



**IN THE INDUSTRIAL COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO. 370/23**

In the matter between:

**ANXIOUS GAMEDZE**

**Applicant**

And

**SOUTHERN STAR LOGISTICS (PTY) LTD** 1<sup>st</sup> Respondent

**NCAMSILE MBINGO N.O** 2<sup>nd</sup> Respondent

**Neutral Citation:** *Anxious Gamedze v Southern Star Logistics (Pty) Ltd and another (370/23 [2024] SZIC 08 (02 February 2024)*

**Coram:** **L.L. HLOPHE–JUDGE**

*(Sitting with Mr.M.P. Dlamini and Mr. E.L.B. Dlamini,  
Nominated Members of the Court)*

**DATE HEARD: 9th January 2024**

**DATE DELIVERED: 2<sup>nd</sup> February 2024**

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## JUDGMENT

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### INTRODUCTION

[1] The Applicant one Anxious Gamedze an employee of the First Respondent Company, instituted these proceedings under a certificate of urgency seeking the following reliefs:-

*1.1 Dispensing with the usual forums (sic) and proceedings as relates to the time limits and services.*

*1.2 Condoning the Applicant's none compliance with the rules of Court.*

*1.3 A rule nisi hereby issues calling upon the Respondents to show cause why on a date to be determined by the Court the following orders should not be made final;*

*1.3.1 Interdictory the Applicant's disciplinary hearing scheduled to proceed on 12<sup>th</sup> January 2024 pending final determination of this application or matter.*

*1.3.2 Directing the Respondents to dispatch or furnish to Applicant the sound recordings and or detailed minutes of the disciplinary hearing of the Applicant for with pending determination of this application or matter.*

*1.4 Prayer 1,2,3,3.1 and 32 (sic) to operate to operate with immediate interim effect pending determination of the application.*

*1.5 Reviewing and setting aside the ruling of the 2<sup>nd</sup> Respondent issued on 15<sup>th</sup> December 2023 refusing her recusal from the Applicant's disciplinary hearing.*

*1.5.1 Removing the 2<sup>nd</sup> Respondent as Chairperson of the Applicant's disciplinary hearing with immediate effect.*

*1.6 Further and / or appropriate alternative relief.*

[2] The facts of the matter as revealed before this Court are that sometime in November 2023, the Applicant as an employee of the First Respondent was charged with an alleged misconduct, namely dereliction of duty. When the disciplinary process commenced, the Applicant asked for the 2<sup>nd</sup> Respondent, the Chairman of the inquiry into this alleged misconduct, to recuse himself from chairing the disciplinary process. The reason for that was a contention that the said 2<sup>nd</sup> Respondent had not been properly appointed. It was alleged she had been appointed by the initiator of the proceedings instead of the management of the company. It was contended that the said chairman had been appointed by the 2<sup>nd</sup> Respondent because they were close associates and friends from a certain church situated in Matsapha known as the Challenge Ministries.

[3] The Applicant's contention in challenging the appointment of the Chairperson went further to claim that the initiator had appointed the chairperson as his puppet who he was going to use to dismiss the Applicant. He claimed further that in fact the initiator had rejected the initial Chairperson who had been appointed by management to preside over this matter. It was allegedly the conduct of the initiator rejecting the initial and allegedly properly appointed Chairperson that caused the

Applicant to raise his eyebrows concerning the impartiality of the current Chairperson.

- [4] The Applicant went on; the hearing meant for the 6<sup>th</sup> December 2023 which was after the chairperson approved by the initiator had already assumed his duties at the hearing, the initiator allegedly only sat and remained at the inquiry for a very short while. After introductions, the said initiator, (Mr Wayne Lovendale), went out of the disciplinary process, which however continued to the conclusion of the process with the chairperson allegedly now playing the double role as the chairperson and the initiator. He contends that the failure by the 2<sup>nd</sup> Respondent to recuse himself under those circumstances where he was allegedly both the chairman and the initiator.
- [5] According to the Applicant, that the mandate of the chairperson was to get rid of him, was allegedly moved by the fact that his position was now allegedly filled by one Traphesh Chaubae, a South African national, who had already taken over his duties as workshop manager. Further all the working tools taken from him were now being used by the said Traphesh Chaubae. Without producing any proof, the Applicant contended and emphasised that that the said Traphesh was not just acting in his position but was actually appointed in his position as the Workshop Manager.
- [6] The Applicant contended further that it requested that the First Respondent as his employer avails him the investigation report together with the laptop that had been taken away upon suspension from work. He clarified that his intention in requesting these items was to enable

him prepare for his defence to the alleged charges. He claimed that his request was rejected unreasonably in circumstances that exposed the Chairperson as lacking in impartiality and therefore that she was biased against him.

