IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE	CASE NO. 342/23
In the matter between:	
Samuel Nabaala	Applicant
And	
Mbabane Hotels (PTY) LTD	1st Respondent
Bon Hotels (PTY) LTD	2nd Respondent
Busizwe Dlamini N.O	3rd Respondent

Neutral Citation: Samuel Nabaala v Mbabane Hotels (Pty) Ltd and 2 Others (342/23) [2024] SZIC 01 (26th January 2024)

Coram: **L.L. HLOPHE–JUDGE**
(*Sitting alone with the consent of the litigants Counsel)*

DATE HEARD: **3rd December 2023**

DATE DELIVERED: 26th January 2024

Summary: The Applicant filed the present application seeking an order directing the first respondent to institute the disciplinary proceedings against him instead of the second respondent. The applicant also wants the court to stop the participation of the Human Resource Manager of the second respondent in its disciplinary hearing. Applicant also wants its suspension uplifted as the person who issued it allegedly did not have the requisite authority to suspend him being an employee of Bon Hotels, which is alleged to be a separate and distinct entity.

Reasons for Ruling on points of Law

Introduction

[1] On the 23rd January 2024, this court delivered an ex tempore ruling on the application brought by applicant on an urgent basis to among other things have his disciplinary enquiry interdicted. I dismissed the application and inter alia allowed the process to be taken forward. This text constitutes the reasons for the conclusion I reached.

[2] In this matter the Applicant, an employee of the First Respondent, seeks various reliefs as are set out herein below. The prominent ones among these reliefs are an interdict sought against the participation of the Second Respondent in a disciplinary inquiry established to discipline the Applicant as well as that seeking to have the latter's suspension at his workplace set aside with him being allowed to return to work.

THE PARTIES

[3] The Applicant is Samuel Nabaala who described himself as an adult male of Mbabane and as an employee of the First Respondent occupying the position of General Manager.

[4] The First Respondent is Mbabane Hotels (PTY) Ltd a legal entity established in terms of the laws of Eswatini. Its principal place of business is in Mbabane. It is described in applicant's papers as his employer. The first respondent is also described as a subsidiary of a company known as **Sakhumnotho International Investment Holdings Limited.**

[5] The Second Respondent is **Bon Hotels (PTY) LTD**, a South African company that manages, markets, administrates and owns hotels, lodges and resorts throughout Southern Africa which currently manages the First Respondent on behalf of the company referred to above and known as Sakhumnotho International Investment Holdings Limited. The management of the First Respondent aforesaid is in terms of a management agreement concluded between the two.

[6] The Third Respondent is Busizwe Dlamini, an admitted attorney to practise at the High Court of Eswatini and all the other courts in the country who is cited in this matter as the person who was the initiator in the disciplinary hearing of the applicant conducted by his employer described above.

BACKGROUND

[7]The Applicant, brought this application on an urgent basis seeking the following orders:-

1. ***That the normal rules relating to forms, procedures and time limits relating to the institution of the proceedings be dispensed with and allowing (sic) this matter to be heard as one of urgency.***

2. ***Condoning Applicant's non-compliance with the rules of Court.***

3. ***That a rule nisi does issue with immediate and interim effect, calling upon the Respondents to show cause on a date to be appointed by the Honourable Court, why an order in the following terms should not be made final.***

    3.1 In preparation for the hearing, the Applicant be hereby granted access to his work computer at the disposal of the 1st and 2nd Respondents and that he be provided with all the documents requested, as detailed in attachment 'SN1.'

    3.2 That the 2nd Respondent or anyone acting under its authority be hereby interdicted and restrained from being part of the Applicant's pending disciplinary inquiry in any capacity other than as witnesses.

    3.3 That the Applicant's suspension by the 2nd Respondent be declared unlawful and (sic) is hereby set aside and Applicant be and is hereby authorised to return to his duties forthwith.

    3.4 That the 1st Respondent be hereby directed to conduct a disciplinary inquiry against the Applicant, if any.

3.5 The ongoing disciplinary be hereby stayed pending determination of this matter.

4. That prayers 3.1, 3.2, 3.3, 3.4 and 3.5 operate with immediate and interim effect pending the outcome of this matter.

5. Granting costs against the Respondents in the event of unsuccessful opposition to this application.

6. Further and /or alternative relief.

[8] This application is opposed by the Respondent who duly filled its opposing papers and raised three points of law namely that the matter is not urgent; that the Applicant has failed to set out grounds upon which he relies for the grant of an interdict and that the Applicant has failed to set out exceptional circumstances for the court to interfere with the internal disciplinary proceedings against him.

