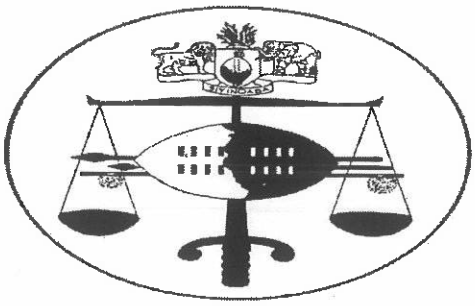

IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No: 20/2022

In the matter between:

IRENE NXUMALO **Applicant**

and

ESWATINI ROYAL INSURANCE CORPORATION **First Respondent**
MUZIKAYISE MOTSA N.O. **Second Respondent**

NEUTRAL CITATION: ***Irene Nxumalo v Eswatini Royal Insurance Corporation and Another (20/2022) [2022] SZICA 14 (17 February 2023)***

***CORAM*: Van der Walt, Nkonyane *et* Mazibuko JJA**

HEARD: 10 August 2022; 22 August 2022; 9 September 2022

DELIVERED: 17 February 2023

Summary

Procedure – urgent enrolment of appeals – requirements restated – substantive application under certificate of urgency fully setting out facts and/or circumstances which render the matter urgent; why the applicant cannot be afforded substantial redress in due course; and prospects of success on appeal – party seeking urgent enrolment seeks an indulgence and even if parties may be agreed on urgency per se and/or prospects of success, Court will not rubberstamp such agreements but will still bring its own mind to bear upon the matter

Procedure - amendment of Notice of Appeal – application to be made by way of Notice of Motion and if opposed, ordinary procedures as to filing of further papers will apply

Appealable decision - decision to be appealed against is decision of presiding Judge on matter of law made in accordance with ***section 8(6)*** *of* ***Industrial Relations Act, 2000*** *- does not include decisions in*

respect of facts or judicial discretion arrived at with participation by nominated members

Questions of law for purposes of appeal to Industrial Court of Appeal – basic principles restated - restricted to questions of law by ***section 19(1)*** *of the* ***Industrial Relations Act, 2000*** *– this means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter – includes where the Court a quo had overlooked a principle of law and failed to apply same because of such oversight*

Prospects of success on appeal – acceptable test is whether appeal court could reasonably arrive at a conclusion different to that of the Court a quo – prospects must not be remote but must have realistic chance of succeeding - more than a mere possibility of success is to be established – case must be arguable on appeal *and not hopeless – sound, rational basis required for conclusion that such prospects exist*

JUDGMENT

Cur adv Vult
(Postea: 17 February 2023)

VAN DER WALT, JA

INTRODUCTION

[1] This judgment pertains to an application for urgent enrolment of the instant appeal.

[2] In brief, the Applicant (hereinafter referred to as the "Employee") is the Appellant in the main appeal. During the course of as yet uncompleted disciplinary proceedings that had been instituted against the Employee by the First Respondent (hereinafter referred to as the "Employer") and chaired by the Second Respondent (hereinafter referred to as the "Chairman,") the Employee approached the Court *a quo* for relief on more than one occasion, the most recent being the application now

enjoying scrutiny on appeal, bearing Industrial Court Case Number 161 of 2022.

[3] The relief sought therein pertinent to this appeal, was captured in the following prayers in the Notice of Motion:

> " 3. *Reviewing, correcting and/or setting aside the ruling of the 2nd Respondent dated the 27th May 2022.*
> 4. *That the 2nd Respondent is hereby removed from being Chairperson of Appellant's disciplinary hearing with immediate effect and a new Chairperson be appointed to hear the disciplinary enquiry de novo.*
> 5. *Directing the Respondents to allow Applicant to have legal representation in her pending disciplinary hearing.*
> 8. *Interdicting and/or restraining the Respondents from proceeding with Applicant's disciplinary hearing."*

[4] The outcome can be reflected as follows:

4.1 **Prayer 3** relates to the Chairman's refusal to recuse himself and ties in with **Prayer 4**. The basis for these prayers was **alleged bias** on the part of the Chairman with reference *inter alia* to handing down a ruling in the absence of the Employee; postponements of the matter and proceeding in the absence of

the Employee. The Court *a quo* in effect found that the facts and circumstances of the matter did not demonstrate bias. [1]

4.2 **Prayer 5** concerning **legal representation**: A ruling by the Chairman was still awaited and the Court *a quo* held that the Employee had been premature "*to then rush this request to Court*," and also referred to the case of ***Graham Rudolph v Mananga College and Another.***[2][3]

4.3 As regards the **interdict** sought in **Prayer 8**, the Court *a quo* held that it was *functus officio* in that it had already decided the issue.

[5] The application accordingly was dismissed by the Court *a quo,* resulting in the instant appeal.

