



## **IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND**

### **JUDGMENT**

Case No. 10/2012

In the matter between:

**NEDBANK SWAZILAND LIMITED**

**Appellant**

And

**SWAZILAND UNION OF FINANCIAL  
INSTITUTION & ALLIED WORKERS [SUFIAW]**

**1<sup>st</sup> Respondent**

**RONNY DLAMINI**

**2<sup>nd</sup> Respondent**

**Neutral citation:** *Nedbank Swaziland Limited v Swaziland Union of Financial Institution & Allied Workers [SUFIAW] & Another (10/2012) [2013] SZICA 4 (20<sup>th</sup> March 2013)*

**Coram:** **M. M. RAMODIBEDI JP, N. J. HLOPHE AJA and  
M. DLAMINI AJA**

**Judgment:** BY THE COURT

**Heard:** 13<sup>th</sup> March 2013

**Delivered:** 20<sup>th</sup> March 2013

- *Disciplinary code and procedure – article 2.4.1.2 – deviation thereof by one party – as the code is the result of elaborate consultation and negotiation between the employer and employee, deviation thereof should*

*only be in exceptional and appropriate circumstances with both parties agreeing to the deviation – unilateral deviation will be viewed by courts as resulting in procedural unfairness.*

**Summary:** The appellant, a banking institution, instituted disciplinary proceedings against the 2<sup>nd</sup> respondent, its employee for dishonest conduct. On the hearing date, 1<sup>st</sup> respondent, a workers' union and representative of 2<sup>nd</sup> respondent, moved an application for the recusal of the chair. The basis for the application was that the chair was not a member of appellant's management as envisaged by article 2.4.1.2 of the disciplinary code and procedure and therefore was disqualified from appointment as chair. The chair, in its ruling, dismissed the application by respondents for his recusal. The respondents filed a review application in the *court a quo* which found in their favour. Appellant has lodged the present appeal.

### **THE COURT**

[1] On the 8<sup>th</sup> November 2012 appellant noted an appeal on the following grounds:

- “1. *The court a quo erred in finding that the appellant had admitted in its answering affidavit that ‘The contents of the Disciplinary Code are peremptory’;*
2. *The appellant merely admitted that the Disciplinary Code and Procedure Agreement forms part of the employment conditions between the 2<sup>nd</sup> Respondent and the appellant and that the conditions of service cannot be changed unilaterally;*

3. *The court a quo erred in finding that the Disciplinary Code, incorporated into the contract of employment is binding between the employer and employee.”*

[2] Respondents filed their heads of argument and raised a point *in limine* that no appeal lies against the grounds as raised by appellant.

[3] On the date of the roll call, appellant moved an application to amend its grounds of appeal and tendered costs. The respondent objected. This court allowed the appellant to amend its grounds as an interim order, with a view that the respondents would motivate their ground for objection on the date of hearing. The parties were put to terms with regard to the time frame for filing.

#### The issues

[4] Appellant subsequently filed its amended appeal with the following grounds:

*“The court a quo erred in granting an Order setting aside the Ruling of the 2<sup>nd</sup> Respondent in the court a quo and ordering that the disciplinary hearing start de novo.*

*The court a quo erred in ordering that in the event the designated managers are unable to serve as Chairman, the parties should agree on appointment of a Chairperson of a disciplinary hearing, with the employee concerned.”*

[5] Counsel for respondents indicated to the court that on the basis of appellant’s tendered costs, he was no longer pursuing the objection to the

Notice to Amend. The court granted the application to amend with costs to the respondents.

Ad merits

[6] The respondents in their founding affidavit before the *court a quo* averred as follows:

**“PRESENT DISPUTE**

9.

9.1 *The present dispute concerns the interpretation of Article 2.4.1.2 of the disciplinary code and procedure signed between the Applicant and the respondent.*

9.2 *The article provides as follows:*

*‘The proceedings of the formal disciplinary hearings shall be presided over by a Bank representative of a Senior Management level from another Branch/Department.’*

9.3 *The Disciplinary Code and Procedure forms part of the employment conditions between Second Applicant and the First Respondent. Accordingly conditions of service cannot unilaterally be changed.*

10.

*I am advised and verily believe that the Second Respondent has acted unreasonably in deciding that:*

10.1 *the disciplinary code is not mandatory;*

10.2 *there can be a deviation therefrom;*

10.3 *that as an outsider he can, in flagrant violation of the disciplinary code, continue to preside and proceed with the disciplinary hearing against our member.*

11.

*I am further advised and verily believe that it is unfair for the Second Respondent to proceed to preside over the hearing as:*

11.1 *he is an outsider;*

11.2 *he is not familiar with First Respondent's workings;*

11.3 *has permitted a departure from procedures agreed between the parties that has been used in previous hearings;*

11.4 *the applicant has not been consulted in the choice of the Second Respondent."*

[7] In answer, the appellant raised the following as question of law:

"5. *The Applicants seek a declaratory order in the form of a final interdict declaring that the charges against the 2<sup>nd</sup> Applicant are invalid; and reviewing and setting aside the ruling of the 2<sup>nd</sup> Respondent.*

6.

