IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 257/2023

In the matter between:-

MBONGWA DLAMINI APPLICANT

And

THE CHAIRMAN OF THE TEACHING SERVICE COMMISSSION N.O	1ST RESPONDENT
THE TEACHING SERVICE COMMISSION	2ND RESPONDENT
THE HONOURABLE MINISTER OF EDUCATION AND TRAINING N.O	3RD RESPONDENT
THE MINISTRY OF EDUCATION AND TRAINING	4TH RESPONDENT
THE ATTORNEY GENERAL	5TH RESPONDENT

Neutral Citation	:	Mbongwa Dlamini v The Chairman of the Teaching Service Commission N.O and 4 Others, Case No.257/2023 SZIC 32 [2024] (21 March 2024).
Coram	:	**THWALA - JUDGE.** *(Sitting with Mr. M.T.E Mtetwa and Mr. A.M. Nkambule - Nominated Members of the Court).*
Matter Argued	:	7 November 2023.
Judgement Delivered	:	21 March 2024.

JUDGEMENT

Introduction

[1] The factual matrix of these proceedings is rather long such that it would not be out-of-tune to recite them in *ex tenso*.

Background Facts

[2] The present proceedings came before this Court on the 18 September 2023, wherein Mbongwa Dlamini ("the Applicant") launched an urgent application seeking for certain listed reliefs against the Chairman of the Teaching Service Commission in his official capacity as such, as well as the Teaching Service Commission ("the TSC"). Specifically, the Applicant sought to –

2.1 **Review and set aside the TSC's decision of terminating his employment services as per the contents of the letter dated the 24 August 2023.**

2.2 Review and/or set aside the Chairperson of the 2nd Respondent's decision –

2.2.1 Firstly, to proceed with Applicant's disciplinary hearing, including the subsequent hand down of its verdict in his absence.

2.2.2 Secondly, to proceed to issue the letter of dismissal of the 24 August 2023; without first affording Applicant due notice and opportunity to mitigate the dismissal verdict.

2.3 Directing the Chairman and the 2nd Respondent to prepare and file with the Court the complete record of Applicant's disciplinary proceedings, including the reasons for its ruling.

[3] It is needless to state that the grant of the above orders was opposed and Mr Simelane, who appeared on behalf of the Respondents, advised the Court, from the Bar, that it was the attitude of his principals that the matter be disposed of expeditiously in light of its possible negative effect on the learners' end-of-year examinations which were scheduled to commence sometime towards the end of October 2023. And so it was that this Court proceeded to allocate, with the consent of Counsel for both parties, the 28 September 2023, as the return date for the hearing of arguments.

[4] Then on the 26 September 2023, Mr Simelane caused to be filed a "notice of application" (interlocutory application) on behalf of the TSC in terms of which the following reliefs were sought:

4.1 a stay of the main application pending the finalization of the interlocutory application. In the interlocutory application itself, the TSC sought for:-

(a) an order barring Mbongwa Dlamini; Lot Vilakati and Sakhile Nxumalo from entering the court room wherein the main matter was to be heard. In fact, prayer 2 was more explicit, for it sought for an order directing these three (3) gentlemen to keep a distance of 1km from the precincts of the Court.

(b) removal; retraction and/or disassociation with the contents of the video clip which was circulating in the Swaziland National Association of Teachers ("SNAT") portal or platform, by the First Respondent. Compliance with the above prayer was couched for First Respondent under prayer 5 and 6 of the interlocutory application, i.e that it be done through publication of his retraction; apology and/or disassociation in the national media as well as on the SNAT Facebook platform. Non-compliance was to be visited with the sanction of an order for the striking out of his application – **See Prayer 6 (c). Prayer 7 of the TSC's** interlocutory application was rhetorical in so far as it was nothing but a repetition of the enforcement of prayer 2.

(d) The TSC also sought for the leave of this Court to have the video footage which was the subject of the interlocutory application, played in open court.

[5] It is needless to state that the Respondents (in the interlocutory application) opposed the granting of the TSC's reliefs. This they did by not only controverting each and every averment as contained in the TSC's founding affidavit, but by going further to raise some points of law.