[9] The first contention by the Respondent was whether this matter was urgent, warranting the courts attention on such basis.

[10] Urgent matters are governed by section 15 of the Industrial Court Rules. Rule 15 provides as follows:

15. (1) a party that applies for an urgent matter shall file an application that so far as possible complies with the requirement of Rule 14.

(2) The affidavit in support of the application shall set forth and explicitly-

(a) The circumstances and reasons which render the matter urgent;

(b) The reasons why the provisions of Part VIII of the Act should be waived; and

(c) The reasons why the Applicant cannot be afforded substantial relief at a hearing in due course.

(3) On good cause shown, the Court may direct that a matter be heard as one of urgency.

[11] Applicant argued that the matter should be enrolled as an urgent one for the following reasons;-applicant avers that the matter is urgent because after his suspension he requested to have access to his work computer and a report, but was denied same; applicant submits further that the matter is urgent because he has been hauled before a disciplinary tribunal without the presence of his employer or representative with the authority to administer such proceedings; the third ground is that the applicant has been suspended by the second respondent who had no authority to do so. Lastly the second respondent is alleged to have indicated its intention to place the applicant on suspension without pay.

[12] Respondent denies that it refused to give applicant access to the information requested, it in fact sent him an email through Mr Greg Sparke concerning the requested information. The said email which was attached to applicants founding affidavit marked SN10 reads: "***Good day Sam, you have received all the necessary information. Please let me know what you would like to retrieve from your PC that I can arrange for it.***

Kind regards

Greg Sparke."

[13] It is true that after this revelation by the respondents, the applicant did not persist in his claim that he had been refused access to the laptop he had been using, just it was similar to other documents he had requested. It is also true that aspect had been resolved amicably with a court order by consent issued. In this way I take this point *in limine* to have fallen away.

[14] Returning to urgency, in ***Njabuliso Dlamini v Get Med Swaziland (137/2012) [2012] SZIC 24 (18April 2012),*** the court stated that for the court to enrol the matter as urgent it should not be left in doubt that the matter is indeed urgent, it should be satisfied that all the facts informing or supporting the requirements have been stated in detail, nothing should be left for implication.

[15] Although the court has a discretion in such matters, same should be exercised judicially and judiciously. Sufficient grounds have to be shown including the following;- *"i. The prejudice that the applicant may suffer by having to wait for a hearing in the ordinary course; ii. The prejudice that other litigants might suffer if the application were to be given preference on the roll; iii. The prejudice that the respondents might suffer by the abridgement of the prescribed times and an early hearing."*

[16] *In casu,* the Applicant is faced with a disciplinary hearing which he claims or believes is being orchestrated by other forces other than his employer

following a suspension he also believes to be unlawful as he claims it was assigned by someone who is not his employer. He contends he had to rush to court as a matter of urgency, to stop the ongoing disciplinary hearing. The determination of these issues he claims ought to be done urgently because he stood to be prejudiced by these issues being determined in the ordinary cause of events.

[17] Other than the applicants' belief that his disciplinary process was not driven by his employer, the facts suggests otherwise. The second respondent, it cannot be denied was engaged by the first respondents for the purpose of inter alia managing its employees who included the applicant as long as the said first respondent had been made aware such action was being taken. The first respondent has by means of an answering affidavit, confirmed that it mandated the second respondent to manage its affairs in its hotels including the one to which the applicant is attached. Therefore do not find anything supporting that the disciplinary action was unlawful as contended. If indeed this alone was the basis of the urgency justifying the institution of the proceedings it simply means that the matter could not succeed, however I do not think it is advisable to dismiss these proceedings on this point. I form this view because I notice that all the pleadings that needed to filed had since been filed with each party having put before the court all he needed to do , and therefore that instead of adding the backlog of matters, it was advisable to have decided the matter in its merits or on other substantial legal issues.

[18] This takes me to the related point *in limine* taken by the respondents, to the effect that whereas this court is being urged to interfere in incomplete

disciplinary proceedings, the position is now trite in this jurisdiction that the court can only do so where it shown that there exists exceptional circumstances entitling it to do so. The involvement of the court is otherwise taken to be premature if it is urged at any point and as a matter of course.