*I am advised that it is now settled law that in order to succeed in obtaining a final interdict an applicant must establish:*

6.1 *Clear right;*

6.2 *An injury actually committed or reasonably apprehended;*  
*And*

6.3 *The absence of similar adequate protection by any other ordinary remedy.*

7. *The Applicants have tried to establish a clear right by referring to clause 2.4.1.2 of the Disciplinary Code and Procedures agreed to between the 1<sup>st</sup> Applicant and the 1<sup>st</sup> Respondent. The clause provides that the proceedings of the formal disciplinary hearings shall be presided over by a bank representative or a Senior Management level from another branch or department.*
8. *I am advised that in law while it is a relevant consideration whether an employer has complied with the code it is not exhaustive of the enquiry. The code merely represents guidelines and is not to be elevated to an immutable code which is to be applied rigidly, regardless of the circumstances. Furthermore, I am advised that in some cases, courts have held that a company is entitled to look outside the organization for somebody with the appropriate expertise and objectivity to chair the hearing, and that this served the interests of both sides receiving a fair hearing. Furthermore, I am advised and submit that the decision as to who chairs a hearing is entirely at an employer's discretion.*
9. *In this case, the departure from the proceedings as set out in clause 2.4.1.2 was done in the interests of fairness. 1<sup>st</sup> Respondent's employees have been sensitized on a high profile matter which involved the disappearance of funds belonging to 1<sup>st</sup> Respondent amounting to between E2.5 million to E3 million. 1<sup>st</sup> Respondent's Managing Director undertook road-shows in all the branches and informed staff that there was a possibility of further disciplinary action being taken in pursuance of all those connected with the fraud. The 2<sup>nd</sup> Applicant is accused of having accepted a gift in the form of money from one of persons who were in the course of committing the fraud, contrary to Respondents' policy.*
10. *As a result of the above, the 2<sup>nd</sup> Applicant's fellow employees would have associated him with the fraud, albeit on the periphery and the*

*1<sup>st</sup> Respondent would have had difficulty finding an impartial employee to chair the hearing. As a matter of fact, 1<sup>st</sup> Respondent requested two Senior Managers to chair the hearing and both declined fearing that due to the publicity of the fraud, they would either not be objective, or would not be perceived to be objective.*

- 11. In appointing the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent chose someone who is removed from the internal issues facing the bank. 2<sup>nd</sup> Respondent is not employed by 1<sup>st</sup> Respondent, and is, in fact, a qualified attorney, who is not in practice and currently the Director of Federation of Swaziland Employers. I submit that 2<sup>nd</sup> Respondent is best placed to be objective and has no reason to ingratiate himself to the 1<sup>st</sup> Respondent.*
- 12. Applicants have also failed to establish an injury actually committed or reasonably apprehended, nor have they been able to establish the absence of similar or adequate protection by any other ordinary remedy.*
- 13. The Applicants have not shown any actual harm or injury suffered by 2<sup>nd</sup> Applicant or an injury reasonably apprehended if 2<sup>nd</sup> Respondent continues to preside over the hearing. Applicants merely state that it is unfair for the 2<sup>nd</sup> Respondent to proceed to preside over the hearing as he is an outsider, unfamiliar with 1<sup>st</sup> Respondent's work, has permitted a departure from procedures agreed between the parties, and that the Applicant has not been consulted in the choice of the 2<sup>nd</sup> Respondent. Applicant do not allege any bias on the part of the 2<sup>nd</sup> Respondent nor any reason, other than to disagree with his ruling, why they are of the view that he should not continue as Chairperson. I therefore submit that no submission has been made by the Applicants to merit the court granting a final order on the basis of this requirement.*

14. *Lastly, the Applicants have not met the requirement of showing the absence of similar or adequate protection by any other ordinary remedy. Should the disciplinary hearing proceed and a finding be made against the 2<sup>nd</sup> Applicant he is still able to seek appropriate relief at CMAC and even at the Industrial Court in due course. The holding of an enquiry can occasion no irreparable loss to the 2<sup>nd</sup> Applicant.”*

[8] The respondents reacted by filing a replying affidavit where they maintained the scathing attack on the procedure adopted by the appellant, more specifically its failure to comply with the disciplinary code in the light of the fact that there were other cases where the appellant had acted in a similar manner by appointing outsiders and objections to the chair were sustained. They further ferociously contested that the other managers would not be in a position to deal fairly with the matters as the Managing Director had sensitized every employee on the fraudulent conduct that was experienced by appellant.