[7] The Chairperson allegedly refused to grant the request that the applicant had made, namely that the Second Respondent recuses herself as Chairperson of his on-going disciplinary hearing. Given that she had been appointed irregularly. Contending that the Chairperson failed to apply her mind and to take relevant considerations as she took the wrong ones. The Applicant has approached this court seeking inter alia a review of the Second Respondents decision refusing to recuse herself and to find that her appointment was improper as it had been done by a person who had no authority to appoint her.

[8] It was further claimed that the Chairperson had displayed lack of impartiality in the hearing of the 6<sup>th</sup> December 2023 when the impugned decision, was taken. This was allegedly displayed when the initiator allegedly left the hearing and would not return until it was allegedly finalised. He had allegedly failed to address that the Applicant had allegedly been replaced by one Thapesh Chaubae who was allegedly occupying his office and also used the tools that had been allocated to Applicant. The Chairperson had also allegedly failed to disclose her alleged association with the initiator, which she had allegedly not disclosed even when it was argued that the appointment of the Chairperson was irregular, being associates of the same church from which the appointment of the chairperson was allegedly made. The other

alleged ground for the review was allegedly that the chairperson allegedly made the wrong decision to the effect that the Applicant never disclosed the document which he was asking that he be furnished with. This was allegedly that the record indicated that these items had been requested for.

- [9] Before even recording the reaction of the respondent to these allegations. We need to point out our observations. They are that the Applicants that case seems to be based on allegations that one in the form of sweeping statements without any clear source or basis. They are therefore mainly in the realm of hearsay or even one's own opinion. For instance whereas allegations are made about the Chairperson having been appointed outside the Disciplinary Code, we are not shown what provision of the Disciplinary Code provides for the appointment of a Chairperson. We are not even told what it is this provision provides.
- [10] Whereas we are told that the current Chairperson was not appointed by management but that it was appointed by the Initiator who rejected the properly appointed one for his own puppet we are not told how the Applicant knows this. Was he part of the team that did the appointment for his own disciplinary hearing? Was he told that by anyone who however failed to confirm such material information? We are not told. It appears we must accept this wild sweeping statement, of-course such a statement amounts to hearsay. The position of our law is long settled, a case is made through cogent and admissible evidence. Hearsay is no such evidence. In fact a case founded on hearsay is no case at all given that hearsay is no evidence. A statement founded on hearsay contention or

evidence is not admissible in our law, which is by now a trite position. See in this regard Hoffman and Zerfett on their work, THE LAW OF EVIDENCE.

[11] A similar sweeping statement was made with regards the contention that the initiator appointed the Chairperson of the inquiry outside the undertaking of the First Respondent, but at their church where they attend and were close associates. Again no information is revealed why the applicant makes such serious allegations against the initiator. Surely that both of them go to the same church without more cannot be enough. It again amounts to hearsay evidence as embodied by the making of sweeping statements which are not backed by disclosure of their source or even their basis who should in any event confirm them by means of a confirmatory affidavit.

[12] Immediately this observation is made, the applicants case is in jeopardy as it means that it is founded on either hearsay statements or even on unsubstantiated grounds where a case was not made. A case like that fails merely on this basis that there was a failure to make a prima facie case.

[13] Being that as it is the Respondent's responded to the Applicants contentions. The Respondents did that through the affidavit of Wayne Lovendale, the First Respondent's Managing Director. In a nutshell the said Wayne Lovendale said that reflected herein in his opposition to the prayers sought particularly the prayers on the review and the removal of

the Chairperson appointed to preside in the disciplinary process established against the applicant.

- [14] The said Wayne Lovendale denied that the Chairperson of the Applicant's disciplinary hearing, one Ncamsile Mbingo had not been appointed by the First Respondent's Management, but contended that she was so appointed, and that she was appointed by the First Respondent's Management acting through the provisions of the Disciplinary Code. She was in that regard appointed through a letter signed by the Human Resource Manager, executing management's decision in keeping with the Disciplinary Code. The Initiator denied that management ever appointed anyone else as the Chairperson prior to appointing the current Chairperson. Whereas a consideration had been embarked upon to appoint a practising attorney picked from their pool of practising Attorneys, that did not come to fruition when the Human Resources manager who had the power to do so, appointment of the current chairperson.
- [15] According to the said Wayne Lovendale, and as regards the appointment of the current chairperson, he only saw her for the first time on the day the hearing was meant to commence. The said Wyne Lavendale denied having a hand in the appointment of the chair even though he could not deny they were from the said church. The reality was that the church in question had over 1000 members making it impossible that the Initiator would know all of them by name, or even get that close to them as to appoint her to manipulate the disciplinary process.