Ad Submissions

[6] During the course of Mr Simelane's submissions on the 3 October 2023, it became apparent that the role and/or conduct of SNAT, either in the preparation; posting and/or hosting of the video footage stood to affect whatever order and/or decision that was to be issued by this Court in terms of

the TSC's interlocutory application. Regrettably, the said entity had not been cited as a party in the proceedings. This much was acknowledged by Mr Simelane, who proceeded to apply, orally, for the leave of this Court to have SNAT joined as the Eighth Respondent in the interlocutory application. The Court acceded to Mr Simelane's oral application, firstly, because Counsel for the Respondents raised no issue with the granting of same. Most importantly though, our consent was premised on the basis of our common law rule which stipulates that:

> **"any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he or she has waived his or her right to be joined"[1].**

[7] Whilst we concede that the question of joinder is one that lies solely at the discretion of the court, it is our view, however, that the question as to which procedure is to be followed by an applicant who is seeking to join another party ought to be chosen with extra caution. We make mention of this because, whereas Mr Simelane had orally sought and was granted the leave of this Court to have SNAT joined as a party in the TSC's interlocutory proceedings, Counsel then veered off course and proceeded to file a document which was neither a **"notice"** nor a **"notice of motion"**. This we say because, the document that Mr Simelane filed contained what now appeared to be allegations of fact- such as would normally be found in a founding affidavit.

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[1] Erasmus Superior Court Practice [Service 40, 2012] Page B1-94, B1-95. See also Rule 23 of the Rules of this Court of 2007.

These alleged averments of fact were signed for, (not sworn) by Mr Simelane in his capacity as Counsel for the TSC. Perhaps, it is critical to note and record that Mr Simelane's written version of the application for the joinder of SNAT also contained a distinct paragraph which sought for certain specific reliefs which were now being sought against the Eighth Respondent, including a penal sanction of E500, 000-00. This sum was to be paid to the Registrar of this Court. The role and legal capacity of the Registrar of the Industrial Court to collect fines for criminal transgressions was not readily discernible to the Court.

[8] Most noticeably though, was the fact that the TSC's second (written) interlocutory application for SNAT's joinder was fraught with a number of legal defects. Firstly, and as already alluded to above, there is a huge difference in law between a 'notice' and a 'notice of motion'. The 'notice of joinder' – as envisaged by the Court and consented to by Counsel for the Respondents, was a simple notification of an intention to join – akin to a notice of set-down, without any expectations for the repetition of the contents of Applicant's averments as contained in the interlocutory application's founding affidavit. Indeed, in the case of a joinder, normal legal practice provides that the duty of the party applying for the joinder of another person is to facilitate the service and delivery of the record of the proceedings of the matter thus far. Any averments, as contained in a sworn statement from a party applying for a joinder of another would only come to the fore in the event that such application is opposed. And it is at that point of opposition that the applicant for a joinder is then expected to launch a fully-fledged application – on notice of motion-supported by a sworn affidavit which must then fully set out the facts upon which the applicant relies for his relief. The question of the

penal sanction of E500, 000-00, is what loomed large in the background of our aforegoing comments simply because same had not been sought by the TSC in its prayers for the interlocutory application, neither were there any facts averred in the founding affidavit, to sustain the grant of such a relief.

[9] The second point relates to Mr Simelane's attempts to amend-through the use of the purported written notice of joinder – Applicants' reliefs as originally sought in their interlocutory application, by introducing a new prayer in the nature of a jail term for First to Seventh Respondent, and a fine of E500, 000-00, for the Eighth Respondent. What caught the attention of the Court was the question as to whether such a cause of action was permissible under our law, and if so, the circumstances under which it could be granted. Whilst it is common cause that the rules of this Court are silent on the question of the amendment of pleadings that are already filed of record before Court, practitioners have had recourse to Rule 28 of the rules of this Court as a stop-gap-measure to fill up whatever procedural 'deficiencies' that maybe there within the rules of this Court. This Court would like to take this opportunity to state, for the up-tenth time, that Rule 28 was not meant to serve as an entitlement for parties to conduct litigation before this Court through the wholesale importation of the High Court Rules. Rule 28 is only **permissive**, and provides that it is this Court, (not litigants) which may sanction any recourse to the Rules of the High Court depending on the exigencies and circumstances of each case before it.

[10] The nett effect of our above analysis is this, firstly, that it is trite that a litigate may amend its pleadings at any stage of the proceedings. It is also trite that such litigate may not, however effect such amendment without the leave

of court, which leave must be first sought and obtained. To the extent that the TSC purported to do the above, i.e effect an amendment of its interlocutory application through the back door, then this Court can do no more than to declare same to be mischievous on the part of Counsel for the TSC. This therefore means that same, i.e such purported amendment cannot be allowed to stand. The upshot of this is that, in making its determination on the TSC's interlocutory application, this Court only had recourse to the TSC's prayers as contained in the notice of application which bears the Registrar's Date Stamp of the 26 September 2023. The opposite shall obtain as regards the 8th Respondent's answering affidavit, *to wit*; that this Court shall only have recourse to those contents of their answering affidavit which were meant to answer to Nhlanhla Dlamini's depositions and not to what was then purportedly said by Mr Simelane in his written version of the joinder of SNAT.

