IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No 79 /2025

In the matter between:

DUMSILE MHLONGO Applicant

And

BEST HOME AND ELECTRIC 1st Respondent

THAMSANQA TSOAEDI N.O 2nd Respondent

Neutral Citation	:	Dumsile Mhlongo v Best Home and Electric and Another, Case No. 79/2025 SZIC 36 [2025] (8th April 2025)
Coram	:	**MSIMANGO - JUDGE** *(Sitting with Mr S.P Dlamini and Ms N. Dlamini- Nominated Members of the Court)*
DATE HEARD	:	**27th March 2025**
DATE DELIVERED	:	**8th April 2025**

SUMMARY : **The Applicant alleges that the 1st Respondent has disregarded company policy by suspending her, instead of subjecting her to a poor work performance management process, and further argues that the failure to abide by the Disciplinary Code and Guide makes her suspension not only unfair but also incorrect.**

JUDGEMENT

[1] The Applicant is Dumsile Mhlongo an adult Liswati female of Manzini area in the District of Manzini, and an employee of the 1st Respondent.

[2] The 1st Respondent is BEST HOME AND ELECTRIC, a company established in terms of the company laws of Eswatini. It has its official place of business or main branch in Matspha, in the Manzini District. It has capacity to sue and be sued in its own name.

[3] The 2nd Respondent is THAMSANQA TSOAEDI N.O, a South African male adult, cited in these proceedings in his capacity as the chairperson of the disciplinary hearing.

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

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

4.2 Condoning the Applicant's non compliance with the Rules of this court as relate to service and time limits.

4.3 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;

4.3.1 Interdicting the Respondents jointly or severally with immediate effect from proceeding with the disciplinary hearing against the Applicant pending final determination of the matter.

4.4 prayers 4.1, 4.2, 4.3 and 4.3.1 to operate with immediate interim effect pending determination of the matter.

4.5 Correcting, reviewing and setting aside the ruling issued by the 2nd Respondent on the 5th and 6th March 2025.

4.6 Removing the 2nd Respondent from chairing the disciplinary hearing forthwith.

4.6.1 Declaring the disciplinary hearing to be premature in terms of 1st Respondent's Disciplinary Code and Guide Policy.

4.7 Costs of suit.

4.8 Further and or alternative relief.

[5] The Applicant was employed by the 1st Respondent on the 1st October 2016 as Regional Accounts Manager, and was promoted on the 2nd September 2021 to the position of Regional Controller. Which position Applicant alleges is a management position, that she still occupies the position of Regional Controller to date.

[6] On the 17th December 2024 the Applicant was served with a letter of suspension with pay from work by the Respondent and as such she duly adhered to the suspension directive by the 1st Respondent. That, on the 5th March 2025 the disciplinary hearing commenced at the 1st Respondent's premises, wherein the Applicant was represented by Mr Ernest Dlamini.

[7] Through her external representative the Applicant moved an application to dismiss the proceedings as there was an issue of procedural unfairness based on the following issues:

7.1 The 1st Respondent has severely flouted its own policies and procedures in terms of its Disciplinary Code and Guide, in that, the

charges were issued to the Applicant by someone in a lower rank, namely Dumsile Mamba who holds the position of Assistant Regional Controller.

7.2 The initial charges were issued by a different Regional Controller, namely, Sithuli Mkhaliphi who holds an equal rank as the Applicant in the organization.

7.3 According to the 1st Respondent's Disciplinary Code and Guide, a superior must investigate and issue charges to the offending employee, hence, the Applicant submitted that in her case the person that charged her was of equal rank to her and the other charge was by a subordinate.

7.4 On the suspension and charges, the Applicant submitted that the charges she had been charged with are incorrect, as she did not commit a misconduct, she rather failed to reach a performance standard and should have rather been subjected to a performance management process, which does not warrant her suspension, thereby making her suspension unfair and incorrect.

7.5 The performance evaluation process should have been followed as prescribed by the 1st Respondent's Disciplinary Code and Guide, which clearly states that suspension is not acceptable as a form of discipline. Only suspend under exceptional circumstances. The Applicant submitted that in her case she was suspended for failing to reach the standard performance level.

[8] The Applicant alleges that she subsequently made an application that the 1st Respondent must move an application for condonation as per the Disciplinary Code and Guide, as the hearing should have commenced in fourteen (14) days after she was erroneously placed on suspension on the 17th December 2024.

