IN THE INDUSTRAIL COURT OF ESWATINI

HELD AT MBABANE CASE NO: 28/2024

In the matter between:

YOLISWA ZWANE **APPLICANT**

AND

PRINCIPAL SECRETARY-MINISTRY OF HEALTH N.O **1st RESPONDENT**

EXECUTIVE SECRETARY –CIVIL SERVICE COMMISSION N.O **2nd RESPONDENT**

THE ATTORNEY GENERAL **3rd RESPONDENT**

Neutral citation: *Yoliswa Zwane V Principal Secretary-Ministry of Health and 2 others, case no. 28/2024 [2024] SZIC 118 (18th Novemberr, 2024)*

Coram: **MSIMANGO - JUDGE**

(Sitting with Mr. S. Mvubu and MR. E.L.B.Dlamini, Nominated Members of the Court)

Date Heard: 15th October 2024

Date Delivered: 18th November 2024

SUMMARY: ***The Applicant was charged for misconduct by the 1st Respondent and was called upon to make representations on why she should not be charged. She has now brought an application to Court for an order directing the 1st Respondent to furnish her with the forensic audit report and departmental preliminary investigation report which resulted in the 1st Respondent preferring charges against her.***

JUDGEMENT

---

[1] The Applicant is Yoliswa Zwane an adult Liswati female of Ngwane Park area in the Manzini Region, an employee of the 1st Respondent and currently employed as a senior pharmacist under the Ministry of Health.

[2] The 1st Respondent is the Principal Secretary under the Ministry of Health which the Applicant is employed under.

[3] The 2nd Respondent is the Executive Secretary- Civil Service Commission, cited herein as the Commission that will handle the Applicant's disciplinary action.

[4] The 3rd Respondent is the Attorney General, cited herein in his capacity as legal representative for the 1st and 2nd Respondent

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

5.1. Directing the 1st Respondent to furnish and/or provide the Applicant with the forensic audit report and departmental preliminary investigation report which resulted in the 1st Respondent preferring charges against the Applicant.

5.2. Granting the Applicant leave to state her grounds to the 1st Respondent upon which she relied on to exculpate herself from liability.

5.3. That pending finalization of the matter, the 2nd Respondent be interdicted from proceeding or taking any further step with the disciplinary action against the Applicant.

5.4. Cost of the application against the 1st Respondent.

5.5. Further and/or alternative relief.

[6] The Applicant alleges that on or about the 2nd December 2023, she was served with a letter by the 1st Respondent which briefly indicated that she was being formally charged for misconduct, and was called upon to make representation within 14 days on why she should not be charged.

[7] On or about the 15th January 2024, a response was served upon the 1st Respondent wherein, the Applicant's attorney requested on her behalf the departmental preliminary report and forensic report, so as to enable the Applicant to adequately respond to the allegations of misconduct leveled against her.

[8] On or about the 1st February 2024, the Applicant was served with a response of the letter which her attorneys had addressed to the 1st Respondent, wherein, the 1st Respondent in its response indicated that the forensic audit report was with the office of the Auditor General and if the Applicant needed it she should approach the Auditor General. The Applicant submitted in this regard that the 1st Respondent however, never made mention on how she was to get the departmental preliminary report.

[9] The Applicant submitted that the application has been necessitated by the conduct and the fact that the 1st Respondent has failed to furnish her with the departmental preliminary investigation report and forensic audit report which she had requested. Thus, it is unlawful for the 1st Respondent not to furnish her with the requested documents as this disadvantages her from analyzing the reports and further challenging same if ever she is aggrieved with the findings of the reports.

[10] The Applicant argued that it is wrong and irregular for the 1st Respondent to direct her to the Auditor General for the forensic report since there is no relationship between the Auditor General and herself, the only existing relationship is the one between herself and the 1st Respondent, therefore, the 1st Respondent cannot refer her to a third party.

[11] It was the Applicant's submission that there is foreseeable prejudice and/or apprehension of harm if ever she is not furnished with the requested documents, in that once the 2nd Respondent resumes or actions the disciplinary action against herself, she will be unable to challenge the reports as they would

be part of the discovered documents in the proceedings. Further that, the balance of convenience favours the grant of the orders sought herein as she has clearly demonstrated her right towards the requested documents and the prejudice which she will suffer if she is not granted the requested documents and the 2nd Respondent decides to proceed with the disciplinary hearing.

