



**IN THE INDUSTRIAL COURT OF ESWATINI**

HELD AT MBABANE

Case No. 322/22

In the matter between:-

**NOMCEBO MDZINISO**

Applicant

**And**

**NATIONAL AGRICULTURE MARKETING BOARD**

1<sup>st</sup> Respondent

**FUNDIZWI SIKHONDZE**

2<sup>nd</sup> Respondent

**MZWANDILE KUNENE**

3<sup>rd</sup> Respondent

**Neutral citation:** Nomcebo Mdziniso v National Agriculture Marketing Board  
And Two (2) others (322/22) [2022] SZIC 04  
(20 February, 2023)

Coram:

**DLAMINI NG'ANDU - JUDGE**

*(Sitting with Ms.P.P. Dlamini and Mr.N.M.V Gumbi  
Nominated Members of the Court)*

**HEARD: 31 January 2023**

**DELIVERED: 20 February 2023**

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## RULING

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[1] Nomcebo Mdziniso an adult female is the Applicant herein and had filed an urgent application against the Respondents herein seeking the following orders:

**1.1 Dispensing with the normal rules, procedures, forms and time limits of the honorable Court an enrolling the matter as one of urgency**

**1.2 A rule *nisi* do issue calling upon the Respondent to show course why an order in the following terms should not be made final.**

**1.3 Reviewing and setting aside the decision of the 2<sup>nd</sup> Respondent (Chairperson) handed down in the grievance hearing of the Applicant on the 6<sup>th</sup> of October 2022 and substituting same with a decision granting the Applicant external legal representation of her own choice.**

**1.4 Staying the Applicant's grievance hearing pending the outcome of this matter.**

**1.5 Prayer for cost against parties opposing the application.**

[2] The 1<sup>st</sup> Respondent is the National Agriculture Marketing Board, a statutory body established in terms of the **National Agricultural Marketing Board Act of 1985**. First Respondent is also the Applicants employer.

[3] Second Respondent, Fundizwi Sikhondze an adult male is the Chairperson appointed by the 1<sup>st</sup> Respondent to preside over the grievance hearing instituted by the Applicant herein against the 3<sup>rd</sup> Respondent.

[4] Third Respondent Mzwandile Kunene an adult male is also an employee of the 1<sup>st</sup> Respondent holding the position of Chief Financial Officer and to whom the Applicant reports and against whom her grievance report is directed.

[5] The Applicant herein reported a grievance to her employer against the 3<sup>rd</sup> Respondent on the 29<sup>th</sup> of May 2022 where she listed her grievances amongst which were allegations of verbal attacks against her by the 3<sup>rd</sup> Respondent, accusations of sexual relation with the former Chief Executive Officer the Applicant herein of abuse, threats, victimization action and sabotage of her work by the 3<sup>rd</sup> Respondent to mention a few.

[6] The National Agricultural Marketing Board grievance and dispute procedure, Article 3.04 states that:

*“The employee shall normally receive a reply to a grievance, at all levels in the procedure within 10 working days after the date the grievance is submitted at that level...”*

[7] It is worth noting that the Applicant filed her 1<sup>st</sup> grievance on the 29<sup>th</sup> of May 2021, which grievance was not attended to, she subsequently filed the 2<sup>nd</sup> grievance, being the current complaint on the 20<sup>th</sup> of May 2022, exactly a year later. Even the 2<sup>nd</sup> grievance report was also not attended to in accordance with the 1<sup>st</sup> Respondent grievance and dispute procedures up until about 2 months later. The Applicant was

being invited to a grievance hearing by the Human Resource Officer, one Nombulelo Vilakati. The Applicant then requested for a postponement to a later date so to enable her to prepare for the said hearing and such postponement was granted to a later date.

[8] It would appear that even the 2<sup>nd</sup> suggested date, the hearing could not proceed as the Applicant requested for a further postponement due to the work pressure occasioned by the audit, she was involved in on the said dates, but unfortunately the request for the postponement from her supervisor the very same 3<sup>rd</sup> Respondent as well as the Chief Executive Officer, he never responded to her request instead the date set came and went.

[9] It is worth noting that, soon thereafter on the 20<sup>th</sup> of September 2022 to be precise, the 3<sup>rd</sup> Respondent wrote a letter to the Applicant entitled, **“Formal Notice of Suspension from Employment with Immediate Effect”**.