Hence, the fourteen (14) days had long prescribed, and in making the application she would have been given an opportunity to oppose same.

[9] That, after the disciplinary hearing had been stood down, whilst walking back to their cars the Applicant's representative had a brief conversation with 2nd Respondent. In this conversation the 2nd Respondent praised Applicant's representative on the submission he made during the disciplinary hearing, and further mentioned that in an impartial hearing he would have ruled in Applicant's favour, but he had been given a strict mandate to rule in favour of the 1st Respondent.

[10] The Applicant contends that her representative notified her about the brief conversation, and advised that he would be moving an application at the next sitting for the recusal of the 2nd Respondent as he was compromised. On the 6th March 2025, the Applicant and her representative attended the hearing, whereby, through her representative the Applicant moved an application for the recusal of the 2nd Respondent. The Applicant submitted that the application was as a result of the previous day's events, which included the following:

10.1 The 2nd Respondent was given a mandate to dismiss the Applicant, the disciplinary hearing was merely being conducted to formalize process.

10.2 The 2nd Respondent was biased in his ruling dated the 5th of March 2025, in that the initiator did not make any submissions when called upon by the 2nd Respondent, but the ruling handed down by the 2nd Respondent was in favour of the 1st Respondent, yet there was no evidence presented to support their case.

10.3 The 2nd Respondent handed down his ruling on the recusal application on the 6th March 2025, again, he ruled in favour of the

1st Respondent, citing that the allegations made against him were malicious, unfounded and untrue.

[11] The Applicant submitted that the 2nd Respondent misconceived his function, and instead simply took the side of the 1st Respondent thus deviating from the Disciplinary Code and Guide. He further failed to comprehend his function which was to apply his mind and consider her submissions, that, in terms of the Disciplinary Code and Guide, she was prematurely brought to a disciplinary hearing. That, the 2nd Respondent ought to have exercised his discretion judiciously by considering relevant factors and not take into account irrelevant ones.

[12] The 1st Respondent is opposed to the application and in its defense argued that the charges against the Applicant were prepared by the divisional Manager, and were duly served to her by Miss Sithuli Mkhaliphi who is the Divisional Leader in Eswatini. Further that, in light of the applications that were brought to this Honourable Court by the Applicant, the Applicant had to be given another notice on the continuation of the disciplinary hearing. The last notice was served on the Applicant by Dumsile Mamba, effectively the same charges which were brought to Applicant's attention on/or about December 2024 when she was charged were not changed. There were no new charges that were preferred against the Applicant by the said Dumsile Mamba, she only served as a messenger for the 1st Respondent for purposes of serving the Applicant with a hard copy of the charges as same had been previously sent to her via email.

[13] That, the fact that the Applicant states that the charges against her are incorrect, and suggests to the Honourable Court that her charges are performance related clearly demonstrates the gross attitude of the Applicant which seeks to challenge the prerogative of the employer to discipline her. The Applicant approaches the process with contempt against the 1st Respondent for charging her and seeks to dictate terms that she ought to be taken on a performance management process as

opposed to the charges of gross negligence against her. These are charges which the Applicant ought to answer to the chairperson and clearly demonstrate with evidence that she ought to be taken on a performance management process as opposed to charges of gross negligence. The Honourable Court does not have jurisdiction in this regard to entertain such a claim at the present moment, unless such has been fully canvassed in the disciplinary hearing and/or conciliated upon by the Conciliation Mediation and Arbitration Commission.

[14] The 1st Respondent argued that the Ruling of the 2nd Respondent as demonstrated in the papers clearly disputed such conversation, and the Applicant has failed to produce any evidence that demonstrates that there was ever such a conversation with the chairperson of the disciplinary hearing. Furthermore, it was particularly denied by the 1st Respondent that the 2nd Respondent was given a mandate to dismiss the Applicant. The 2nd Respondent has at all material times afforded the Applicant a fair hearing, and has gone to the extent of affording the Applicant latitude to approach the Honourable Court when she felt aggrieved by the ruling of the 2nd Respondent. Therefore, the allegations of bias or reasonable apprehension of bias against the 2nd Respondent are unfounded.

[15] The 1st Respondent submitted that the balance of convenience favours that the court should not grant the orders as prayed for by the Applicant. That, the circumstances of the matter are such that the application ought to be dismissed with costs.