[11] Having dealt with the TSC's application for the joinder of SNAT as the 8th Respondent in these proceedings, as well as Mr Simelane's controversial attempt to effect an amendment of the TSC's reliefs, the stage is now set for the Court to consider and traverse the substantive issues of the TSC's interlocutory application. As already mentioned under paragraph 5 above, Respondents are objecting to the granting of such reliefs. Respondents' opposition to the grant of the TSC's relief's was premised upon three (3) pillars, *viz*: the TSC and/or Attorney General's lack of *locus standi* to move this application; this Court's lack of jurisdiction to adjudicate and/or make a declaration on the question of the order of precedence between the Respondents' right of freedom of expression as enshrined under Chapter III of the Constitution and the common law power of courts to prohibit the

alleged 'publication of matter which was likely to affect the trial of the main matter'. Other grounds upon which the Respondents relied, included the use of motion proceedings, by the TSC, when it was reasonably forseable that the use of such proceedings was likely to be fraught with numerous disputes of fact, as well as the Eswatini Government's failure to comply with the judgement of the High Court in **The Attorney General v Ray Gwebu and Another. High Court Case No. 3699/2002.**

Ad points in limine

[12] Mr Howe's first point of law centred around the question of *locus standi* for the TSC and/or the Attorney General to bring these proceedings. We hasten to state that for our part, these proceedings constituted contempt by publication, by which it is meant: the publication of material which may interfere with and/or bring the administration of justice into disrepute. The above description represents the traditional classification of the law of contempt which has been classified as either "civil" contempt and/or "criminial" contempt. And to that end, Lord Scarman, in the House of Lords case of **Harman V Secretary of State for the Home Department**[2] stated as follows:

> **"The distinction between "civil" and "criminal" contempt is no longer of much importance, but it does draw attention to the differences between on the one hand contempt such as "scandalizing the court", physically interfering with the course of justice, or publishing matter likely to prejudice fair trial, and on the other, those contempts which arise from**

[2] 1983 A.C 280 at 310

> **non-compliance with an order made, or undertaking required, in legal proceedings. The former are usually the business of the Attorney General to prosecute by committal proceedings (or otherwise): the latter, constituting as they do, an injury to the private rights of a litigant, are usually left to him to bring to the notice of the court.** (Underlining is ours)

[13] Indeed, it is generally accepted that contempt by publication may be prosecutable by either the Attorney General and/or the Director of Public Prosecutions (the DPP), and tried before the High Court of Eswatini. This much is borne out in the case of **The King v Swaziland Independent Publishers (Pty) Ltd.**[3] See also the case of **Rex v The Nation Magazine and 3 Others**[4]. We consider these two (2) cases to be good authority for the proposition that cases of contempt by publication are prosecutable by either of the two (2) public officials. We draw this conclusion from the constitutional relationship between the Attorney General and the Director of Public Prosecutions in respect of matters pertaining to the due administration of justice in the Kingdom. In the case of **S vs Mamabolo**[5], the Constitutional Court of South Africa, per Kriegler J, cautioned, albeit, *obiter* against the use of the summary procedure as a way of dealing with cases of contempt **ex facie curiae**. It is perhaps apparent, from a reading of the whole judgement, that His Lordship's sentiments were thus formulated notwithstanding his full concurrence with Gubbay CJ in the case of **In re: Chinamasa 2000 (12) BCLR 1294 (ZS)**.

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[3] (53/2010) [2013] SZHC 88 (17 April 2013)
[4] (120/2014) [2014] SZHC 152 (17 July 2014)
[5] (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC)

[14] In the **Chinamasa case**, His Lordship Gubbay CJ had this to say:

> **"It is convenient at the onset to consider what I regard as the main question. In doing so a preliminary matter must be made clear. In the context of the Applicant's statements, the reference in the question to the law of contempt must be taken to mean that species of the common law of contempt which has been given the colourful nomenclature of "scandalizing the court"; and not the other different ways in which the offence may be committed".**

Perhaps the point of legal convergence between Kriegler J. and Gubbay C.J, is upon the procedure that needs to be adhered to, and in this connection their Lordships were *ad idem* that, though *sui generis*, contempt proceedings must be prosecuted just like any other criminal transgression.