[19] In the case brought on an urgent basis by the applicant arguing this court to intervene in incomplete disciplinary proceedings, he says it is because the respondents have refused to hand over to him his laptop and certain other documents he had requested. I have already commented on the fate of this assertion as I dealt with the issue of the point raised on urgency. That factual matrix applies even here. Firstly it has been shown to be untrue or inaccurate that the respondents refused with any documents or the laptop to the applicant. The email of the 19th September 2023 at 3:25 PM put this fact beyond doubt when it invited the applicant to advise on what other documents he would like to retrieve from the laptop so that it could be availed. This was after opining that he had already received all documents he had set out to obtain. This aspect was later settled on court on the 26th September 2023 by means of a Deed of Settlement between the parties in court. The issue of an alleged refusal to handover whatever documents and laptop the applicant required cannot amount to an exceptional circumstance.

[20] Although I will deal with it more fully and in a pointed manner herein below as I deal with the merits of the matter, I notice that the other aspect on why the intervention of the court in the incomplete disciplinary proceedings was allegedly warranted because the second respondent was

allegedly not supposed to be involved in the disciplinary proceedings in whatever capacity- than being a witness. It has just been revealed, (and) the details of how it comes about are to follow as I deal with the merits below that this assertion of the applicant is wrong and completely inaccurate. It has been shown through the respondents' contention in the answering affidavit and as supported by the annexure "SN3", the hotel management and licence agreement concluded between Bon Hotels (PTY) Ltd and Sakhumnotho International Investment Hotels Limited, that there was a management agreement between the two in terms of which the said Bon Hotels (PTY) Ltd was engaged to manage the Mbabane Hotels as entities of Sokhumnotho International Investments Holdings LTD. The said agreement is as shall be seen below, detailed on how the third respondent was to manage, the employees of the first respondent, which included issues of discipline, which is also a vital cog in the notion of management prerogative.

[21] It is clear that the applicant prayed for that relief because in his view or belief the second respondent had no legal entitlement to manage or discipline the first respondent's employees. There is no doubt that as soon as that view changed, or was shown to be incorrect or inaccurate, then there were no exceptional circumstances allowing the applicant to involve this court in incomplete disciplinary proceedings.

[22] The importance of observing the principle that the court ought not to involve itself in the absence of exceptional circumstances, in incomplete disciplinary proceedings can be found in the South African case of ***Jiba v*** **Minister of Justice and Constitutional Development and Others**

(J167/09) [2009] ZALC 57; (2010) 31 ILJ 112 (LC). It was there expressed in the following terms: - *"Although the Court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this Court in review proceedings."*

[23] I therefore have no hesitation in concluding that the applicant had indeed not met the requirements of establishing exceptional circumstances before seeking this courts intervention in incomplete disciplinary proceedings.

[24] The respondents' other contention *in limine* is that the Applicant has failed to establish grounds for an interdict and he states the following at paragraph 2(11) of his notice to raise points of law:-(i) the applicant should have stated that he would suffer *irreparable harm should the employer not be interdicted from proceedings with the hearing scheduled for the 4th December 2023; (ii) and that Sufficient allegations that the balance of convenience favours the granting of the interdict. (iii) And that he has no satisfactory alternative remedy."* (Respondents answering affidavit).There is a difficulty with the contention by the applicant. He hardly states any facts on why he contends sufficient allegations were not made. He thus makes sweeping statements for the court to infer per chance. He should set

out facts that justify the inference that the requirements of an interdict have been met.

[25] **Herbstein and Van Winsen : "The Civil Practice of the Supreme Court of South Africa": 4th Edition at pg. 1064-1065** sets out the position of our Law with regards the requirements of an interdict as follows: "*In order to succeed in obtaining a final interdict, whether it be prohibitory or mandatory, an Applicant must establish: a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.*"

There are thus no facts alleged on what his clear right entitling him to the interdict he seeks are. The same thing applies in my view with regards the other requirements.

[26] The position as regards an interim interdict was captured as follows in the case of **Mahlobo Edmund Dlamini and another v Chief Hayindi Dlamini – High Court case no. 4633/10:-***"It is settled law that in order to establish an interim interdict the Applicant must establish that it has a prima facie right even though open to some doubt, that there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted, that the balance of convenience favours the granting of interim relief and that the Applicant has no other satisfactory remedy. The court weighs up the likely prejudice to the Applicant if the interim interdict is refused and also the likely prejudice to the Respondent if the interim interdict is granted. Similarly the court must also have regard to Applicant's prospects of success".*

[27] The interdict sought in this matter relates to the second respondent forming part of the disciplinary inquiry against the applicant. The applicant contends that the second respondent or anyone acting under the latters' authority ought to be interdicted from forming part of the disciplinary inquiry against him. It cannot be in doubt that for the applicant to succeed in that prayer he should satisfy the requirements of an interdict. I clarify that because of the stage the matter is at, the requirements to be met are those of a final interdict as opposed to those of an interim one. Those requirements are the three discussed above.

