary hearing proceedings with immediate effect.**

**6.4 That the Applicant's disciplinary hearing proceedings commence *de novo* before another Chairperson.**

**6.5 That pending finalization of these proceedings, the Respondents be and hereby interdicted from continuing with the Applicant's disciplinary hearing.**

**6.6 That a *rule nisi* operative with immediate and interim effect do hereby issue in respect of prayer 6.5.**

**6.7 Costs of suit.**

**6.8 Granting the Applicant such further and/or alternative relief as the Court may deem fit.**

[7] The Applicant's application is opposed by the 1st Respondent and an answering affidavit was duly filed and deposed thereto by Ms. Sindisiwe C. Mango, 1st Respondents General Manager Corporate Services. The Applicant on the 21st July, 2022 thereafter filed his replying affidavit, together with his heads of arguments, which heads were also filed by the Respondent. Seeing that all pleadings and heads had been filed the parties agreed to set the matter down for argument for the 25th July, 2022, on which date the matter was argued and judgment reserved.

## ANALYSIS OF FACTS AND APPLICABLE LAW

[8] The Applicant is an employee of the 1st Respondent. On the 14th June, 2022 the Applicant was suspended by the 1st Respondent on full pay, pending a disciplinary hearing on the 23rd June, 2022. The hearing is still on going, with the 2nd Respondent as Chairperson. It was the averment of the Applicant that

the 2nd Respondent is the 1st Respondent's General Manager Operations and that foreseeing that he may not be impartial in dealing with the proceedings, he duly applied for the Chairperson's recusal.

[9] The 2nd Respondent dismissed the application, and issued out a ruling to that effect. Dissatisfied with the ruling the Applicant thereupon approached this Honourable Court, seeking the setting aside of the 2nd Respondent's ruling and his recusal. The application was heard by the Court, and Applicant's application dismissed by the Court. The proceedings were then set to reconvene on the 12th July, 2022, however the Applicant's representative Ms. Jabu Shiba from **Swaziland Union of Financial Institution and Allied Workers (SUFIAW)** advised that she was unavailable on the said date.

[10] Efforts by the representative to have the matter scheduled to another date were futile. It was the Applicant's evidence that on the 11th July, 2022 he began to experience strange chest pains, headache and shortness of breath. He took medication to alleviate the pain, however same persisted, leading him to resort to seeking medical attention on the morning of the 12th July,2022, on which date the disciplinary hearing was scheduled to proceed. He accordingly attempted to inform his union's representative Ms. Shiba on the development of his health, but her phone rang unanswered.

[11] He proceeded to inform his colleague Mr. Sandile Dlamini who is a shop steward on the developments of his health. He then proceeded to seek medical attention whereat he was treated by Dr T. Fynn who prescribed medication and further certified him unfit, until the 15th July, 2022. A copy

of the medical certificate was advanced by the Applicant as proof thereon. The medical certificate was transmitted to the shop stewards who in turn advised the Respondents of his ill health, and his failure to attend the disciplinary hearing. Despite being advised of his ill-health, the 2nd Respondent, proceeded with the disciplinary hearing in his absence.

[12] The 2nd Respondent allowed proceedings to continue in the Applicant's absence and his substantive representative without due cause. Further the Applicant averred that the 2nd Respondent allowed the proceedings to continue without the Applicant pleading to the charges he is currently facing. It was the Applicant's argument that the 2nd Respondent allowed two witnesses to lead evidence, one being an external witness, of whom neither the Applicant nor his representative cross examined. Applicant avers that this happened despite the shop stewards advising the 2nd Respondent of his handicap. Applicant argued that the action by the 2nd Respondent was in total disregard of his ill-health, his rights and the rules of fairness.

[13] It was his submission that the 1st Respondent placed emphasis on the stipulated time frame with which disciplinary proceedings should be finalized as contained in 1st Respondent's **Disciplinary Code and Procedure**, and made him a sacrificial lamb to attain his goal. It was the Applicant's evidence that after the submission by the 2nd witness the matter was postponed to the 13th July, 2022 for continuation, however upon the Respondents being informed by his representative that he had been admitted and receiving medical treatment, at Manzini Clinic, the 2nd Respondent postponed the proceedings indefinitely pending his recovery.