[15] The simple meaning of the above legal conclusion, in the context of the case before us is this; that the Attorney General could not delegate his prosecutorial authority to the TSC. In fact, it is rather apparent that the legal status of the TSC's official i.e Nhlanhla Dlamini herein was that of an eventual witness in the prosecution of the alleged case for contempt, it being common cause that the deponent to the TSC's founding affidavit was 'someone familiar with the matter and the dispute at hand' – as per paragraph 3 of the its founding affidavit. In the final result, Mr Howe's point of law on the locus standi of the TSC and/or that of the Attorney General must succeed. We hasten to point out though that its success is not premised upon any lack of legal authority, of the Attorney General, to prosecute contempt of court proceedings – which the Attorney-General does possess – but rather on the want of the legal authority

for him to delegate these powers to a private *personae*, i.e the said Nhlanhla Dlamini in his official capacity as the Secretary of the TSC.

Ad Lack of jurisdiction of the Industrial Court

[16] Under this head, Counsel for the Respondents argued that the Industrial Court lacked the necessary jurisdiction to make a declaration upon any of the fundamental rights that are enshrined under Chapter III of the Constitution of Eswatini. *In casu*, it is apparent that the TSC is asking this Court to make an inquiry into the ranking of the right of this court to protect itself against scurrilous public criticism and the circumstances under which a court may be permitted to interfere with the constitutional right of private individuals to their freedom of expression. Indeed, it is the attitude of this Court that it is well within its statutory powers to avoid any declarations on the hierarchical ranking of these two (2) rights. In short, it is the attitude of this Court that the pre-constitution common law rule of *sub judicae* has come into conflict with Respondents' right to freedom of expression. This state of affairs does amount to a constitutional issue which either of the parties may pursue before the appropriate forum. We, however pause to mention that the decision by either of the parties to pursue this constitutional issue appears to us not to be **germane** to the resolution of the main matter. In the adoption of this approach, we find comfort from the **Supreme Court Case of Daniel Didabantu Khumalo V the Attorney General[6],** where the Court there said:

> **"[3] It is strictly not necessary for this Court to reach a concluded view on whether or not the learned Judge *a quo* was correct in relying on lack of jurisdiction in terms of S151**

[6] [2010] SZSC6 (30 November 2010)

> **(8) of the Constitution. <u>It shall suffice merely to stress a fundamental principle of litigation that a court will not determine a constitutional issue where a matter may properly be determined on another basis</u>.** Underlining is ours.

[17] Respondents' next point *in limine* related to the TSC's failure to comply with the provisions of Rule 14 as read together with Rule 15 of the rules of this Court. Specifically, Respondents picked issue with the TSC's alleged failure to foresee the possible emergence of material disputes of fact. A careful reading of Rule 14 (1) of the Industrial Court Rules, 2007, makes it clear that the risk of launching a claim by way of notice of motion lies squarely at the doorstep of the applicant. Indeed, it has been stated **"that motion proceedings are aimed at arriving at an outcome based on undisputed facts. In fact, it behooves the applicant in motion proceedings to found its case on facts that are not disputed."**[7] **In National Director of Public Prosecutions v Zuma,**[8] the Court there held that:-

> **"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities."**

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[7] South African Poultry Association and Others v Ministry of Trade and Others (Appeal 94/2014) [204] NAHCMD at para38.

[8] (573/08) [2009] ZASZA 1: 2009 (2) SA 277

[18] Having regard to the relief that was sought in the TSC's interlocutory application as a whole, it is apparent that the procedure adopted by the TSC was inappropriate. Put differently, we agree with Respondents' Counsel that the relief sought by the TSC in its interlocutory application was likely to be fraught with numerous disputes of fact. As it turned out, the aforesaid risks of denials and contestations of TSC's averments came to the fore thereby resulting in the inability of the Court to grant any of the orders prayed for. The ruling of the Court on the TSC's interlocutory application was delivered *ex temporae* on the 25 October 2023.

[19] Having upheld the Respondents' points of law, the matter was then set for arguments on the 7 November 2023. On this date, it was common cause that the contestations between the parties now revolved around the prayers as captured under paragraph 2 above. In his founding affidavit which served as the basis for the relief of the reviewal and setting aside of 1st and 2nd Respondents actions, Applicant averred:

19.1 That, he was an employee of the 4th Respondent.

19.2 That, on the 10th November 2022, he was charged with two (2) counts, *viz*: Absenteeism and the contravention of Regulation 15 (9) (j) and (k) of the Teaching Service Regulations, 1983.

