IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No 219/2024

In the matter between:

DELISA MALINGA 1st Applicant

SWAZILAND UNION OF FINANCIAL AND ALLIED WORKERS 2nd Applicant

And

CELUMUSA PHAKATHI N.O 1st Respondent

STANDARD BANK ESWATINI LIMITED 2nd Respondent

Neutral Citation	:	Delisa Malinga and Another v Celumusa Phakathi N.O and Another, Case No. 219/2024 SZIC 84 [2024] (10th September 2024)
Coram	:	**MSIMANGO - JUDGE** *(Sitting with Mr. S Mvubu and Ms N. Dlamini- Nominated Members of the Court)*
HEARD	:	21st August 2024
DATE DELIVERED	:	10th September 2024

Summary : The Applicants have brought an urgent application to court seeking the recusal of the 1st Respondent from presiding over the disciplinary hearing of the 1st Applicant. The Applicants argue that the 1st Respondent has conducted himself in such a manner that they believe he is biased and cannot bring an impartial mind to bear in the disciplinary hearing, and therefore he must recuse himself.

JUDGEMENT

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[1] The 1st Applicant is Delisa Malinga an adult Liswati male of Mbabane area in the district of Hhohho and also an employee of the 2nd Respondent.

[2] The 2nd Applicant is Swaziland Union of Financial Institutions and Allied Workers (SUFIAW) a union duly registered in terms of the labour laws of the country. It has capacity to sue and be sued in its own name in terms of its constitution. It has its principal place of business situated at SUFIAW House, Dzeliwe Street, Mbabane in the Hhohho District. It is the 1st Applicant's representative in the hearing.

[3] The 1st Respondent is Celumusa Phakathi N.O a Liswati male adult, and cited in these proceedings in his capacity as the Chairperson of the disciplinary hearing and is employed by the 2nd Respondent.

[4] The 2nd Respondent is Standard Bank Eswatini (Pty) Ltd, a financial institution with limited capacity to sue and to be sued in its own name, duly established in accordance with the laws of the Kingdom of Eswatini. It has its principal place of business situate in Mbabane, 5th Floor, Corporate Place Swazi Plaza in the Hhohho District.

[5] The Applicants brought an urgent application against the Respondents seeking an order in the following terms:-

5.1 Dispensing with the usual forms and procedures as relating to time limits and service of court documents, that the matter be heard as one of urgency.

5.2 Condoning the Applicant's non-compliance with the Rules of this Court as relate to service and time limits.

5.3 A Rule Nisi hereby issue calling upon the 1st Respondent to show cause why on a date to be determined by the court an order should not be made final that;

5.3.1 Interdicting the Respondents with immediate effect from proceeding with the disciplinary hearing against the Applicant pending final determination of the matter.

5.3.2 Directing the Respondents to forthwith furnish the Applicants with a record of proceedings or minutes of the disciplinary hearing since its inception until the sitting of the 14th August 2024.

5.4 Prayers 5.1, 5.2, 5.3, and 5.3.1 to operate with immediate interim effect pending final determination of the matter.

5.5 Correcting, reviewing and setting aside the ruling issued by the 1st Respondent on the 13th August 2024.

5.6 Removing the 1st Respondent from chairing the disciplinary hearing forthwith.

5.6.1 Directing that the hearing starts *de novo* before a new chairperson.

5.7 Further and/or alternative relief.

BACK GROUND OF THE MATTER

[6] The 1st Applicant alleges that on the 17th May 2024, he was served with a charge sheet which doubled as an invitation to a disciplinary enquiry. The charges he was charged with are involvement in acts of bribery and corruption.

[7] On the 30th May 2024, the 1st Applicant through his representative raised an objection to the disciplinary hearing in terms of clause 1.11 of the Disciplinary Code and Procedure, in that 35 days had elapsed since the issue was brought to the attention management on the 26th March 2024 and actioned on the 3rd April 2024. The 1st Applicant argues that this conduct was inconsistent with clause 1.11 of the Disciplinary Code and Procedure which is a collective agreement by virtue of having been negotiated by and between the union to which he is a fully paid up member, therefore, he was to be disciplined within the 35 days from which management became aware of the matter.