[14] It was the Applicant's averment that the conduct of the chairperson of proceeding with the disciplinary action in his absence, despite a medical certificate as proof of his medical condition, warrants the intervention of the Court. Further that the 2nd Respondent is conducting the disciplinary proceedings in an unprecedented, unfair and unreasonable manner, thus his actions demonstrate a reasonable apprehension of bias. The Applicant in support of its argument in seeking the Courts intervention and the admissibility of a medical certificate, cited the cases of;

**BOTHATA MOSIKILE V SOUTH AFRICAN BOARD OF SHERIFFS (WESTERN CAPE DIVISION, CAPE TOWN – SOUTH AFRICA) [1629/2019]**

**SAZIKAZI MABUZA V STANDARD BANK AND ANOTHER, INDUSTRIAL COURT CASE NO. 311/2007.**

[15] In rebuttal it was the 1st Respondents argument that the disciplinary hearing, was set down to be heard on the 12th July, 2022 after two postponements at the instance of the Applicant. It was the 1st Respondent's submission that on the 11th July, 2022, the General Manager Corporate Services received a telephone call from the Secretary General of SUFIAW Ms. Jabu Shiba, seeking a postponement of the proceedings .It was the averments of the 1st Respondent that based on previous experience where the union had sought multiple postponement of matters and thereafter turned around and claimed that same were time barred, they would be opposing any application for a further postponement of the matter.

[16] Further she advised her that it was the union's duty to avail itself, and apply for the postponement before the relevant Chairperson. It was the 1st

Respondent's submission that two of applicant's representatives (shop stewards) attended the hearing on the 12th July, 2022, and reported that the Applicant was unwell, and further requested that the matter be stood down for thirty minutes as the Applicant was seeing a doctor as he did not feel well. When the hearing resumed, the Applicant was not in attendance and his representatives produced a medical certificate on his behalf, the said medical certificate indicated that the Applicant was unfit for work.

[17] It was the 1st Respondents argument that the medical certificate did not specify why he was said to be unfit for duty, as a result thereof the 1st Respondent doubted the integrity of the medical certificate. It was 1st Respondents averment that it could not have been a coincidence that after the union had sought a postponement of the matter, and having been advised that same would be opposed the Applicant suddenly took ill and was reported to be indisposed. This arose suspicion with the 1st Respondent that the certificate had been procured so as to engineer the postponement of the matter, hence the 1st Respondent argument that the authenticity of the medical certificate was questionable.

[18] Secondly 1st Respondent averred that the medical certificate did not provide details as to why the Applicant was declared unfit for duty. The 1st Respondent submitted that after the Chairperson had heard submissions from both parties, he stood the matter down until 2pm, and after having given the Applicant's representative an opportunity to place evidence before him that the certificate was genuine i.e., oral evidence by the doctor, or an affidavit, the Chairperson ruled that the certificate submitted in terms of the rules of

evidence constituted hearsay evidence. The Chairperson allowed the proceedings to continue in the absence of the Applicant, in order to ensure that the disciplinary hearing was unduly delayed having regard to the thirty (30) day provision as contained in **Article of 3.02 of the Disciplinary Code**.

[19] The matter accordingly proceeded, and was postponed to proceed the following day, Wednesday 13th July, 2022, to allow the Applicant to cross examine the witnesses that had testified, and further to allow the Applicant to go through the transcript, which the 2nd Respondent averred the Applicant requested to assist in the cross examination. On the 13th July, 2022, the Applicant was again not in attendance, and the Chairperson was informed by the Applicant's representative that he had been admitted to hospital, and therefore could not be in attendance. The hearing as a result thereof was postponed indefinitely by the Chairperson after receipt of a medical certificate confirming his admission in hospital. The 1st Respondent argued that the conduct and ruling of the Chairperson was judiciously sound, and done within the perimeters as conferred to him as a chairperson. Further that the Applicant if unhappy with the ruling of the Chairperson is required to lodge a recusal application before him, pursuant to him approaching the Court. Therefore, the Applicant's application should be dismissed, and in support of this argument referred the Court to the case of **MGOBHOZI V NAIDOO NO AND OTHERS [2006] 3 BLLR 242(LAC)** and the articles of **HUGO PIENAAR, HOW TO DEAL WITH BOGUS MEDICAL CERTIFICATES (11TH JUNE 2018), JODI-LEIGH ERASMUS, HOW TO DEAL WITH SUSPECTED FRAUDULENT MEDICAL CETRIFICATES (5TH JULY 2021)**.

[20] The Applicant has now approached the Court seeking its intervention in the incomplete disciplinary hearing, and have the 2nd Respondent removed as Chairperson, and the matter begin *de novo* before a new Chairperson. The Applicant cited that the conduct exhibited by the 2nd Respondent from the Transcribed Record, exhibit actual bias, and as a consequence there of tainting the proceedings.