19.3 That, a date for the hearing of his matter was set by the 2nd Respondent. Applicant raised issue with the setting of the 23 August 2023, on the basis that it was not possible for him to attend the hearing on this date since he had to attend a meeting in Botswana from the 22 to the 27 August 2023. Applicant went on to suggest that his attendance at the said meeting was known to the 2nd Respondent's Executive Secretary.

19.4 That, the setting of the date of the hearing of the disciplinary hearing for the 23 August 2023, was not the first as the matter had been before the 2nd Respondent on previous occasions but had to be postponed for reasons that are not material for our purposes. It would appear from Applicant's averments, that 2nd Respondent allocated two (2) dates for the hearing of Applicant's matter, being the said 23 August 2023, as well as the 28 August 2023.

19.5 This explains the application that was subsequently made, by Applicant's legal representative, for the postponement of the matter to its next allocated date, being the 28 August 2023.

[20] Applicant proceeded to aver, in his founding affidavit, that on the 23 August 2023, 1st Respondent rejected a formal application that was made for the postponement of the matter to the 28 August 2023. It would appear to us that it is 1st Respondent's refusal with the postponement of the disciplinary hearing, from the 23 August 2023, to the 28 August 2023, which then formed the legal basis for Applicant's application before this Court. Indeed, this much is readily discernable from the contents of his founding affidavit wherein Applicant veered off-course and started to aver the principle of our law which purportedly supported the granting of his prayers.

[21] Under paragraph 4.6, Applicant reiterates his alleged claim to the effect that his inability to attend the hearing on the 23 August 2023, was actually known to the 2nd Respondent's Executive Secretary. Applicant further averred that he had never pleaded to the charges for which he was subsequently found guilty. Of course, this can hardly be controverted. What can, possibly be controverted

by the 2nd and 4th Respondents' is Applicant's averment to the effect that they – as the Employer – stood to suffer no prejudice in the event of the postponement of the hearing to the 28 August 2023.

[22] As regards the disciplinary hearing itself, Applicant confirmed that having dismissed the application for a postponement, 1st Respondent then directed that the matter be proceeded and thereafter arrived at a verdict which confirmed Applicant's guilt as regards Charge #1, i.e the charge of Absenteeism. The verdict was communicated to the Applicant by letter dated the 24 August 2023. It would appear that the communication itself was made through Applicant's Attorneys of record, Messrs Howe Masuku Attorneys. The said letter is titled "Outcome of your Disciplinary Hearing" and was filed as **"Annexure M6"** of Applicant's annexures.

[23] Applicant proceeded to place at issue, 2nd Respondent's assertions (at paragraph 2 of the above-captioned letter) to the effect that the reasons for his non-attendance before the disciplinary hearing had not been communicated. To this end, Applicant referred the Court to **"Annexure M3"**, being a letter from the Swaziland Association of Teachers (SNAT) addressed to the 3rd Respondent's Principal Secretary. This annexure is dated the 21 August 2023, and is couched as a **"notification of intention to attend the SATO Extra Ordinary Congress in Botswana". Applicant's inability to attend his disciplinary hearing of the 23 August 2023, was thereafter followed by that of his attorney, Messrs L. Howe, who, by letter dated the 22 August 2023, wherein Counsel notified the 1st Respondent of his inability to avail himself on the 23 August 2023, due to reasons beyond his control".**

[24] Then came in the question of the fairness of the procedure that was adopted by the 2nd Respondent in the prosecution of its case against the Applicant. For his part, Applicant questioned 2nd Respondent's failure to make available, in its verdict, the evidence that was presented before 2nd Respondent, as well as its reasons to justify the guilty verdict. What the letter of outcome did was to spell out Applicant's rights to appear before the 2nd Respondent, on the 28 August 2023 at 1430hrs, in order to make any submissions in mitigation before his sentence.

[25] Somewhere in his affidavit, Applicant raised issue about the lack of proper service of such a very crucial notice. This was said to emanate from the allegation that the said letter was only served upon him around 1230hrs on the very Monday of the 28 August 2023. It is not clear as to how this piece of Applicant's evidence can be said to assist especially in light of the fact that **"Annexure M6"** of Applicant's founding affidavit bears testimony to the fact that it was served and received by his attorneys on the 25 August 2023. Perhaps, Applicant's point of substance can be paraphrased to be whether the notice inviting him to appear before the 2nd Respondent in order to mitigate his sentence afforded him a reasonable opportunity to prepare himself. Of course, any inquiry into this matter falls squarely within the purview of this Court.