[9] Common cause

The following are matters of common cause:

- there was in place an agreed binding disciplinary code and procedure governing the parties;
- article 2.4.1.2 designated as chair a person within senior management of the bank from another branch or department;
- the chair selected was an outsider;
- there was no prior consultation with respondents before appellant appointed the outsider.



## Adjudication

- [10] **Mr. Sibandze**, Counsel for the appellant raised formidable submissions, and cited a number of authorities on the aspect of the nature and effect of a disciplinary code. He submitted that a disciplinary code is not peremptory. In support, he referred the court to a number of decided cases *wit.*, **Ngcong v University of South Africa & Another (2012) 33 ILJ 2100 (LC)**, **Khula Enterprise Finance Ltd v Madinane & others (2004) 25 ILJ 535 (LC)** and **Changula v Bell Equipment (1992)13 ILJ 101 (LAC)** **H**. This court will deal with these cases later on in this judgment.
- [11] **Mr. Lukhele**, for the respondents, in *replicando* submitted that the appellant was bound by the disciplinary code and procedure. A deviation from the code was not permissible at all.
- [12] It is clear that the issue *in casu* calls for the interpretation of the disciplinary code and procedure.
- [13] **Wessels A. J. A** in **Stellenbosch Farmers' Winery v Distillers Corp. (S.A.) Ltd. & Ano. 1962 (1) SA 458 (A)** at 476 eloquently summed up the various canons of interpretation in the following manner:

*“In my opinion it is the duty of the Court to read the section of the Act which requires the interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the “matter of the statute, its apparent scope and purpose, and, within limits, its background.”*

[14] Understandably, the above *dictum* by **Wessels AJA** in the language of interpretation simply states that words should be given their literal meaning (*apparent scope*) followed by their contextual meaning and then search for the mischief (*purpose*) with reference to the extrinsic evidence (*background*). When he states, “*within limits*”; in the process of interpretation, it means one should not make or change the law or the position of the draftsman as the case may be.

[15] Applying the above *dictum* to the present case, it is undisputed that the background of the disciplinary code and procedure *in casu* is that following a series of consultations, negotiations and agreements between the employers, Appellant inclusive and 1<sup>st</sup> Respondent who represented the workers, a *consensus* was reached which culminated into the disciplinary code and procedure (herein after referred to as the code). This code was not just a unilateral piece of art by the appellant. Not only did it result into an agreement but it formed part of the contract of employment between the employer and the employee.

[16] **Combrinck J. in Changula v Bell Equipment** *supra* correctly states the position of the law at the workplace as:

*“generally, an employer does have certain prerogatives, including the right to prescribe rules and set standards”.*

[17] This *dictum* by the honourable **Combrinck J.** and the total reading of the case (**Changula** *op. cit*) points to one direction *viz.*, that the code he was called upon to enforce was unilaterally formulated by the employer in exercise of its right under the *dictum*. For that reason, a procedural deviation from the code was of no effect as long as the aggrieved party could not show prejudice.

[18] Similarly in the case of **Khula Enterprise Finance Ltd v Madinane & another (2004) 25 ILJ 353 (LC)**, his **Lordship Kennedy A.J.** as he then was, at page 536 on the summary of the judgment pointed out:

*“In review, the court noted that the commissioner had placed much reliance on the company’s disciplinary code which provided that “an appropriate level of manager accepted to both parties shall chair the enquiry” to find that the company had deliberately breached its own procedure and had unilaterally decided who would chair the disciplinary enquiry”.*

[19] Again here (**Khula’s** case) there is no evidence that the code was as a result of the employer-employee deliberations and *consensus ad idem*, nor have we been persuaded that it was part of the contract of employment.

[20] In *casu*, as already highlighted, the code was as a result of a deliberated consensus between the parties and it formed part of the contract of employment and in that way distinguishable from the cases cited by appellant. At any rate the cases cited by appellant were all from the lower labour courts. Even if it could be argued that they are persuasive, they are not binding in this jurisdiction.

[21] The *dictum* by **Combrinck J. supra viz.**, the prerogative by the employer to dictate on rules of procedure was lost the minute the parties hereof agreed to collectively, as opposed to unilaterally, decide on the terms of the code.

[22] The case of **Ngcongong v University of South Africa & another (2012) 33 ILJ 2100 (LC)**, although of the same court, stands in a different footing from the cases of **Changula** and **Khula**. It is apposite to highlight the facts of that case briefly.