[16] The court is now called upon to determine the following issues:

(a) **Whether the disciplinary process against the Applicant is time barred.**

(b) **Whether or not the 1st Respondent has flouted or deviated from the Disciplinary Code and Guide as it relates to the charges against the Applicant.**

(c) **Whether or not the 1st Respondent has flouted the procedure on suspension.**

(d) **Whether the Applicant has met the test on the requirements of a reasonable apprehension of bias against the 2nd Respondent.**

[17] The Applicant through her representative at the commencement of the hearing had made an application to dismiss the hearing, on the basis that the 1st Respondent failed to make an application for condonation, for the reason that the Respondents have failed to conclude the disciplinary hearing within fourteen (14) days, thus it was time barred. However, on the day the matter was argued before the Honourable Court, Applicant's representative conceded that the disciplinary hearing was not time barred taking into consideration the court applications that were instituted by the Applicant. As such the allegation was abandoned by Applicant's representative and was not argued by the parties. Consequently, the Honourable Court will not deliberate on the said allegation as raised by the Applicant on her pleadings.

CHARGES

[18] The Applicant argued in this regard that the charges preferred against her were performance related, therefore, the charges she has been charged with are incorrect as she did not commit a misconduct, rather she failed to reach a performance standard and should have been subjected to a performance management process which does not warrant suspension, thus making her suspension unfair and incorrect.

[19] It is well settled that the employer enjoys the discretion in terms of the management prerogative to discipline employees. This is rooted in the employer's authority to regulate and control operations including the conduct and behavior of its employees. Management prerogative is jealously guarded, this means that management's authority and the right to make decisions regarding the business or organization are held very carefully and protected, often with resistance to any

encroachment or limitation on that authority. **JOHN GROGAN, IN HIS BOOK WORKPLACE LAW 12th Edition**, at page 127 states that:

> *"The power to prescribe the standard of conduct for the workplace and to initiate disciplinary steps against transgressors is one of the most jealously guarded territories of managers everywhere, forming as it does an integral part of the broader right to manage, or managerial prerogative".*

[20] While an employee can raise concerns about a wrongful charge before a disciplinary hearing, directly instituting a court application at this stage is generally not the proper course of action. The appropriate first step is to follow internal company procedures and potentially appeal any adverse decision after the hearing. Therefore, in casu it is not proper for the court to determine whether or not the Applicant was wrongly charged by the employer. The hearing is the designated forum for presenting evidence and allowing the employee to defend herself. Dealing with a similar matter, the court in **STAWU AND ANOTHER V CASQUIP STARCH (Pty) Ltd, IC Case No. 30/2012** held that:

> *"The court would be interfering with the duties of the chairperson of the disciplinary hearing if it were to entertain this argument. It is not the duty of this court to conduct a hearing or pre-hearing of the disciplinary charges. These are issues that should be determined by the chairperson".*

[21] The Applicant argued further that she was charged by someone junior to her, namely Dumsile Mamba who is Assistant Regional Controller. The 1st Respondent argued to the contrary that Dumsile did not prefer any charges against the Applicant, but she only served as a messenger who furnished the Applicant with the disciplinary charges which had already been furnished to Applicant. The Applicant in her founding affidavit contended that she was served with a letter of suspension on the 17th December 2024, after which she attended the disciplinary hearing on the 13th January 2025, and further made an application to be

represented by an external representative, which application was dismissed by the chairperson.

[22] Being dissatisfied with the chairperson's ruling, the Applicant approached the Honourable court to seek for the court's intervention to review and set aside the chairperson' ruling. The matter was heard by the court on the 27th February 2025. The Applicant contended further that the disciplinary hearing continued on the 5th and 6th March 2025. On perusal of Annexure "A" at page 34 of the book of pleadings the court notes that the Applicant was being advised that, following the judgement issued by the court on the above mentioned date, the hearing was now to proceed on the 5th and 6th March 2025.

[23] It is the Honourable Court's considered view that the Applicant was not being charged afresh, but was being advised on the new dates on which the hearing was to proceed after being granted her request for external representation. In the absence of evidence to the contrary, the court will take it that, the assertion put forward by the 1st Respondent is the probable one.