[26] Applicant avers further that it was improper of the 2nd Respondent to have the disciplinary hearing set down for the purpose of hearing Applicant in mitigation without having first furnished him with its ruling. Indeed, Applicant proceeded to allege that his ability to make any submissions in mitigation on the 28 August 2023, was stultified by the lack of 2nd

Respondent's reasons for its ruling amongst others. The net effect of it all was that Applicant proceeded to place under contention not just 2nd Respondent's failure to prepare and make available the written reasons for its findings, but also the allegation that the TSC knew about Applicant's non-availability due to his travelling commitments to the Republic of Botswana.

[27] Then out of the blue Applicant veered off-course and started questioning the constitution of 2nd Respondent's panel of commissioners. It was not for the Court to discern as to how the validity and/or invalidity of the Commission stood to affect its ability to issue properly thought out decisions.

[28] Applicant then concluded his averments by making reference to the 1st and 2nd Respondent's refusal to have the disciplinary hearing postponed to the 28 August 2023, notwithstanding the fact that some of the alleged acts of misconduct forming part of the charges against him dated as far back as December 2021.

1st – 3rd Respondent Case

[29] In their quest to resist the granting of Applicant's prayers, Respondents filed their opposing affidavit (which was erroneously referred to as a 'founding affidavit'). This opposing affidavit was deposed to by the 2nd Respondent's Executive Secretary, Nhlanhla Dlamini, who started off by raising three (3) points *in limine* before proceeding to plead over on the merits. Specifically, the deponent averred that the matter was riddled with numerous disputes of fact thereby rendering it not fit to be dealt with under Rule 14 and 15 of the rules of this Court. The second point of law raised related to the principle of dirty hands, it being alleged that on the 15 September 2023, Applicant had

incited teachers to engage in a go-slow strike so as to exert pressure for his reinstatement. For this, Respondents accused Applicant of playing double standards. Respondents' last point of law related to what one may term as the unwarranted abridgement of the timeless for the filing and setting down of this application.

[30 As to the merits of the matter, Respondents reacted by pointing out that Applicant had been unjustifiably evading the prosecution of his disciplinary hearing through requests for postponements which, in the eyes of the deponent, amounted to nothing but part of a list of measures that were employed by the Applicant in order to delay the conclusion of his case. Other measures that were allegedly employed by the Applicant included challenging the validity of the constitution of the Commission; to the power of the deponent to depose to legal documents on behalf of the 2nd Respondent. The deponent to 2nd Respondent's opposing affidavit drew the attention of the Court to correspondence, from Applicant's attorneys, dated the 3 August 2023, wherein it is expressly stated that Applicant had no intention of making appearance before 2nd Respondent as then constituted. We understood the reference to this correspondence to be 2nd Respondent's intention to underscore Applicant's subsequent non-appearance on the 23 August 2023, as amounting to a premeditated action.

Ad Forseeable Disputes of Fact

[31] In their first point *in limine*, Respondents alleged that Applicant's application stood to be dismissed on the basis that the relief sought was not grantable as the averred facts were fraught with numerous disputes of fact. The question of the existence and/or non-existence of disputes of fact is a question for

determination by the court after having considered the provisions of Rule 14 and 15 of the rules of this Court. In the case of **Skhumbuzo Dlamini v GMR Freight Services Pty Ltd**[9], this Court had occasion to traverse this very subject matter. In espousing Rule 14, the Court there said:

> **"Rule 14 has introduced an exception to the general rule.**
>
> **Rule 14 provides as follows:**
>
> **Rule 14 (1) where a material dispute of fact is not reasonably forseen, a party may institute an application by way of Notice of Motion supported by affidavit**
>
> **(2) .....;**
>
> **(3) .....;**
>
> **(4) .....;**
>
> **(5) .....;**
>
> **(6) The Applicant shall attach to the affidavit –**
>
> **(a) all material and relevant documents on which the Applicant relies; and**
>
> **(b) in the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission, unless the application is solely for the determination of a question of law".**
>
> Underlining is ours.

[32] Indeed, the Court proceeded to say:

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[9] IC Case No. 450/2014 (Unreported).

"16.2 Rule 14 (6) (b) (ii) provides an option to a potential litigant who has an application that is solely for the determination of a question of law to either report a dispute to CMAC for resolution or to file an application direct with the Court for adjudication.

16.3 Sub-rule 14 (6) (b) (ii) clearly provides an exception to the general rule that is stated in sub-rule 14 (6) (b) (i). The word 'unless' in sub-rule 14 (6) (b) (ii) clearly indicates a lawful departure from the legal route that is provided for in sub-rule 14 (6) (b) (i)".