[8] The 1st Applicant submitted that the 1st Respondent ruled that the hearing should proceed to the merits. The matter was taken to the Industrial Court and the High Court challenging the decision of the 1st Respondent, where upon the 1st Applicant was unsuccessful.

APPLICATION FOR RECUSAL

[9] The 1st Applicant alleges that on or around the 23rd June, he took ill until the 26th June 2024 wherein he consulted a doctor who booked him off for 2 days. On the 26th June he received an invitation to the disciplinary hearing for continuation. He in turn informed the union that he had received an SMS from the Human Resource Officer advising that the disciplinary

hearing will proceed with or without him and he duly submitted a valid sick note from the doctor.

[10] The 1st Applicant alleges further that he was too weak to attend the hearing as his blood pressure was very high due to stress. The Union attended the hearing wherein it was represented by one Mr Buhle Dlamini who updated him on the happenings at the disciplinary hearing and advised him that the Chairperson was adamant that he was proceeding in the 1st Applicant's absence despite the submission of a valid doctor's note.

[11] The 1st Applicant argued that he was always aware that the Chairperson would insist on proceeding despite that he was ill and unavailable. At this point the union moved an application for recusal of the Chairperson due to the reasonable apprehension of bias exhibited by the 1st Respondent. This was necessitated by the fact that a disciplinary hearing is one of the mechanism employed by an employer in its prerogative to maintain discipline in the work place, and also a fact finding mission in order to establish whether an employee has in fact misconducted him/herself in the workplace. However, it seemed to the 1st Applicant and the Union that the Chairperson had another mission, other than to establish facts to enable him to advise the employer whether he had committed the offences as alleged, but rather he wanted to finish the hearing and obviously issue a sanction or dismissal against the 1st Applicant.

[12] The disciplinary hearing convened again on or about the 10th July 2024, the Union submitted that the Applicants herein intended to move an application to be furnished with further particulars. The 1st Applicant alleges that the 1st Respondent did not allow the application to be made but ordered progression with the hearing, wherein, the Applicants applied for the Chairperson's written reasons to this effect and again he blatantly refused.

[13] The Applicants submitted that the conduct of the 1st Respondent from the first day of the hearing and his demeanor raised a suspicion that he was biased in favour of the 2nd Respondent, that he could not bring an impartial mind to bear, let alone a mind open to persuasion, and as such his conduct cannot be countenanced by this Honourable Court, hence he ought to be removed from presiding in the disciplinary hearing for the follow reasons:-

13.1 The 1st Respondent's actions and rulings have been so obvious such that any objective person would arrive at a conclusion that the 1st Respondent is biased and that fairness is not feasible whilst the 1st Respondent continues to preside over the disciplinary hearing.

13.2 From the 1st date of the hearing the 1st Respondent refused and/or denied the 1st Applicant's representatives the right to make reference to the Disciplinary Code which is binding and which the hearing is convened in terms of. The Chairperson consistently denied the 1st Applicant's representative an opportunity to cite clauses of the Disciplinary Code. The reason he cited for this unfair conduct was that the code is in applicable at the hearing and this was the first act of bias they noted according to Applicants.

13.3 The second conduct of the 1st Respondent which was too obvious that he is biased is that he descended into the arena and literally counter argued on behalf of the initiator against the case presented by the 1st Applicant's representative, in particular preliminary, without any evidence presented to him. He appeared to be more well versed about the salient occurrences that preceded the charges.

13.4 The 1st Respondent refused to postpone the hearing, which the 1st Applicant submits was a discretion exercised unfairly or not judiciously. The Chairperson instead ruled that he was proceeding with the hearing in the absence of the 1st Applicant. It was submitted by the Applicants that such conduct by the 1st Respondent in such circumstances is one which would render any objective mind to have reasonable grounds for apprehension of bias.

13.5 The 1st Respondent has been appointed by the 2nd Respondent before to preside over various matters of 1st Applicant's former colleagues. He always makes guilty findings as he has never acquitted any of those colleagues. His conduct in previous cases is reason enough that there will not be a fair hearing, and there will not be any other finding which 1st Respondent will make other than a finding of guilty and a recommendation of summary dismissal.