[24] It is trite that a litigant stands or falls on his pleadings, which means that a party's legal case is entirely determined by the accuracy and completeness of the formal statements they file with the court, as the court's decision will be based solely on the information presented in those pleadings. If a party's pleadings are weak, insufficient or contain errors, their case is likely to fail. Conversely, if the pleadings are strong and well supported the party is more likely to succeed. This is to emphasize that the outcome of a case hinges on the strength and completeness of pleadings, because the pleadings are so crucial, it is essential for litigants to carefully draft their pleadings, ensuring that they are accurate, complete and clearly state the basis for claims or defenses.

[25] In **POUNTAS TRUSTEE V LAHANAS 1924 WLD and 68**, the court had this to say:

".....an Applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegations of the facts stated therein, because those are the facts which the Respondent is called upon either to confirm or deny. Since it is clear that the Applicant stands or falls by his petition and the facts therein alleged.

SUSPENSION

[26] On the issue of suspension the Applicant argued that the 2nd Respondent's failure to apply his mind, and formulating a ruling in line with the Disciplinary Code and Guide is evident from his failure to consider the submission made to him with regards to when an employee can be suspended. Further that, the Applicant in her application brought to the attention of the 2nd Respondent Clause 16 of the Disciplinary Code and Guide, which provides as follows:

"16 SUSPENSION

Suspension is not acceptable as a form of discipline and can only be applied in a period waiting for a disciplinary decision or waiting for a disciplinary hearing. Only suspend under exceptional circumstances. Suspension should not be taken lightly. An employee can be suspended for three main reasons:

(a) Employee presence could lead to aggravating or sensitive situation- intimidation.

(b) Employee could interfere with further investigation or alter or destroy evidence.

(c) Further damage to the company property is likely to occur or negatively influencing the company image, if the employee remains on the premises.

[27] The Applicant contended that the total disregard of this clause by the 2nd Respondent shows that he did not exercise his judicial discretion, and rather formulated his own submissions that were not presented by the 1st Respondent. Further that, the 2nd Respondent's failure to formulate a ruling that would indicate that she was wrongfully placed on suspension as her charges do not warrant a suspension, shows that the 2nd Respondent considered irrelevant considerations and failed to apply his mind in determining whether or not Applicant's suspension was warranted by the Disciplinary Code and Guide that all disciplinary hearings are regulated by, and that all employees must conform to.

[28] It must be pointed out that it is not the disciplinary chairperson's role to decide if an employee was wrongly suspended. Suspension is often used while an employer investigates allegations of misconduct, and it does not automatically mean the employee has done anything wrong. The chairperson's role is to facilitate the hearing and make a finding of guilt or innocence based on the evidence presented.

[29] In casu, the employer cannot be faulted for suspending the Applicant for the reason that the clause clearly defines the circumstances under which an employee can be suspended, and does not need any interpretation. An employer is entitled to suspend an employee pending an investigation of gross misconduct or other severe disciplinary issues. The right to suspend will usually be set out in the employee's contract of employment if any. Even if there is no right to suspend in the contract, providing there is a sufficiently serious reason and the employee suffers no detriment (for example, if the employee continues to receive full pay and other usual benefits) then the employer will be deemed to have acted reasonably.

[30] **JOHN GROGAN IN HIS BOOK "WORKPLACE LAW, 8th Edition (2005)** at page 102, deals with the subject of suspension as follows:

"Suspension may be of two kinds: It may be imposed either as a holding operation pending disciplinary action, or as a form of disciplinary penalty. The first type of suspension also known as precautionary suspension is not punitive in itself, it is acceptable provided the employer bona fide believes that such action is necessary for good administration and the employer continues to pay the employee".

[31] It is the Honourable Court's considered view that the Applicant is challenging the employer's right to discipline her, and further dictates what course the employer should adopt in her matter. Dealing with a similar matter, the court in **DUMISA ZWANE V EZULWINI MUNICIPALLY AND 3 OTHERS, CASE NO. 30/2014**, held that:

"It is a well known fact that there are various laws imposing all kinds of burdens and obligations upon employers in relation to their employees, and yet as a rule, this court has always consistently so, upheld the employer's inherent prerogative to regulate their workplace. Under the doctrine of management prerogative every employer has the inherent right to regulate, according to their own discretion and judgement all aspects of employment relating to employees' work including hiring, work assignments, working methods, time, place and manner of work, supervision, transfer of employees, discipline and dismissal of employees. The only limitations to the exercise of prerogative by employers are those imposed by labour laws and the principles of equity and substantial (natural) justice".