[21] The Court has consistently stated that it is weary to intervene, and come to the assistance of an employee in internal disciplinary proceedings, until such time that the proceedings have run their course, except where compelling and exceptional circumstances exist, warranting such interference. These sentiments were also stated in the case of **GUGU FAKUDZE VS THE SWAZILAND REVENUE AUTHORITY AND OTHERS INDUSTRIAL COURT OF APPEAL CASE NO 8/2017** where the Court stated the following:

*"It is a trite position of the law that the court cannot come to the assistance of an employee before a disciplinary enquiry has been finalized. The reason being that the court does not want to interfere with the prerogative of an employer to discipline its employees or even to anticipate the outcome of an incomplete disciplinary process.*

*This would be the case even if the employee is in a situation where his pre-dismissal rights have been infringed or where there has been unfair labour practice. In such a case the court would only be able to grant relief after the fact. Conversely, the court has jurisdiction to interdict any unfair conduct including the disciplinary action in order to avert irreparable harm being*

*suffered by an employee. Put differently, where exceptional circumstances exist for the court to intervene, it will."*

[22] The question whether or not there are compelling and exceptional circumstances is a question of fact to be determined from the facts and circumstances of each case. In the same case the Court stated the following:

*"In answering the question of whether the Appellant set out exceptional circumstances for the court to intervene, the court a qou ought to have considered whether a failure to intervene would result in injustice or whether the appellant could achieve justice by other means".*

[23] The chairperson of a disciplinary enquiry and in whose hands the final decision, has a quasi-judicial function. He is by law presumed to be independent and impartial umpire and to have competence to determine any question in relation to the disciplinary enquiry, including the legality of the charges, until the contrary is proved.

[24] The Court again stated the same position in the **SAZIKAZI MABUZA V STANDARD BANK OF SWAZILAND AND ANOTHER SUPRA:**

*"43 The court will not come to the assistance of the Applicant unless it is satisfied that the chairman did not exercise his discretion judiciously.*

*44. 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 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 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."*

[25] As alluded to above, and at the risk- of the Court repeating itself, it is important to note that the Court will not come to the assistance of the Applicant unless it is satisfied that the Chairperson did not exercise his discretion judiciously. The duty resting on the Chairperson 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 decision where he has applied his mind, even if the Court disagrees with his conclusions on the facts or the law. No more is required of the Chairperson 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 then 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.

[26] The Applicant's argument is based on the procedure that the 1st Respondent followed during the disciplinary hearing, relating to his failure to adjourn the hearing after being advised of the Applicant's medical unfitness to attend the hearing, despite having been furnished with a medical certificate. Whilst there may be a variation in the evidence tendered by the parties regarding what transpired before, after and during the hearing, it is however confirmed by both parties that the hearing scheduled for the 12th July, 2022, proceeded in the Applicants absence, notwithstanding him having submitted a medical certificate certifying him unfit. Further that the hearing was scheduled to resume on the 13th July, 2022, but was postponed indefinitely after provision of yet another medical certificate by the Applicant stating that he was now hospitalized.

[27] It is trite in law that the Chairperson has a legal duty to afford an employee a fair hearing, by affording the employee a fair opportunity to present their case. Accordingly, can it be said therefore that the conduct of the 2nd Respondent of seeking the oral evidence of the author of the medical certificate or a sworn statement, was fair and reasonable in the circumstances. put differently was it proper procedure to follow in the circumstances.

[28] In the judgment of **SWAZILAND AIRLINK (PTY) LTD V NONHLANHLA SHONGWE N.O AND TWO OTHERS (29/2020) [2020] SZSC 26, Cloete JA** cited with approval the following excerpt from the South African Labour Appeal Court case of, **HIGHVELD DISTRICT COUNCIL V CCMA AND OTHERS [2002]12 BLLO 1158:-**

*"when judging whether a particular procedure was fair the tribunal, judging the fairness must scrutinize the procedure actually followed. It must decide whether the procedure was fair."*

[29] From the above statement of the law, it is therefore the duty of the Court to decide whether it was fair for the Chairperson to cause the disciplinary hearing to proceed, notwithstanding the fact that the Applicant had produced a medical certificate, certifying him unfit for duty. Was there a need for the 2nd Respondent to proceed and require oral evidence/or a testimonials statement from the author of the medical certificate.

[30] In the case of **BOTHATA MOSIKILI V SOUTH AFRICAN BOARD OF SHERIFFS, SHERIFFS (WESTERN CAPE DIVISION, CAPE TOWN – SOUTH AFRICA) [1629/2019],** which was correctly cited by the Applicant the Court stated the following:

*"It is beyond doubt that it is an overarching and essential right of an accused person to be tried in his or her presence. If there is any deviation, it must always be kept in mind that the deviation, may often inadvertently, do more harm than good. For instance, on occasion, it may affect equality of arms between the accused person and the accuser, with devasting consequences. It may place an accused person at a disadvantage. Hence, a hearing in the absence of an accused person may be justified only in exceptional circumstances. Similarly, it is significant that there should always be clear, valid convincing reasons to proceed in the absence of an accused person. When a presiding officer is confronted with the possibility of excluding the accused person from the proceedings; it must be emphasized that it is prudent*

