



IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 280/2023

In the matter between:

MPHILO DAVID JELE

Applicant

And

CASHBUILD (PTY) LTD

1st Respondent

THEMBA MATSEBULA

2nd Respondent

FAITH MKHATSHWA

3rd Respondent

Neutral Citation: *Mphilo David Jele vs. Cashbuild (Pty) Ltd and Two Others*
(280/2023) [2024] SZIC 04 (31 January 2024)

Coram: **V.Z. Dlamini – Judge**
*(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango –
Nominated Members of the Court)*

Heard: 03 October 2023

Delivered: 31 January 2024

SUMMARY: *Disciplinary Inquiry – Legal representation – Discretion of chairperson.*

Discretion of chairperson – exercised judiciously – Factors to consider.

Legal representation – Premature application – Exhaustion of internal representation prerequisite.

JUDGMENT

INTRODUCTION

- [1] The Applicant, a liSwati male adult of Ezulwini is employed as a Perpetual Inventory Controller and Peoples Portfolio by the 1st Respondent, a company incorporated and registered in accordance with the Company laws of Eswatini and situated in Ezulwini in the Hhohho region. The 2nd and 3rd Respondents are the Chairperson and Initiator respectively of the disciplinary hearing instituted by the 1st Respondent to investigate allegations of misconduct preferred against the Applicant.

BACKGROUND FACTS

- [2] On the 4th October 2023, the 1st Respondent charged the Applicant with gross negligence, gross dishonesty and breach of company policy and procedure following an incident that occurred on the 11th September 2023 where a

customer took forty (40) bags of Icon cement from the store without paying for the said goods, thus causing a discrepancy between stock in the system and physical stock. It was alleged that the Applicant failed to perform his duties with proper care in that he neglected to report the shortages after conducting daily stock counts, but instead presented false information that the stock balanced, until management discovered the shortages after investigations.

- [3] The disciplinary hearing was scheduled to commence on the 10th October 2023, but a day before that the Applicant's attorneys wrote a letter to the 1st Respondent notifying it that they would be representing him during the hearing. On the first day of the hearing, the Applicant raised a preliminary point in which he applied for legal representation; after hearing both sides, the 2nd Respondent refused the application on the basis that the company's policies do not permit legal representation in an internal disciplinary inquiry. The 2nd Respondent then postponed the hearing to the 12th October 2023 to afford the Applicant an opportunity to look for an internal representative.
- [4] On 12th October 2023 the Applicant renewed his application for legal representation but the 2nd Respondent reiterated his decision taken on the 10th October 2023. The Applicant then advised the 2nd Respondent that he would not be participate in the hearing without legal representation. The disciplinary hearing proceeded in his absence.

[5] On the same day, the Applicant filed an urgent application before this court in which he sought the following orders: -

1. *Dispensing with the time limits, manner of service and procedures for instituting applications set out in the Rules of Court and enrolling and hearing this matter as one of urgency.*
2. *That a Rule Nisi do hereby be issued calling upon the 1st Respondent to show cause on a date to be determined by the above Honourable Court why an order in the following terms should not be made final:*
 - 2.1 *Staying the disciplinary hearing pending the final determination of this application for review.*
 - 2.2 *Reviewing, correcting and setting aside the 2nd Respondent's ruling issued on the 12th day of October 2023 to deny the Applicant external representation for the disciplinary hearing that commenced on the 12th day of October 2023.*
3. *That the Respondents furnish the Applicant with a record of the disciplinary hearing.*
4. *That prayers 1, 2, 2.1, 2.2 and 3 operate with immediate and interim effect pending the finalization of the matter.*
5. *Declaring any further steps that may be undertaken by the Respondents pending the determination of the matter as unlawful.*
6. *Further and/or alternative relief.*
8. *Costs of suit in the event of unsuccessful opposition.*

APPLICANT'S CASE

- [6] In summary, the Applicant's reasons for seeking legal representation were that the charges he faced were legalistic, serious and carried adverse consequences such as dismissal. Moreover, he stated that he occupies a managerial position and it would be difficult to obtain adequate representation by a fellow employee.

1ST RESPONDENT'S CASE

- [7] The 1st Respondent raised what in essence amounted to two preliminary points. It asserted that the application did not disclose a cause of action for two reasons. Firstly, that no grounds for reviewing the 2nd Respondent were alleged by the Applicant more so because the former's reasons for refusing the latter legal representation were legally sound and valid; hence, unassailable. Secondly, the Applicant challenges a decision of the 2nd Respondent allegedly made on the 12th October 2023 yet the actual decision refusing him legal representation was made on the 10th October 2023; consequently, the application was directed at a non-existent ruling.
- [8] The other preliminary point was that the Applicant sought to set aside the decision to deny him external representation without seeking that the decision be substituted with one permitting him external representation.