[32] The Applicant further sought an order for the removal of the chairperson of the disciplinary hearing, arguing that the ruling of the 5th March 2025 which was in respect of the condonation application, the chairperson considered irrelevant factors and further took into consideration submissions that were not made by the 1st Respondent. The Honourable Court will not deal with this aspect on the recusal

of the chairperson, since the condonation claim has been abandoned by Applicant's representative.

[33] On the other aspect on the recusal application the Applicant argued that, the 2nd Respondent in arriving at his ruling which was unreasonable, failed to properly apply his mind and ignored relevant considerations and/or submissions that were made by Applicant, as such the ruling should be reviewed on the following grounds:

33.1 The 2nd Respondent did not consider the factors put to him that, the application was moved not to be scandalous or be disruptive but was in fact solely for the purpose that the Applicant was of the view that the 2nd Respondent's failure to conduct himself in an impartial fashion, subjected the Applicant to an unfair hearing as her submissions and applications were being dismissed solely to further the interests of the 1st Respondent and not those of justice.

33.2 After the brief conversation between the 2nd Respondent and Applicant's representative and the rulings handed down, prompted the Applicant to make the application for recusal as she was being prejudiced.

33.3 The Code that was implemented by the 1st Respondent for the sole purpose that all employees are subjected to fair disciplinary hearings was being used against her.

33.4 In his ruling the 2nd Respondent stated that the application was merely brought to discredit him as the allegations made against him were scandalous, which was the furthest thing from the truth.

[34] The Applicant submitted that, the application was moved with the sole intention of preventing a miscarriage of justice in her disciplinary hearing, as a biased chairperson would have a negative impact on her case. Further that, the 2nd

Respondent's biased decisions in his rulings made it clear to the Applicant that he was indeed biased, as they were in favour of the 1st Respondent, yet no submissions were made by the 1st Respondent, the submissions were coined by the 2nd Respondent.

[35] One of the hallmarks of administrative law is that justice must not only be done, but must be seen to be done. This principle has been extended to quasi-judicial proceedings, 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. Yet mere allegation of bias will not suffice.

[36] 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.

[37] Effectively the minutes which are subject to the ruling of the chairperson have not been filed by the Applicant, notwithstanding that on the 19th March 2025, the Honourable Court ordered that same be filed pending hearing of the matter on the 27th March 2025. The 2nd Respondent has denied the allegation levelled against him by the Applicant in her founding affidavit, to the extent that he contended that same was malicious, unfounded and untrue. Yet the court is being asked to review, correct and set aside the ruling. The minutes would have served as a key piece of evidence to demonstrate whether or not the chairperson misdirected himself or committed an irregularity when making the ruling.

[38] An allegation of bias should be proved, mere averment 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. [**GREEM V CHAIRMAN – NATIONAL SOCIAL SECURITY AUTHORITY APPEALS COMMITTEE ANOTHER HB 104/2003**].

[39] The court concludes that the conduct of the Applicant is nothing more than a delaying tactic meant to frustrate the disciplinary process instituted against her. In a strongly worded judgement, and in no uncertain terms, the Labour Court dismissed an urgent application with costs in **GEORGE V XOLANI AND OTHERS (J 214/23) [2023] ZALCJHB 70**, where it was held that:

> *"Accordingly to the court, this application is representative of the now familiar and habitual abuse of the urgent court by employees, especially those who occupy senior positions in all spheres of government, especially in the municipalities. These employees, after being placed on prolonged periods of precautionary suspensions and when called upon to answer to the charges of misconduct, will take all means necessary in order to avoid the conclusion of those inquiries. When all the strategies deployed to avoid the hearing comes to nought, the next step is to seek sanctuary from this court, with contrived and legally unsustainable urgent applications, with the hope that serious charges of misconduct will vanish".*

[40] In the result, the court makes the following order:

(a) The application is hereby dismissed.

(b) There is no order as to costs.

The Members Agree.

L. MSIMANGO

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT	:	MR S. DLAMINI (MLK NDLANGAMANDLA ATTORNEYS)
FOR RESPONDENTS	:	MR S. KUNENE (KN SIMELANE ATTORNEYS in association with HENWOOD AND COMPANY)