[14] The 1st Applicant argued in this regard that at present he is not being afforded a fair disciplinary hearing by the 1st Respondent, on numerous occasions he has made rulings contrary to the provisions of the Disciplinary Code. He has further made rulings which are adverse and without justiciable reasons in law.

[15] The 1st Applicant submitted that he was left with no alternative but to approach the Honourable Court on an urgent basis, as the decisions and behavior of the of the 1st Respondent at the disciplinary hearing are not only unreasonable but irrational and unwarranted. Further that, the 1st Respondent behaves like a person who has a score to settle with him and his suspicion is that the 1st Respondent is biased in favour of the 2nd Respondent. Any reasonable and objective person in 1st Applicant's

circumstances would come to the conclusion that reasonably and objectively viewed, the act of the 1st Respondent does raise a reasonable suspicion of bias and therefore he is disqualified from presiding over the disciplinary hearing.

[16] The matter is opposed by the 2nd Respondent and has argued to the effect that the application is aimed at preventing the finalization of the internal disciplinary hearing, as this is not the first time the Applicant is abusing the process of the court. The Applicant has done so just two months ago and the Honourable Court dismissed the application and ordered that the matter should proceed to the merits. Instead of dealing with the merits the Applicant has continued to raise several spurious preliminary points before the First Respondent. These points were properly heard by the chairperson by affording both sides the right to be heard. It is when the First Respondent ruled against the Applicant that the latter felt that the chairperson was biased.

[17] It was the 2nd Respondent's argument that after the dismissal of the application by this Honourable Court, the Applicants were undeterred and sought to challenge the judgement of this court at the High Court under case no. 1476/24. The High Court held that the judgement of this court was unassailable and dismissed the Applicant's review application with costs on the 8th July 2024. Whilst the matter was in court the hearing could not be proceeded with out of respect for court processes and mutual consent of the parties.

[18] When the matter resumed on the 11th July 2024 the Applicants yet again raised the same preliminary point that the charge was time barred. This is the same point that had been dismissed by the chairperson. The chairperson ruled that the issue of time bar had already been decided and it will not be an issue for discussion. The raising of the already decided point of law on

the time bar was conveniently meant to delay the finalization of the matter. Furthermore, the Applicants yet again in a calculated attempt to delay the finalization of the hearing submitted a request for further particulars which was addressed by the initiator on behalf of the bank and subsequently dismissed by the Chairperson having heard submissions from both parties.

[19] The 2nd Respondent submitted that the Chairperson has always maintained an open mind in the conduct of the matter from the start, and has never descended to argue the matter on behalf of the bank, but allowed both the Applicants and the initiator to make their submissions and thereafter apply his mind to issue fair rulings. In some instances the Chairperson would seek clarity on certain submissions made before issuing a ruling. Therefore, the issuing of a ruling against one of the parties is not ground for recusal. When reading the founding papers of the Applicants they seek the Honourable Court to remove the chairperson because he ruled against them.

[20] The 2nd Respondent submitted further that there is no allegation against the chairperson of actual bias that is pleaded, there is no allegation that the Chairperson cannot be persuaded otherwise through the evidence and arguments made by the parties, there is further no allegation that the Chairperson has pre-judged the merits of the matter but the allegation of bias is based on a suspicion without any primary facts. The Applicants plead that they have a reasonable appreciation of bias because the Chairperson has made adverse rulings against fellow employees and recommended their dismissal. The 2nd Respondent argued that this is the first time the chairperson is handling an internal hearing at the second Respondent's employ.

[21] Furthermore, the test is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the

Chairperson has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. In *casu* the Applicants have dismally failed to pass the test.

[22] The 2nd Respondent submitted that in light of the above, there is no substance in the present application. It is without any foundational basis and only aimed to prevent the finalization of the internal disciplinary hearing, it therefore, stands to be dismissed with costs at attorney and own client scale or at party and party scale.