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[1] Judgment, Paragraphs [35] to [44]
[2] Industrial Court **Case No 94/2007**
[3] Judgment, Paragraph [46]

A URGENCY: GENERAL

[6] The Employee filed an application for urgent enrolment of the appeal.

6.1 The requirements for such an application have been held by this Court in ***Eswatini Civil Aviation Authority v Sabelo Dlamini***[4] to include a substantive application fully setting out (1) facts and/or circumstances which render the matter urgent; (2) why the applicant cannot be afforded substantial redress in due course; and (3) favourable prospects of success on appeal.

6.2 Procedurally, the Court first determines whether or not the matter is urgent; if so, an urgent hearing can be scheduled and if not, the appeal must take its place on the roll in the ordinary course.

[7] The Employer is not taking issue with urgency *per se* i.e., with the first two legs of the enquiry but is expressly challenging the Employee's prospects of success on appeal. As will appear

[4] *(13/2021) [2021] SZICA 01 (9 February 2022)*

more fully later hereunder, this aspect revolves around an enquiry as to whether or not the stated grounds of appeal constitute questions of law.

[8] A party seeking urgent enrolment seeks an indulgence and even if the parties may be agreed on urgency *per se* and/or prospects of success, the Court will not rubberstamp such agreements but will still bring its own mind to bear upon the matter.

B AMENDMENT OF NOTICE OF APPEAL

[9] The application for urgent enrolment served before this Court for the first time on the 10th August 2022, the Employee being represented by Mr A Dlamini and the Employer by Mr S M Simelane. Mr Dlamini, from the Bar, indicated an intention to amend the Notice of Appeal and Mr Simelane informed the Court that there was no objection thereto.

9.1 The Court adjourned to consider the situation and after consulting the relevant Rules and authorities, concluded that:

*" 1 Unlike for instance amendment of pleadings where a Court does not become involved unless the other party opposes the proposed amendment, that in the case of amendment of a notice of appeal, Rule 12 of the Rules of this Court stipulates that that this Court **"may allow"** such an amendment, reading as follows:*

"(Amendment of notice of appeal.
"12. The Industrial Court of Appeal may allow an amendment of the notice of appeal and arguments, and allow parties or their counsel to appear, notwithstanding any declaration made under Rule 11 upon such terms as to service of notice of such amendment, costs and otherwise as it may think fit.

*2 Rule 12 of the Rules of the Supreme Court contains a substantially identical provision and the judgment in **Emangweni Holdings Sugar Association (Pty) Ltd v Kubuta Agri Designs & Civils (Pty) Ltd (89/2019) [2020] SZSC 29 (21 September, 2020)** is instructive as to the format of such an application. As regards the role of the Court, it was held therein that: "**[17] The Rule bestows upon the Court discretionary powers either to grant or refuse an amendment and make orders as to whether to award costs or not. It is trite law that when Courts are vested with discretionary powers that in the exercise of those powers the Courts must do so judiciously."***

9.2 In the result, the Court ordered, if the Employee is desirous to amend the Notice of Appeal, that application for amendment is to be made by way of Notice of Motion supported by affidavit and in the event of the application being opposed, that the ordinary procedures as to filing of further papers will apply. The Court also issued further directives as to the filing of further papers and a new hearing date.

9.3 An application for amendment was duly filed and the 22nd August 2022 was allocated as the new hearing date. The application for amendment was not opposed and Counsel, no doubt with the sincere intention to be helpful, presented the Court with a "*Consent Order.*" What has been stated above in respect of rubberstamping by the Court, applies *mutatis mutandis*. Suffice it to state for current purposes that the Court had satisfied itself that the application should be granted and did so accordingly.

9.4 The Court also granted leave for the filing of supplementary Heads of Argument pursuant to the amendment and postponed the matter to the 9th September 2022, on which date the application for urgent enrolment was argued fully.

[10] The amended grounds read as follows, with Grounds subsequently abandoned by the Employee during the course of argument, struck through:

1. *The Court a quo erred in law by holding that the Appellant had abused the court process.*

2. *The Court a quo erred in law by holding that the 2nd Respondent was not biased, in particular when postponing the Appellant's disciplinary hearing to some later days, being the 6th and 12th April 2022, which were covered by the Appellant's sick sheets and that no prejudicial step could be taken against the Appellant thereof.*

3. *The Court a quo erred in law and misdirected itself by holding that Appellant had agreed that the hearing would be proceeded with, whether or not any of the parties were present in the absence of compelling evidence to that effect.*

4. *The Court a quo erred in law and misdirected itself by holding that the matter was for appeal under 1st Respondent's internal structures as opposed to one for review.*

~~5. *The Court a quo erred in law and misdirected itself by holding that it was incumbent upon the Appellant to apply before the 2nd Respondent that what had been said in her representative's absence be expunged from the record and that the witness be allowed to start de novo yet the 2nd Respondent was functus officio as he had already issued a ruling on that respect.*~~