Section 33 of Constitution

[33] The dispute that is before court is whether proper procedure was followed by the 1st Respondent whilst in the process of conducting Applicant's disciplinary hearing. More specifically, Applicant has challenged the legality of his dismissal without having been afforded the opportunity to be heard. This is a question of law that warrants no need for referral to the Conciliation Mediation and Arbitration Commission (CMAC). This point of law must therefore fail.

Ad concept of dirty hands

[34] Under this head, 2nd Respondent contended that it was mischievous of the Applicant to approach this Court for the alleged protection of his rights when he had already mobilized teachers to embark upon a go slow strike so as to put pressure on the 2nd Respondent to reinstate him. The concept of 'clean hands' is an English common law concept which is akin to the Roman Dutch Common law concept of ***in pari delicto potior est conditio defenditis***, commonly referred to as the ***par delictum rule, meaning (equally morally***

guilty). In the case of **Klokow v Sullivan**[10], the Court, cited the famous case of **Jajbhay v Cassim 1939 AD 537**, and said -

> **"[17] .... a party seeking to extricate himself from the consequences of an illegal or immoral contract had to demonstrate that he had come to court with clean hands".**

[35] A careful reading of 2nd Respondent's opposing affidavit discloses that it is their honest belief that the doctrine of dirty hands ought to operate as an absolute bar to the granting of any relief to the Applicant. In the **Klokow case** cited above, the Court there said –

> **"[19] Since Jajbhay courts have frequently relaxed the protection afforded to defendants by the par delictum rule on grounds of public policy".**

We cite this except in order to demonstrate that courts are now reposed with the judicial discretion as to whether to invoke this doctrine. To this except must be added the following:

> **"Before a person seeks to establish his rights in a Court of law he must approach the Court with clean hands: where he himself, through his own conduct makes it impossible for the processes of the Court (whether criminal or civil) to be given effect to, he cannot ask the Court to set its machinery in motion to protect his civil rights and interests"[11].**
>
> (Underlining is Ours).

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[10] 2006 (1) SA 259 (SCA)

[11] Mulligan v Mulligan 1925 WLD 104.

[36] This Court has taken time to underline certain portions of the quotation of this judgement in order to underscore its true legal import. Perhaps, it is important to point out that the facts that are serving before this Court are nowhere near those that were obtaining in the **Mulligan case**. The brief facts of the **Mulligan case** are that the applicant and the respondent were husband and wife, who had appeared before the court to litigate regarding their divorce. The court having heard the matter between Mr and Mrs Mulligan, it then issued an order in favour of Mrs Mulligan. Instead of complying with the order of the court, Mr Mulligan eloped the court's jurisdiction. He later returned to file the proceedings which resulted in the judgement cited above. The sum total of the above case, including those wherein it has been cited and followed, is that a man cannot seek for the court's assistance in order to enforce his rights when it suits him and then stultify the enforcement of these very processes of the court when they are against him.

[37] The conduct of the Applicant which it is said by the 2nd Respondent to warrant censure by this Court relates to events and/or occurrences, i.e calls for a go-slow strike. Of course no evidence was led by the Respondents, to show that these events were ever the subject of litigation between the parties, either before this Court and/or anywhere else. In the final result, we hold that there was no evidence that was led to show that at the launch of these proceedings Applicant stood in flagrant disregard of an order and/or process of the Courts of this land. The 2nd Respondent's argument on the doctrine of 'clean hands' also stands to fail.

Abridgement of Timelines

[38] This point became moot by virtue of the piecemeal fashion that was subsequently adopted by the parties towards the prosecution of the case to its finality. It is obviously common cause that Respondents themselves cannot be said to be innocent victims of Applicant's 17 days' delay. This we say because, whereas the letter for Applicant's dismissal of the 29 August 2023, had correctly acknowledged and promised to ensure that full reasons for the Commission's decision were provided, these were not furnished until the intervention of this Court.

[39] In his notice of motion, Applicant sought to attack 1st Respondent's ruling of the 24 August 2023, wherein the 1st Respondent refused to grant an application for a postponement of the disciplinary hearing to its next scheduled date, i.e the 28 August 2023. It is the considered opinion of this Court that a decision on the validity of the 1st Respondent's decision stands to resolve this matter once and for all. This we say because it has been held that something that is invalid is a nullity at law and the courts have no power to revive it as it is dead[12]. This is so because the right to a fair hearing in disciplinary hearings constitutes the core of the disciplinary process. It is therefore well within Applicant's rights to allege and seek to demonstrate before this Court that this fundamental right was not adhered to by the 1st Respondent when he denied him the postponement. And the **Skhumbuzo case** stands as legal authority for the proposition that it is well within the province

[12] See the case of MacFoy v United Africa Company Limited (1961) 3 All ER 1169 (PC) which has been cited with approval in this jurisdiction. Cf. Solomon Malwane v True Realty Co. (Pty) Ltd High Court Case No. 2217/2010 (Unreported).

of the employee whose right (not claim) has been infringed upon, to determine the procedure to adopt for its protection and enforcement.