[23] It is trite that every person who undertakes to administer justice, whether he or she is a legal officer or is engaged in the work of deciding the rights of others, is disqualified if he/she has a bias which interfers with impartiality, or if there are circumstances that might reasonably create a suspicion of not being impartial. The test for recusal is an objective one, namely, whether in the eyes of a reasonable man in the circumstances of the accused there is a reasonable perception of bias. In **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA V SOUTH AFRICAN RUGBY FOOTBALL UNION 1999 (4) S.A 147 (CC),** the test was succinctly laid down as follows:-

> ***"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour.....It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions.***

They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial".

[24] The above decision of the court equally applies to administrative processes such as disciplinary hearings. Fairness is a pre-requisite in both judicial and administrative decisions that affect people's rights. Courts will set aside an administrative action which is tainted by bias. Furthermore, it is important to note that bias can occur in two ways. One could be the presence of actual bias on the part of the disciplinary authority and the other could be actions occurring before the disciplinary hearing which would lead a reasonable man to conclude that there was a likelihood of bias. Thus bias could be actual during disciplinary proceedings or there could be a real possibility of bias. An allegation of bias should be proven, mere averments will not suffice. The one who complains of bias should be able to prove it, a misdirection, if any does not of itself constitute bias.

[25] It therefore is the responsibility of the adjudicating officer to be aware of some pitfalls to avoid in disciplinary proceedings in order to minimize allegations of bias. Furthermore, disciplinary authorities are not there to advance the employer's interest in disciplinary proceedings. They are there as impartial adjudicators to hear arguments from both sides and make a decision. The courts have acknowledged that owing to the nature of disciplinary proceedings in an organizational setting institutional bias cannot be totally ruled out. What is important, however, is that the

disciplinary authority not only act in a way which ensures that the accused gets a fair trial but also be seen to be doing so.

[26] In **GRAHAM RUDOLPH V MANANGA COLLEGE AND ANOTHER IC CASE NO. 94/2007** the court held as follows:-

> ***"One of the elements of a fair hearing is that the person taking the disciplinary decision should act in good faith, he should not be biased, he should enter into the proceedings with an open mind without prejudicing the issues, and he must make up his own mind on the matter, without deferring to the opinion or decision or desired outcome of another person".***

ANALYSIS OF THE GROUNDS FOR RECUSAL

[27] The first allegation against the Chairperson is that he refused to be referred to the code and further held that the code was inapplicable in the hearing. The court noted from the Record of the disciplinary hearing that the Chairperson was referred to the code by the Applicants and he never refused that it be referred to, again, when the Chairperson made his rulings he referred to the code.

27.1 The second ground is that the Chairperson descended on the arena and made arguments on behalf of the initiator, yet again this allegation is not borne by the Record, it does not show anywhere, where the Chairperson made arguments on behalf of the initiator. It is trite that "he who alleges must prove". The Applicants have failed to prove such allegation.

27.2 The third ground is that the Chairperson refused a postponement when the 1st Applicant had submitted a sick note. The record shows that on the 28th June 2024 the

Applicants were late and did not submit any sick note at the hearing. It is the Union that ordered the employee out of the hearing to force the postponement. The sick note was only submitted to the employer on the same day at 14:42 hours, when the hearing had been already adjourned at about 1100 hours by consent of the parties.

27.3 The other ground for review is that the Chairperson has handled other hearings involving 1st Applicant's colleagues wherein he recommended sanctions of dismissal. It must be mentioned in this regard that it is not for the Applicants to pre-empt the decision of the Chairperson, as each matter is decided on its own set of facts which might be different from other matters.

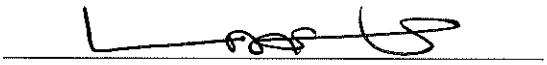
[28] Taking into account all the circumstances of the matter the court finds that the Applicants have failed to explicitly and succinctly set out a case for recusal against the first Respondent.

[29] **In the result the following order is hereby made.**

(a) The application is dismissed.

(b) There is no order as to costs.

The Members agree.



L. MSIMANGO

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANTS	:	**MS G.X MNISI** **MR G HLATSHWAYO** **(MLK NDLANGAMANDLA ATTORNEYS)**
FOR RESPONDENTS	:	**MR N.D JELE** **(ROBINSON BERTRAM)**