[12] The Applicant prayed that the 2nd Respondent be interdicted from taking any further steps pending finalization of this matter, for the reason that if the 2nd Respondent is allowed to take further action against herself, she will be left with an empty order and there will be no other substantial redress in due course on the basis that, she will not be able to challenge the findings of the reports if the 2nd Respondent decides to haul her to a disciplinary hearing.

[13] The matter is opposed by the Respondent and has raised a *point of law* to the effect that the application is academic as the Applicant's disciplinary case is now with the 2nd Respondent. Hence, prayers 1 and 2 against 1st Respondent are no longer tenable at this stage. Therefore, with the failure of prayers 1 and 2, Prayer 3 also automatically falls off as it is contingent on prayers 1 and 2.

[14] The Court noted from the pleadings filed of record that the application was instituted by the Applicant after the 1st Respondent had already transmitted the charges to the 2nd Respondent on the 14th February 2024, whereas, the matter was heard by the Court for the first time on the 5th March 2024. It must be mentioned that nothing happened in between until the Applicant set the matter down for the 1st October 2024. When asked by the Court as to why the matter has been idle for quite some time if the reports being requested for were

of much importance, the Applicant, however, failed to provide the Court with a convincing response.

[15] On the 1st October 2024 the matter was postponed to the 7th October 2024, wherein, the parties were given time lines on which to file all the necessary pleadings and the matter was finally argued on the 15th October 2024. The Applicant made it clear on prayer 1 and 2 that she required the reports in order to exculpate herself before the 1st Respondent.

[16] Furthermore, the Applicant declares her intention to use the reports to persuade the 1st Respondent that she should not be charged. In this regard the Court is of the considered view that there is no useful or practical reason for doing so, as the Applicant has already been charged and the matter duly transmitted to the 2nd Respondent as shown on annexure "C" at page 13 of the book of pleadings.

[17] In light of the culminating events the Court concludes that the application is academic as it has now been over taken by events. In the circumstances the point of law raised by the 1st Respondent is upheld. It must be mentioned that even though the point of law is dispositive of the matter, the Court will, nevertheless, deal with the merits of the matter.

[18] On the merits the 1st Respondent argued that the Honourable Court does not have complete jurisdiction over a matter pending on the shop floor as between employer and employee over incomplete disciplinary proceedings, such as the present one, for the reason that there are no exceptional circumstances warranting the Court's interference. Further that, the Applicant is not as of right entitled to both the report of the preliminary investigation as well as that

of the forensic audit. It was sufficient for purposes of a fair hearing to grant her the opportunity to make oral and/or written representation before the decision was made.

[19] That the relief sought is that of interim interdict, however, the Applicant has failed to establish irreparable harm if not furnished with the documents sought. She only expresses the fear that she would not be able to challenge the documents if tendered as evidence at the disciplinary hearing before the 2nd Respondent. The 1st Respondent submitted in this regard that the fear is unfounded as documentary evidence is challengeable once it is presented at any proceedings.

[20] The Respondent submitted that the interdicts sought cannot be granted because it has been shown that the Applicant stands to suffer no irreparable harm if not furnished with the reports by the 1st Respondent. Secondly, she has the adequate alternative remedy of judicial review against the 1st Respondent over the conduct of the departmental investigations.

[21] The 1st Respondent prayed that the application be dismissed with costs.

[22] In order for the Applicant to succeed in obtaining the interdict prayed for in her papers, she must establish the following requirements:

22.1. <u>Clear legal right</u>- The Applicant must have a clear legal right, which can include rights recognized by both statute and common law. The Applicant must also prove the existence of the right in fact with evidence.

22.2. <u>Apprehension of irreparable harm</u>- The Applicant must have a well-grounded fear that they will suffer irreparable harm if the interdict is not

granted. This includes interference with rights, not just physical harm or financial loss.

22.3. <u>Balance of convenience</u>- The balance of convenience must favour the Applicant.

22.4. <u>No alternative remedy</u>- The Applicant must not have any other satisfactory remedy available to them.

[23] The Applicant in his papers has, however, failed to establish the necessary requirements for the granting of an interdict. The only argument put forward by the Applicant is that she wants the reports so as to be able to adequately respond to the allegations of misconduct leveled against herself. Further that, once the 2nd Respondent resumes or actions the disciplinary action against herself, she will be unable to challenge the reports as they would be part of the discovered documents in the proceedings, whereas, this is the perfect time to analyze and challenge the reports before they are made part of the discovered documents in the disciplinary hearing.