[23] In **Ngcongo**, the Applicant, an employee of the University, applied for setting aside of the arbitration award on the basis that the University had violated the disciplinary code which provided that in disciplinary matters no legal representative from outside would be allowed. On the hearing date, the Applicant objected to the appearance of an attorney who appeared on behalf of the University. The chair responded by extending the same right to the Applicant. The Applicant duly instructed an outside attorney. When Applicant's review application was heard, the court correctly held in our view at page 2107 that:

*“there are exceptional circumstances and appropriate circumstances present warranting a departure from the disciplinary code.”*

[24] In dismissing the application, the court held at page 2105:

*“I am of the view that the applicant, by participating in the proceedings in the manner that he did, accepted to abide by the ruling.... Firstly, the Applicant was also granted the opportunity to obtain the services of an attorney.”*

[25] In essence, in the **Ngcongo** case, both the parties agreed to ignore the dictates of the code. It was not a right attended to one party. There was at the end of the day a consensus not to be bound by the code. To borrow the words of their **Lordships** in the **Ngcongo** case, there was “*equality of arms*” and therefore the procedure was fair. In other words, the procedural fairness has its basis from the code and not from outside it as the cases cited by appellant would suggest.

[26] The line of approach taken in the **Ngcongo** case *supra* is fortified by the labour law principles that in matters of employment, the question for

determination is not just on substantive but also on procedural justice. Surely, where one party, as *in casu*, unilaterally takes a decision to change the rules of the game which have been collectively agreed upon, this will in no doubt, if allowed, result in procedural unfairness, a situation which ought to be frowned upon by those who administer justice especially in labour matters.

[27] A further close analysis of the **Ngcongo** case suggests that even where the said exceptional and appropriate circumstances exist, the party wishing to deviate from the code, should engage the other. It was during that process that the applicant was afforded the same right i.e. of finding counsel outside the dictates of the code.

[28] Having determined that this court agrees with the *ratio* in **Ngcongo** that a deviation from the code should only be in exceptional and appropriate circumstances, we are now set to determine whether appellant did show such circumstances to warrant non-compliance.

[29] In addressing the above, appellant stated:

“9. *In this case, the departure from the proceedings as set out in clause 2.4.1.2 was done in the interests of fairness. 1<sup>st</sup> Respondent’s employees have been sensitized on a high profile matter which involved the disappearance of funds belonging to 1<sup>st</sup> Respondent amounting to between E2.5 million and E3 million. 1<sup>st</sup> Respondent’s Managing Director undertook road-shows in all the branches and informed staff that there was a possibility of further disciplinary action being taken in pursuance of all those connected with the fraud. The 2<sup>nd</sup> Applicant is accused of having accepted a gift in the form of money from one of the persons who were in the course of committing the fraud, contrary to respondents’ policy.*

10. *As a result of the above, the 2<sup>nd</sup> Applicant's fellow employees would have associated him with the fraud, albeit on the periphery and the 1<sup>st</sup> Respondent would have had difficulty finding an impartial employee to chair the hearing. As a matter of fact, 1<sup>st</sup> Respondent requested two Senior Managers to chair the hearing and both declined fearing that due to the publicity of the fraud, they would either not be objective, or would not be perceived to be objective."*

[30] Respondents however, highly contested appellant's averment as can be deduced from their replying affidavit:

9.2 *In particular, I dispute that departure from the agreed disciplinary proceedings policy was done in the interest of fairness to the second respondent;*

9.3.1 *I state that there have been a number of disciplinary hearings conducted against First Respondent's employees wherein the First Applicant has participated. There has been no departure from the agreed code between First Applicant and First Respondent;*

9.3.2 *Indeed in the hearing of Bertha Vilakazi the Bank asked one Leonard Nxumalo who is of senior management level, employed by Swaziland Water Services Corporation to chair, the First Applicant objected to this and he was replaced by a senior Manager then in the First Respondent's employ Rifka da Silva. This was done to comply with the code.*

9.5 *I further state that the employees of the First Respondent are always sensitized against fraud in the discharge of their duties."*

[31] On the basis of the above contention, it cannot be said that the appellant, at least from the papers presented to the *court a quo*, did establish exceptional and appropriate circumstances.

[32] In consideration of the above circumstances of the case, the following orders are made:

1. The appeal is dismissed with costs.
2. The ruling of the chairman (**Mr. Bongani Mtshali**) dated 18<sup>th</sup> November, 2011, dismissing the objection of the respondents is hereby reviewed and set aside.
3. The disciplinary hearing of the 2<sup>nd</sup> respondent shall;
  - 3.1 commence *de novo* before a chairman appointed in accordance with the disciplinary code;
  - 3.2 In the event no manager of appellant is suitable to chair the hearing, the parties shall engage each other in consultation and agree on the alternative pool from which the appellant may draw the chair.

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**M. M. RAMODIBEDI**  
**JUDGE PRESIDENT**

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**N. J. HLOPHE**  
**ACTING JUSTICE OF APPEAL**

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**M. DLAMINI**  
**ACTING JUSTICE OF APPEAL**

**For Appellant : Mr. M. M. Sibandze**  
**For Respondents : Mr. A. Lukhele**