*to be mindful of the fact that the benefit of finalizing the matter speedily; can most probably be far outweighed by the potential harm of material deprivation of a right to a fair hearing."*

[31] It further stated its view on the procedure that should have been adopted by the Disciplinary Committee, before concluding to proceed with the hearing, in light of a medical certificate. It stated the following:

*"There was no indication during the appeal proceedings to indicate that:*

*(a) The Disciplinary Committee made any attempts to contact the Applicant in order to establish the facts of the accident; or*

*(b) It tried to obtain an alternative medical opinion on whether the Applicant was fit to attend the disciplinary hearing;*

*(c) Whether there was any form of investigation before any decision to proceed in the absence of the Applicant was taken; or*

*(d) Whether an adjournment or rescheduling of the disciplinary hearing was ever seriously considered; or*

*(e) There was evidence to indicate that the Applicant in the past persistently or repeatedly failed, or was unwilling to attend the disciplinary hearing; or*

*(f) Reasonable attempt, or efforts on the part of the Disciplinary Committee were made to involve the Applicant in the process; or*

*(g) The Disciplinary Committee explained why it was justified in proceeding straightaway, given that there had already been a substantial delay previously, which was occasioned by the Applicant; or*

*(h) The Applicant was given many opportunities, previously to make representation at the disciplinary hearing and he failed to use them;*

*(i) Whether there were objective facts present to show that the Disciplinary Committee had reason to believe that the Applicant was feigning the accident or injury; or*

*(j) Considering the impact of the decision to proceed in absence of the Applicant, on the Applicant."*

[32] The Court aligns itself with the reasoning of **Ndziweni AJ**, the medical certificate filed by the Applicant reasonably served to excuse the Applicant's absence. The production of the medical certificate should have at the least warranted a consideration that his absence was for a reason beyond his control, or required at the very least before anything else a concerted effort be made to hold an enquiry if there was a reasonable suspicion about the explanation given by the Applicant's representatives. Particularly, if a medical certificate was provided.

[33] It is vital to note that, the Court should not be understood as saying that in each and every case an enquiry should be held. However, when the facts and circumstances of a case are calling for one, like in this instant case, an investigation ought to be undertaken before proceeding with the hearing in the absence of the employee.

[34] The Court is fully mindful of the fact that there is a Disciplinary Code in place which stipulates a thirty (30) day time frame for the commencement of disciplinary proceeding. The Court is of the view that the present proceedings

were instituted well within the stipulated timeframe, and is currently on going. The Applicant therefore should have been afforded a postponement of the matter, this would have provided an opportunity for him to plead to the charges levied against him, consequently the deviation materially affected the Applicant's right to a fair hearing. As alluded to above a chairperson when confronted with the possibility of excluding the employee from the proceedings must be mindful of the fact that the benefit of finalizing the matter speedily, can most probably be far outweighed by the potential harm of material deprivation of a right to a fair hearing. It is on the above stated grounds that the Court is of the view that the matter must therefore start *de novo*.

[35] That being the case the second leg of the matter is the biasness of the Chairperson. It was argued on behalf of the Applicant that the conduct of the Chairperson aroused a reasonable apprehension of bias on his part, the conduct being the act of the Chairperson of proceeding with the hearing despite having in hand a medical certificate, stating that the Applicant was unfit for duty. It is important to note that every hearing of a disciplinary nature must not only be a fair hearing, it must also be seen to be a fair hearing. Clearly from the facts of the matter, and the evidence adduced, the Applicant has set out exceptional circumstances that warrants the Courts intervention on the conduct of the Chairperson.

[36] It is the Courts view that the Chairperson has conducted himself in a manner that would warrant the Court to remove him from hearing the matter. It is important to note that every hearing of a disciplinary nature must not only

be a fair hearing it must also be seen to be a fair hearing. Having considered all the facts and the circumstances of this case, the Court find that the disciplinary hearing flawed, and as a consequence thereof the disciplinary hearing is to start *de novo*, before a new Chairperson.

[37] In light of the above, the Court makes the following order:

1) **The 2nd Respondent is hereby removed as Chairperson in the Applicant's disciplinary hearing proceedings.**
2) **The Applicant's disciplinary hearing proceeding are to commence *de novo* before a new Chairperson.**
3) **There is no order as to costs.**

The Members Agree.

**B. NGCAMPHALALA**

**ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND**

**For Applicant:** Mr. G. Mhlanga (MotsaMavuso Attorneys).

**For Respondent:** Mr. Z. Jele (Robinson Bertram)