[28] The most important requirement that the Applicant needed to satisfy in the circumstances of this matter is in my view a clear right to the relief sought. In other words the applicant has to show that he is entitled to refuse or reject the applicant forming part of the disciplinary process against him. I unfortunately cannot see the justification for this being set out in the applicant's papers. What one sees at most sweeping statements that the second respondent is not his employer and that he therefore should not involve himself in the disciplinary process. I find this disingenuous on the facts of this matter. It cannot be denied that from the correspondence exchanged between the parties and the other documents filed of record, the applicant was made to report and or account to the second Respondent or its employees on the performance of his duties. In my view this alone should suffice to prevent him from refuting the second Respondent's entitlement to discipline him. It puts it beyond doubt that there is in place a management agreement between his employers the First Respondent and the second Respondent. In terms of that agreement the Second Respondent was engaged by the First Respondent to inter alia manage the hotels of the first Respondent.

[29] I must before analysing the foregoing position that is disquieting as it suggests some possible concealment of certain facts in the papers annexed to the application particularly the management agreement which is marked as annexure "SN 3." I say this based on what I am observing on the material and the relevant portion of the contract, namely clause 4 thereof which, whilst it deals with the management obligation of the second Respondent, it ends abruptly at paragraph 4.1 with the other apparent sub-clauses of clause 4 not being revealed, yet they are at the core of this point; instead other clauses from irrelevant paragraphs are brought up in a mixed up fashion. For instance the next paragraph refers to paragraph 1.1.4.1. Other clauses are now brought up. Whatever these other clauses provide, the completed one, clause 4.1 reads as follows on the management obligations of the second Respondent.

"The operator (the second Respondent), shall manage the Hotel on behalf of the owner, provide the management and related services as set out herein in respect of the Hotel and its operations in accordance with the terms and conditions of this agreement..."

[30] There is in my view every like hood that the enumeration of the related services referred to above which were to be set out in clause 4.1 and beyond would include the accountability of the applicant to the hotel management or manager on the performance of his duties, as confirmed in the subsequent correspondence exchanged between the applicant and the second respondent. There is even a more plausible reason why an inescapable conclusion to be reached that matters relating to disciplining the applicant were a preserve of the second respondent as the manager of the hotel.it is undeniable that implicit to the right to manage is the right to discipline as it forms an important aspect or part of the notion of

management prerogative. This was asserted in the case of **Swaziland Union of Financial Institutions and Allied Workers Union and another v Nedbank Swaziland Limited Case No.348/2011,** where Mazibuko J, quoted with approval the principle stated in **John Grogan's book, Work Place Law 10TH Edition, 2009; at p.129.** In the following words;-"the power to prescribe standards of conduct for the workplace and to initiate disciplinary steps against transgressors is one of the most jealously guarded territories of manager's everywhere, forming as it does an integral part of the broader right to manage..."

[31] I could go to further extents trying to consider the satisfaction of the other requirements of an interdict such as the existence of an injury that has occurred and is ongoing or one that is imminent as well as the requirement of the lack of an alternative remedy. For instance the applicant cannot claim to suffer prejudice if he is being disciplined by an entity or authority or person entitled in law to discipline him. He also cannot claim the absence of alternative redress by other lawfully entitled bodies or personnel in a labour matter where the outcome of the disciplinary process could be subjected to conciliation or arbitration by Commission for Mediation Arbitration and Conciliation or a rehearing or review by this court and the High Court.

[32] I have therefore come to the conclusion that in so far as he seeks an interdict, the applicants application cannot for the foregoing reasons not succeed. This means the point *in limine* by the applicant on the failure by the applicant to satisfy the requirements of an interdict by the applicant is hereby upheld.

[33] Owing to the closeness of the relationship between the points *in limine* raised by the respondents and the merits of the matter I now need to deal with what has become the only remaining aspect of the matter namely the contention that the suspension of the applicant by his employer or the party exercising managerial prerogative, should be declared unlawful and that same be set aside.

[34] In terms of the employment Act, 1980, an employer (and anyone exercising managerial power at the instance of the employer), has the right to suspend an employee with pay for various reasons.

[35] Section 39 of the Employment Act of 1980 provides as follows:-

"39. (1) an employer may suspend an employee from his employment without pay where the employee is-

(a) Remanded in custody ;or

(b) Has or is suspected of having committed which, if proven would justify dismal or disciplinary action.