6. *The Court a quo erred in law and misdirected itself by holding that the prayer that the Appellant be allowed legal representation was premature in the absence of any reason which points out on why 2nd Respondent had not issued a ruling to that effect or alternatively making an undertaking on when such a ruling was to be issued.*

~~7. *The Court a quo erred in law and misdirected itself by holding that the Court had dismissed the Appellant's prayer for interdict under Case number 107/2022."*~~

C AD APPLICANT'S PROSPECTS OF SUCCESS ON APPEAL

[11] The crux underlying Mr Simelane's opposition on behalf of the Employer, as pre-empted in the Employer's Heads of Argument, was that the stated grounds of appeal do not amount to questions of law for purposes of an appeal to this Court. Further, that the Employee challenges the regularity and

reasonableness of the decision-making process and as such, that the appeal amounts to a disguised application for review. Because of the aforegoing, the submission went, the Employee had no prospects of success whatsoever on appeal and the appeal falls to be dismissed, in this case with costs.

[12] Mr Dlamini vigorously and at length argued to the contrary and contended that the stated grounds not only amount to justiciable questions of law, but had clear merit.

12.1 Upon repeated invitation by the Court to state which legal principle/s was/were in contention i.e., which "***true rule of law***" was to be determined by this Court, Mr Dlamini argued, in the main, that the law had been applied to the facts incorrectly and therefore that the Court *a quo* had erred in law.

12.2 The only instance where the issue of a correct legal position came into some focus, was in respect of Ground 6, Mr Dlamini maintaining that the ***Graham Rudolph*** case referred to by the Court *a quo* was not authority for a ruling by the Court *a quo*.

C.1 WHETHER OR NOT THE STATED GROUNDS OF APPEAL AMOUNT TO QUESTIONS OF LAW FOR PURPOSES OF APPEAL

C.1.1 Applicable Legal Principles

[13] As regards appeals to this Court in general:

13.1 **Section 19(1)** of the Industrial Relations Act, 2000 (hereinafter referred to as the "Act") stipulates that:

> ***"(I) There shall be a right of appeal against a decision of the Industrial Court, or of an arbitrator appointed by the President of the Industrial Court under section 8 (8) on a question of law to the Industrial Court of Appeal."***

13.2 **Rule 6(4)** of the Rules of this Court requires that:

> ***"The notice of appeal shall set forth concisely and under distinct consecutively numbered heads the grounds of appeal and the points of law [5]upon which the Appellant relies."***

13.3 **Rule 7** prescribes that:

> ***"The appellant shall not, without the leave of the Industrial Court of Appeal, urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Industrial Court of Appeal in deciding the appeal shall not be confined to the grounds so stated."***

[14] As to what **a question of law** would entail, the basic principles have been restated in amongst others ***Trevor Shongwe v***

[5] Underling Court's own

Machawe Sithole and Another,[6] to the effect that an appeal on a question of law, shorn of all embellishments simply, means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter. This includes where the Court *a quo* had overlooked a principle of law and failed to apply same because of such oversight, which has the same effect as if the Court *a quo* had decided the question but had decided it incorrectly.

[15] The Court has noted, in more than one matter before it, that difficulties would arise when it comes to the issue of application of the law to the facts more so since, in general, if a rule of law must be applied prior to the reaching of a conclusion, then it may be said that that conclusion necessarily is one of law. The existence of questions of mixed fact and law also may further obscure the enquiry as to what exactly is appealable.

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[6] ***(08/2020) [2021] SZICA 1 (10 August 2021)***

[16] In order to clarify this penumbra, the authorities in respect of questions of law *per se* should be read with the peculiar nature of appeals from the Eswatini Industrial Court to this Court, and in particular, with the statutory standard that the ***"decision"*** that may be appealed against, is the decision of the presiding Judge (only) on a point of law.

[17] As was expounded recently by this Court in ***Standard Bank of Eswatini v Freeman Luhlanga, and Nhlangano Town Council v Jeremiah Kuhlase & 4 Others (Consolidated),*** [7] *inter alia:*

> *"31.2 At the time of creation of the first Industrial Court under the **1980 IRA,** appeals lay against **"decisions"** on matters of law first to the High Court and then to the then Court of Appeal. Only the presiding judge may decide a matter of law, a prescription that was maintained by the subsequent legislation and which has found application for some forty [40] years since and there can be little doubt that **"decision"** vis-à-vis appeal refers to the such judicial decision on a matter of law by a judge alone, without involvement of the nominated members."*

[18] Further as regards judgments by the Court *a quo,* it would go without saying, in general, that any observations or comments made *en passant* or *obiter* by the Court *a quo* during the course

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[7] ***(11 & 18/2021) [2022] SZICA 8 (23 August 2022)***

of its judgment and which do not form part of the *ratio decidendi,* are irrelevant for purposes of an appeal.