[9] On the merits, the 1st Respondent denied that the Applicant occupies a managerial position; there were senior positions between his position and the branch Manager's position. That said, the 1st Respondent added that the Applicant had colleagues in equal rank and one level above who were capable of adequately representing him, but elected to be represented by an attorney without having engaged those colleagues.

[10] According to the 1st Respondent, the company even widened the pool of colleagues from whom the Applicant could engage, to include other Perpetual Inventory Controllers and Sales Coordinators from other branches such as Manzini, Matsapha, Mbabane, Nhlanguano and Tshaneni. The 1st Respondent mentioned the names of the colleagues from the branches in its answering affidavit.

[11] Furthermore, the 1st Respondent stated that the Applicant elected to abandon the disciplinary hearing without any valid reasons; he therefore could not complain about any prejudice suffered.

ADJUDICATION

[12] In the court's view, the application was filed prematurely by the Applicant, but the 1st Respondent itself is not without fault. The case of **Ndoda H. Simelane v National Maize Corporation (Pty) Ltd (IC Case No. 453/06)** is the leading case on the factors to be considered by the chairperson of a disciplinary hearing in deciding whether or not to permit legal representation

in a disciplinary hearing. It is trite that there is no general right to legal representation; this much was conceded by the Applicant's counsel.

[13] In **Ndoda H. Simelane** (above), the court formulated factors to be considered by the disciplinary hearing chairperson when exercising his discretion to decide whether or not to allow legal representation. These factors, which are by no means exhaustive, are:

13.1 *Whether a fellow employee of equal status to the accused employee is available to represent him;*

13.2 *If not, whether representation by a subordinate would be unreasonably degrading to the accused employee and/or hamper him in the presentation of his defence;*

13.3 *Whether an employee of the organisation can satisfactorily represent the interest of the accused employee in circumstances where the Chief Executive Officer [branch manager] is the complainant;*

13.4 *In circumstances where external representation is appropriate, whether it is reasonable to restrict the accused employee's choice to an employee of another organisation;*

13.5 *Whether the charges are sufficiently complex or legalistic as to warrant the involvement of an attorney;*

13.6 *Whether the charges may result in the dismissal of the accused employee;*

13.7 *Whether the employer will be reasonably prejudiced if the accused employee is permitted a representative of his choice, and in particular a legal representative;*

[14] The above factors were not considered by the 2nd Respondent because they were never brought to his attention and could not have been brought to his attention because the Applicant could not have been in a position to articulate them before the disciplinary hearing Chairperson without a legal representative. Furthermore, without first engaging his colleagues in his branch and the other branches, the Applicant rushed to apply for legal representation.

[15] On the other hand, having accorded the Applicant the opportunity to look for suitable representation internally, the 2nd Respondent did not exercise control to ensure that the Applicant exhausted all the branches, but elected to proceed with the hearing on the basis that the Applicant had waived his right to be represented and to attend the hearing; a conclusion that was not objectively fair. While according to the minutes of the hearing, on the 10th October 2023, the 2nd Respondent appears to have afforded the Applicant a whole day to look for internal representation, the Applicant never used that opportunity; nevertheless, the Applicant did act on the indulgence he was given by the 2nd Respondent on the 12th October 2023.

[16] Having allowed the Applicant a final indulgence to look for internal representation on the 12th October 2023, it was unreasonable to only give him thirty (30) minutes to look for a representative in all the branches of the 1st Respondent across the country. A similar unreasonable approach by a chairperson of a disciplinary hearing was strongly criticized by the Supreme Court in the case of **Swaziland Airlink (Pty) Ltd v Nonhlanhla Shongwe N.O. and Two others (29/2020) [2020] SZSC 26 (19/08/2020)**. The

Respondent in that case had also argued that the employee was initially given sufficient time between the period of receipt of the notice to attend disciplinary hearing and the first session of the hearing.

CONCLUSION

[17] In our view, this being a court of equity, it would be fair and equitable to permit the Applicant adequate time to look for internal representation before adopting a view that there are no colleagues to represent him.

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

- 18.1 The disciplinary hearing is stayed pending Applicant's search for suitable internal representation in all the branches of the 1st Respondent within five (5) working days of issue of this judgment.
- 18.2 If the Applicant secures a suitable internal representative after the expiry of five (5) working days, the disciplinary hearing shall proceed.
- 18.3 In the event the Applicant has failed to secure an internal representative and still wishes to be legally represented, he shall be required to demonstrate to the satisfaction of the 2nd Respondent that he has looked for such representation, in addition to advancing the other factors set by the court in **Ndoda H. Simelane (above)** and the 2nd Respondent shall exercise his discretion on whether or not to allow legal representation.
- 18.4 The 2nd Respondent shall allow the parties legal representation for purposes of compliance with order **18.3**, if they so wish.

18.5 Subject to the above orders, the application is refused.

18.6 Each party to pay its own costs.

Members agree.



V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. S. Jele
(S.M. Jele Attorneys)

For Respondents : Mr. S. Dlamini
(Magagula & Hlophe Attorneys)