[24] It must be pointed out that an interdict whether final or interim cannot be had just for the asking. It is a discretionary measure which the Court is enjoined by law not to award arbitrarily or capriciously but judicially and judiciously upon facts and circumstances which show that it is just and equitable to do so. In **OLYMPIC PASSENGER SERVICE (PTY) V RAMLAGAN 1957(2) S.A 382**, the Court observed as follows:

> *"It thus appears that where the Applicant's right is clear and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his*

prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which on the papers as a whole, the Applicant's prospects of ultimate success may range all the way from strong to weak. The expression "prima facie establishes though open to some doubt" seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension off irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict- it has a discretion to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself a nice consideration of the prospects of success and the balance of convenience- the stronger the prospects of success, the less need for such balance to favour the Applicant, the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the Applicant if the interdict be refused, weighted against the prejudice to the Respondent if it be granted."

[25] *In casu,* it is common cause that the 1st Respondent has already transmitted the charges to the 2nd Respondent for determination. The Applicant's representative further conceded that the disciplinary hearing is under way at the 2nd Respondent. An attempt was made by the Applicant on her replying affidavit that the application is alive so as to determine whether or not procedure was followed in the compilation of the departmental report. It must

be mentioned in this regard that the Applicant cannot be granted that which she has not prayed for in the notice of application.

[26] The Applicant having failed to establish a *prima facie case*, interim relief cannot issue in the circumstances. Dealing with a similar matter, the Court in **PHUMZILE MAGAGULA & OTHERS V ACTING JUDGE OF THE INDUSTRIAL COURT AND ANOTHER, CASE NO. 112/2014 SZHC**; held that;

> *"The established position of the law is that an interdict is meant to prevent future conduct and not decisions already made or completed as is the position in this case."*

[27] The Court aligns itself with the decision of the Court in the above cited case.

[28] The applicant further placed her requirement for the reports on **Regulation 42 and 43 of CSC Regulations**, wherein, she argued that the 1st Respondent ought to have furnished her with the requested documents and further allowed her to state grounds which she relied upon to exculpate herself from the charges which had been preferred against her. Therefore, it was irregular and unprocedural for the 1st Respondent to transmit Applicant's matter without affording Applicant a chance to state her case.

[29] The said Regulation provide as follows:

> *"42(1) If the head of department considers formal charges of misconduct should be preferred against an officer he shall in*

consultation with the Deputy Attorney General prepare such charges setting out the misconduct alleged

(2)The head of department shall transmit the formal charges to the officer, and call upon him to state in writing within a reasonable specified time any grounds upon which he wishes to rely to exculpate himself.

(3)The officer shall be warned by the head of department that anything he states in writing may be used as evidence in subsequent disciplinary proceedings.

43(1) If the officer does not furnish such a statement within the time specified or if he fails to exculpate himself to the satisfaction of the head of department the latter shall report the matter to the secretary of the Board.

(2) The record shall contain a copy-

a) Of any record made of the departmental preliminary investigation,

b) A copy of the charges preferred against the officer

c) A copy of any written statement he has made in reply, and

d) The head of department's views as to the seriousness of the misconduct which the officer is alleged to have committed"

[30] On reading of the Regulations it is clear that they set out a simple procedure to be followed in disciplinary matters of civil servants. *In casu* the Court observed that the 1st Respondent – followed this procedure to the latter by writing to the Applicant on the 12th October 2023 notifying her of the

allegation of misconduct attributed to her, wherein, written explanation was sought from the Applicant why she should not be charged for misconduct. The Applicant responded by letter dated 20th October 2023 explaining why disciplinary action should not be taken against her. That letter is annexure "SG1". Further exchanges between the Applicant and the 1st Respondent are also exhibited by Applicant as annexure A, B and C of the founding affidavit. The Applicant cannot therefore come to Court to request for the report when the process has already been finalized and also that there is no authority entitling her to the report.

[31] Taking into account the circumstances of the matter, the Court makes the following order:

i. The application is hereby dismissed.

ii. There is no order as to costs.

The members agree.

L. MSIMANGO

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT : Mr. S. Jele
(Phakathi-Jele Attorneys)

FOR RESPONDENT : Mr. N.G. Dlamini
(Attorney General)