[10] What comes out clearly from the Applicant’s letter of suspension is the following:

- It suspends the Applicant from employment for unspecified **“serious act of misconduct”** which were still under investigations.
- The suspension was with immediate effect that is to say from the 20<sup>th</sup> of September 2022.
- She was prohibited from entering her place of employment and its subsidiaries unless by written consent of the Chief Executive Officer.
- She is prohibited from communicating with any witnesses- (**unspecified witnesses**,) but possibly individuals from her employment other than the Human Resource Officer.

- She is also in turn prohibited from communicating with any member of staff including her department subordinates and colleagues let alone give them instructions
- She was ordered to surrender all organization's property and gadgets in her possession and further provide her password to the IT officer for such gadgets.

[11] Upon having been suspended the 1<sup>st</sup> Respondent Chief Executive Officer then invited the Applicant to the grievance hearing. Applicant in turn wrote back requesting to be legally represented at the hearing and stating herein her reasons for the request to which the Respondent's Chief Executive Office rejected her request for permission to be represented by council and further advising her to make the same request to the chairperson of the hearing.

[12] The chairperson 2<sup>nd</sup> Respondent indeed heard her request on the 5<sup>th</sup> of October 2022 and dismissed her application. Thus this application before Court.

[13] Respondents have vigorously opposed this application and council for the Respondent in their submissions went as far as to caution this Court stating;

*“5. The Applicant has now brought an unprecedented application in our jurisdiction to this Court to review and set aside the third Respondents decision and she also seeks an order that she be legally represented in the internal grievance hearing. This is an unprecedented application because no complaint in a grievance hearing has ever moved an application in these Court to be legally represented. This Court will therefore be the first to write history on the subject. It should do so with caution”. (Emphasis is mine)*

[14] Respondent's submissions in the paragraphs that followed, which I won't repeat here, made further damning allegations against the Court readily intervening and interfering in incomplete disciplinary proceedings and accusing the Industrial Court of having adopted a lackadaisical approach; possibly in dealing with matters. It did seem like an attack on the Court to say the very least as opposed to dealing with the application that is before Court. This Court could not understand nor appreciated where Respondent's frustration emanated from.

[15] However, that as it may be this Court is totally in agreement with the following:

- i. It is without a doubt every employer's prerogative to deal with disciplinary matters without interference from the Courts and indeed prescribe standards of conduct at the workplace.
- ii. Court must be slow to intervene in an employer's internal disciplinary proceedings until they have run their course unless or otherwise in exceptional circumstances. **See .Sazikazi Mabuza Vs Standard Bank Of Swaziland Limited and Another case number 311/2007, Graham Rutolph Vs Mananga Collage Judgement Industrial case number 94/2007 Ndonda Simelane Vs National Maize Cooperation Industrial Court case number 453/2006.**

[16] The practice in our Jurisdiction is having employees assisted by representatives when defending themselves in disciplinary hearing and not necessarily legal practitioners. There's no general right to legal representation at a disciplinary hearing. What remains as a matter of fact is that the hearing must be fair and if that

fairness means allowing the employee external legal representation, the chairperson has the power to exercise his or her discretion to allow that external representation. It is the duty of the chairperson to ensure that, that discretion is judiciously exercised and ensuring that relevant matters peculiar to that case are taken into consideration.

[17] It is worth pointing out that in this particular case the Applicant was not, even though already on suspension, being invited to a disciplinary hearing, instead she was being invited to the internal grievance hearing.

[18] It is also correct that as the complainant in this grievance hearing; the decision would not necessarily result in her being disciplined or losing her employment.

[19] The chairperson, 2<sup>nd</sup> Respondent exercised a discretion and denied the Applicant her request. He considered the submission made by both counsels and concluded that:

*“.....at this stage there is no evidence to suggest that the complainant extensively sought but was unable to get a fellow employee to represent her in the grievance hearing....”*

[20] The above statement from the chairperson's ruling to this Court clearly suggests that the chairperson, 2<sup>nd</sup> Respondent, acknowledged the need for the Applicant to be represented even though this was a grievance hearing and she was the complainant. What however clearly comes out is that despite this acknowledgement the chairperson did not apply his mind to the contents of the suspension letter which contents made this matter peculiar.