[40] In the case of **Lekolwane and Another v Minister of Justice and Constitutional Development**[13], the Court there held:

> **"[17] The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is a discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation by the applicant for the postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application.**

[13] 2007 (3) BCLR 280 (CC).

[18] If a postponement is refused and the applicant or his or her counsel is unable to argue the matter, it follows that matter cannot proceed and has to be struck off the roll.

[41] Within the sphere of internal disciplinary hearings, it is the chairperson who must consider and decide as to whether to grant an application for a postponement. There is no doubt that this is a discretionary power, one which must be exercised judicially. This therefore means that the reasonableness of 1st Respondent's decision to refuse Applicant's application for a postponement is capable of scrutiny by this Court on the basis of the information which was placed before him at the time when the postponement was sought. The transcript that was furnished by the 2nd Respondent showed that:

(a) the main reason for seeking for the postponement of the hearing was that Applicant's Counsel had become indisposed due to a family bereavement, i.e the loss of a sister who resided in South Africa;

(b) the matter was initially postponed on the 16 August 2023, to the 23 August 2023 and the 28 August 2023, apparently by consent of all parties. It would be fair to record that the conclusion of the prosecution of Applicant's disciplinary hearing had been inordinately delayed much against the spirit of our employment and labour laws which prescribes that disciplinary hearings ought to be dealt with and concluded without any undue delay.

(c) the application for the postponement was moved, for the first time on the 23 August 2023, by Mr Gumedze, an attorney from

Mr Howe's offices. Indeed, the transcript does disclose that for a while 1st Respondent tried to persuade the said Mr Gumede to continue with the matter, a suggestion that was not acceptable to Mr Gumede apparently on the basis that he was not conversant with the facts of the matter. Some element of Mr Gumede being conflicted was also alleged.

(d) It does not appear, from the transcript, that the initiator, Mr Ndabenhle Dlamini, had any issues with the application for the postponement.

(e) the transcript does not disclose any compelling reasons that vitiated against the postponement of the matter to the 28 August 2023, being the second date that 1st Respondent had already allocated for its continuation.

(f) in refusing to grant the application for a postponement, 1st Respondent appeared to have had recourse to the numerous postponements of the hearing, some of which he attributed to Applicant and his Counsel. It is worth noting that in arriving at his ruling, 1st Respondent placed very little regard to the personal circumstances of Mr Howe at the time.

[42] First Respondent's approach calls for scrutiny principally because it brought to the fore the question of the applicability of Section 33 of the Constitution. In other words, the question which begs the answer is: would a reasonable chairperson who was seized with the above information have arrived at the same decision of refusing with the postponement. Whilst we confirm that it was well within 1st Respondent's mandate to control and give guidance to the disciplinary hearing, we are however unable to agree that his subsequent

decision was arrived at judicially. The eventuality that subsequently befell Mr Howe was certainly not self-created nor could it be said that it was vexacious. Whilst the Court was not able to discern, from the papers, as to why Mr Howe omitted to communicate his predicament to Respondent's Counsel, as his colleague, First Respondent, however missed the mark by failing to take into account the exceptional circumstances that befell Applicant's Counsel. To the extent that it appears to the Court that the 1st Respondent failed to exercise his discretion judicially, or that he allowed himself to be influenced by wrong considerations (a fact that could be readily discerned from the transcript), then his decision of refusing to grant Applicant's application stands to be declared as void and therefore a nullity. It follows then that the postponement ought to have been granted.

[43] In the result;

(a) **The 1st Respondent's verbal decision of the 23 August 2023, which was subsequently confirmed into writing by the letter dated the 24 August 2023, is declared to be null and void and therefore set aside.**

(b) **That, in exercise of the powers that are vested in this Court by Section 8 (4) of the Industrial Relations Act, 2000, as amended, 2nd Respondent is hereby directed to forth with reconvene and proceed with Applicant's disciplinary hearing.**

The members agree.

Manene M. Thwala

Judge of the Industrial Court of Eswatini

For Applicant : Mr L. Howe.

For Respondent : Mr M. Simelane.