(2) If the employee is suspended under sub-section (1)(b), the suspension without pay shall not exceed a period of one month.

(3) If the employer finds that the employee did not commit the act referred to in subsection (1)(b), the suspension shall be lifted and the employer shall pay to the employee an amount equal to the remuneration he would have been paid during the suspension.

(4) Where the employee is suspended because he was remanded in custody, and is subsequently acquitted of the charge and other related charges for which he was placed in custody, the suspension shall be lifted, and subject to subsection (5) the employer shall not be obliged to pay any wages to the employee for the period the employee was suspended.

(5) Where an employee is remanded in custody as a result of a complaint laid by his employer in relation to his employment naming him as an accused, is subsequently acquitted of that charge or any other related charges, the employer shall pay the employee an amount equal to the remuneration he would have been paid during the period of suspension.

[36] From the facts of the matter, whereas the first Respondent's letters calling for the applicant to show cause why he should not be suspended without pay and that eventually it was to suspend him with pay, the made it clear that same was to be carried out to be in line with the applicable law as cited in the foregoing paragraph. It would come as no surprise when the applicant was eventually suspended with pay.

[37] In his challenge of this suspension and as I understand it, the applicant's complaint is not per se that he was suspended by a person he complains was entitled to suspend him, at paragraph 5.4 and 5.6 (there is no 5.5), the applicant said the following;- *"5.4 The letter requesting or calling upon the applicant to show cause why he should not be suspended was merely a procedural formality as applicant was suspended on the morning of September 15, 2023.Applicants6' suspension was ambiguous in nature as he was informed of a suspension "pending" an ongoing 'investigation.*

'However, concurrently, he received a notification to participate in a disciplinary inquiry scheduled for September 20, 2023. Attached hereto is the letter of suspension and the invitation to an inquiry marked "SN 8"and "SN9" respectively.

5.6 It is humbly stated that the letter suspending the applicant was issued by one Greg Sparke, who is group Chief operation Director for the second Respondent. The said Greg Sparke lacked the necessary authority to suspend the applicant making applicants suspension unlawful."

[38] I do not see how the suspension can be faulted if it was preceded by a call on the applicant why it should not be effect and he failed to respond that it is a fact that when it was eventually in effect it was with pay. The applicant has himself not set out any reviewable irregularity in that regard. Further still the applicant's major complaint remains being that it was effected by the Greg Sparke who he contends had no power or authority to suspend him. Other than his contention that the second Respondent had no authority to discipline him because it was not his employer, which is an assertion that the applicant ignored the management agreement concluded between the two, no further facts were alleged why it was contended Greg Sparke was not entitled to issue the suspension. The applicant himself asserts in his papers that Greg Sparke was an employee of the second Respondent. If that is the case he then has the authority to issue such a suspension in his capacity as a senior employer of the entity managing the affairs of the first Respondent.

[39] As the applicant had sought to have the suspension set aside supposedly because it had been allegedly issued by a person with no authority; such a request cannot remain if it is shown that that person does have the authority to suspend applicant. On this point alone, there is no basis for challenging this suspension. It makes it worse for the applicant that there is no tangible prejudice he has shown to be suffering now that the said suspension is with pay.

[40] Consequently, I have come to the conclusion that there is no basis for the suspension to be set aside and this prayer is as well rejected.

[41] On the last prayer the applicant had requested that the first Respondent be ordered or directed to conduct a disciplinary inquiry against him. This is supposedly because up till this for the disciplinary process being challenged was by a person who was in the eyes of the applicant alleged to be housing no authority to discipline him. That question has been answered in a number of the points or prayers meant for determination as sought by the applicant as it was the central point in the determination of this matter.

[42] This Court has not been referred to any authority which would allow it to descend at shop floor level and direct who should discipline an employer. If it so direct it would be because it was giving effect to the documents of the employer such as the Disciplinary Code and or other such policies on who should carry out such a function. The Court cannot act arbitrarily and issue the order sought by the applicant in this last prayer.

[43] Accordingly this prayer as well cannot succeed and it should be dismissed.

[44] I have therefore come to the conclusion that the Applicant's application should be dismissed, which I so order. This being a labour matter, I am of the view that each party should bear its own costs.

L.L HLOPHE

JUDGE – INDUSTRIAL COURT

FOR APPLICANT: Mr Nhlabatsi

(Motsa-Mavuso Attorneys)

FOR RESPONDENT: Mr Mnisi

(S.S Mnisi Attorneys)