[21] Not only was the Applicant suspended before the hearing of her grievance but the following were communicated to her:

- i. She was not allowed entry into her place of employment inclusive of all NAMBOARD work station and subsidiaries.
- ii. She was prohibited from interfering with any witness in anyway, needless to state that at that point she had not even been furnished with a list of those witnesses she was not to interfere with.
- iii. She was prohibited from calling any member of staff including her department subordinates with an intention to give instructions.

[22] The question that remains unanswered to this Court is how then did the chairperson, expect the Applicant to:

*“Extensively seekbut was unable to get fellow employees to represent her in the grievance hearing...”*

If the Applicant had been expressly prohibited to communicate with anyone in the organization through the suspension letter?

[23] The Industrial Court, it has been said in many cases will only interfere in incomplete disciplinary proceedings in very rare instances where there are exceptional or special circumstances and injustice is likely to be the end result if the Industrial Court does not interfere. This I believed is aimed at ensuring illegalities are curtailed and justice and fairness prevails in all relationships between the employer and employee.



[24] I totally align myself with what was said in **Sazikazi Mabuza Vs Standard Bank Swaziland and Another 311/2007:**

*“Whether the Court will intervene depends on the facts and circumstances of each particular case. It is not sufficient to merely find the chairperson of the disciplinary enquiry come to a wrong decision. In order to justify intervention the Court must be satisfied that this is one of those rare cases where a grievance might result if the chairperson’s decision is allowed to stand....”*

The possibility of the Court being overwhelmed by a flood of ill-conceived or undeserving applications for relief cannot justify the court refusing altogether to entertain applications for intervention in disciplinary proceedings otherwise relief would be denied to those rare cases where a miscarriage of justice might otherwise occur.

[25] The case of **Ndoda H Simelane Vs National Maize Corporation (Pty) Ltd case number 453/06** cited by the Applicant highlight considerations which the chairman/ person should take into account in deciding whether legal or external representation is indispensable to ensuring a procedurally fair hearing. I do note that the said case dealt with a disciplinary hearing as opposed to a grievance hearing and counsel for the Respondent argued that:

*“This is an informal grievance hearing where none has been charged and its aim is to solely reconcile the two employees and therefore the requirement for legal representation at this stage does not arise”.*

What council for the Respondent seems to have overlooked as well as possibly the chairperson is the very strongly worded suspension letter given to the Applicant in this matter which makes this case not just an ordinary grievance hearing. That suspension letter specifically prohibits the Applicant to seek any form of assistance from her fellow colleagues, whether senior or junior to her for that matter. Even at this stage of this matter, the said suspension letter is still in place despite the Respondent suggesting in their submission that the Applicant could get assistance and representation from fellow colleagues.

[26] The hostility against the Applicant by 3<sup>rd</sup> Respondent cannot be ignored from the suspension letter, 3<sup>rd</sup> Respondent wrote to the Applicant and it also become clear from the reading of that suspension letter that the intension is to have Applicant alienated from any and all employees of the first Respondent. The circumstances surrounding this case, it is the Court's finding renders this case rare and exceptional circumstances do exist as indicated above.

It is therefore one of those very few if not rare instances whereby in order to prevent any form of miscarriage of justice, the Court's intervention is necessary. This the Court is doing so, solely for the reason that the 2<sup>nd</sup> Respondent, the chairperson herein failed to take into account the contents of the Applicant's suspension letter which prohibits her from seeking any assistance from any employee of the 1<sup>st</sup> Respondent, despite the grievance code stating that the employee:

*“...may be represented at each successive step in the grievance handling procedure....”*

In the interest of fairness and justice, it is the Court’s view that taking into account the peculiar circumstances of this case the chairman (2<sup>nd</sup> Respondent) ought to have therefore permitted Applicant representation by her attorney even at this grievance hearing.

[27] In conclusion, the Court therefore makes the following orders:

- a) The chairperson (2<sup>nd</sup> Respondent) shall permit both Applicant and as well as the Respondents to be represented by legal practitioners if they wish to do so at the grievance hearing.
- b) A copy of this judgment is to be furnished to the chairperson.
- c) The decision of the chairperson (2<sup>nd</sup> Respondent handed down on the 6<sup>th</sup> of October 2022 is consequently set aside.
- d) Cost of this application are awarded in favour of the Applicant in the ordinary scale.

The Members Agree.



**D. F. DLAMINI-NG'ANDU**

**JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

FOR APPLICANT : S Dlamini

FOR RESPONDENTS : N.D Jele