[16] Whereas the applicant contends that the initiator exhibited impartiality, which she says was borne out when the initiator left the disciplinary hearing of the 18<sup>th</sup> December 2023, leaving the Chairperson to assume the roles of both the chairperson and the initiator the second respondent and the initiator deny this assertion. They claim that the initiator never left the hearing in the hands of the chairman as alleged. She only went out to answer a phone which was after having made her submissions. This court has noted that the minutes annexed to the application suggest that all the parties played their part. Whatever the position, we note that the bottom line is that the applicant had not made a case for the reliefs sought in so far as his case was founded on hearsay or bald statements/allegations or both which was not adversely affected by the absence of an initiator during the hearing.

[17] The applicant contended further that from the ruling, it was clear that the Chairperson had not considered his contention that his position was already taken by one Thapesh Chaubae. The Applicants contention in this regard assumes that it is common cause that Thapesh had taken his position, this The Respondent's deny that this was the case. According to them the said Thapesh was just a consultant who was engaged even before the Applicant was charged with any offence, Thapesh had in fact at some point worked with the applicant. The said Thapesh assumed some of the Applicants duties after the latter was suspended and he did this to ensure that the operations did not grind to a halt.

[18] It therefore goes back to what one was saying in the Applicant being in the habit of making wild bold statements. He for instance does not

disclose his source for alleging that his position was taken over by Tapes Chaudhary. Whether he was told by someone or it was just his assumption he does not say. It is difficult for this court to conclude that a case had been made if there was no disclosure of how he came to know about that inclusive of his opinion, conclusion or even having been told by anyone who would have been required to file a confirmatory affidavit put forth all these necessary pieces of information. Again a case had not been made for the relief sought.

[19] It was argued further that the Chairman had not commented on this challenged association and or close acquaintance with the intention of members of a church. Again we have already indicated our difficulty with faulting the Chairperson on this. There is again no clarity on the proof of this assertion that the chair was not properly appointed or that he was appointed irregularly outside the Disciplinary Code there was also no proof she was actually appointed irregularly by a person who had no authority. There is no proof why applicant contends that the chairperson was appointed for being a member of a certain church or even that she was appointed by the initiator.

[20] The Respondents contend that she was properly appointed by the management of the First Respondent, acting through the Human Resources Manager. The letter of appointment confirms her appointment was by the Human Resource Manager. There is nothing by the Applicant to prove this was irregular except that she says so through a bald and bold statement which was not enough. There is therefore no proof that the appointment aforesaid was irregular and one cannot fault the chairman

for rejecting this bald statement and dismissing the applicants request for her to recuse herself.

[21] The Applicant further sought to have the Chairperson's decision or ruling reviewed because she had said that the applicant had not disclosed the documents she needed to have availed to her. What we notice is that if it is true that the Chairperson said the document she asked for had not been revealed when as a matter of fact same had been disclosed in various earlier correspondences between the parties, she then made an error that would be tantamount to saying her ruling was wrong than irregular. That ruling would therefore not be a matter for a review given that a wrong ruling is a matter for an appeal as opposed to a review. Whereas the former an appeal is meant to challenge a wrong ruling, a review on the other hand is based on an irregularity in the process leading to the ruling.

[22] The point is that the applicant would not show in his papers that the respondent company had a duty in Law to keep a voice recording of the disciplinary proceedings and that whereas any was kept, he was not being handed one. We do not know what the true position is and we should not speculate. The trite position of our law is that the Applicant as *dominis litis* ,is required in law to establish a prima facie case in his papers which was not done here.

[23] Consequently and for the foregoing reasons, the applicant's application not being founded on proven facts than bold and bald statements cannot succeed.it is hereby dismissed with the applicant being ordered to submit

himself to the jurisdiction of the disciplinary hearing conducted by its current chairperson. Accordingly, and for the removal of doubt the following order is made:-

- (i) The applicant's application be and is hereby dismissed.
- (ii) The applicant is ordered to subject herself to the disciplinary process reconvened to continue with her matter.
- (iii) This being a labour matter, each one of the parties is ordered to bear its own costs.

The members agree.



**L. L. HLOPHE**

**JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

**FOR APPLICANT:** Ms. Mnisi

MLK Ndlangamandla Attorneys

**FOR RESPONDENT:** Mr S. Dlamini

Musa M. Sibandze Attorneys