[19] The stated grounds of appeal will now be scrutinised more closely against the above considerations. The Court is cognisant of the fact that the determination of prospects at this stage of the proceedings, is not final and that the parties, at the hearing of the appeal itself would be entitled, for all practical purposes, to re-argue the grounds of appeal and perhaps persuade the Court to adopt a different view.

[20] For ease of convenience, a summary of the relevant Prayers and outcomes will be repeated:

20.1 **Prayer 3 and 4**: **Alleged bias** - Court *a quo* in effect found that the facts and circumstances of the matter did not demonstrate bias;

20.2 **Prayer 5: legal representation – premature application** – so found by Court *a quo* with reference made to the case of ***Graham Rudolph v Mananga College and Another;***

20.3 **Prayer 8**: **interdict** – Court *a quo* considered itself *functus officio* having had decided the matter in a previous application. This Prayer no longer is relevant in view of the abandonment by the Employee of the Ground of Appeal 7 which related thereto and this topic will not be considered further.

C.1.2 Application of legal principles

(1) Ground 1: *"The Court a quo erred in law by holding that the Appellant had abused the court process."*

[21] This would pertain to **Prayers 3** and **4.** No point of law is stated. The alleged error is a conclusion with reference to the facts of the matter, i.e. it is case specific. It is a conclusion by the Court *a quo* involving the nominated members, and not a decision on a matter of law by the presiding Judge (only) and in

the result, this ground on the face of it would not be capable of adjudication by this Court.

(2) **Ground 2:** ***"The Court a quo erred in law by holding that the 2nd Respondent was not biased, in particular when postponing the Appellant's disciplinary hearing to some later days, being the 6th and 12th April 2022, which were covered by the Appellant's sick sheets and that no prejudicial step could be taken against the Appellant thereof."***

[22] Paragraph [21] *supra* applies *mutatis mutandis*.

(3) **Ground 3:** ***"The Court a quo erred in law and misdirected itself by holding that Appellant had agreed that the hearing would be proceeded with, whether or not any of the parties were present in the absence of compelling evidence to that effect."***

[23] Paragraph [21] *supra* applies *mutatis mutandis*.

(4) **Ground 4:** ***"The Court a quo erred in law and misdirected itself by holding that the matter was for appeal under 1st Respondent's internal structures as opposed to one for review."***

[24] This would pertain to **Prayers 3** and **4.**

24.1 The reference to *"internal structures"* and appeal *versus* review at first glance may suggest an interpretation of an agreement between the parties, which may amount to a question of law.

24.2 However, a closer reading of the Judgment reveals that this comment was preceded by the finding by the Court *a quo* that: *"We are therefore of the firm view that the applicant has not shown any partiality by the 2nd Respondent..."* [8]

24.3 The Court *a quo* then continued that: *"We are bolstered in our view by the fact that even if the Respondent had not really been able to explain the supposed irregularities, a case had not been made in our view showing reviewable irregularities..."*[9] followed by the comment on review *versus* appeal.

24.4 The repetitive use of *"our view"* palpably demonstrates that this aspect does not involve a determination of a point of law by the presiding Judge (only).

24.5 Further, the Court *a quo* as composed of the presiding Judge and the nominated members, already had held that there were no reviewable irregularities and as such that an application for review could not succeed. Whether the Employee should have

[8] Judgment, Paragraph [42]; abbreviation Court's own
[9] Judgment, Paragraph [43]; abbreviation Court's own

proceeded by way of appeal or review, therefore is purely academic and *obiter*.

24.6 In view of the aforegoing, this ground would not pose a question or point of law for purposes of an appeal to this Court.

(6) **Ground 6**: ***"The Court a quo erred in law and misdirected itself by holding that the prayer that the Appellant be allowed legal representation was premature in the absence of any reason which points out on why 2nd Respondent had not issued a ruling to that effect or alternatively making an undertaking on when such a ruling was to be issued."***

[25] This would pertain to **Prayers 5.** No point of law is stated but the Court permitted latitude for argument on the question of interpretation of the said Industrial Court ***Graham Rudolph v Mananga College and Another*** judgment.

25.1 Mr Dlamini submitted to the effect that said case is authority for the proposition that a ruling on legal representation by the chairman need not be awaited before an aggrieved party may approach the Court *a quo*, and that the view of the Court *a quo* as regards acting prematurely therefore was misconceived in law. Further, that the Court *a quo*'s view was not in accordance

with the Industrial Court judgment in ***Ndoda H Simelane v National Maize Corporation (Pty) Ltd.***[10]

25.2 The relevant portion of the Judgment reads:

> *"[46] On the prayer that the Applicant be allowed legal representation, we agree that it is a settled position in this jurisdiction that such a request should be directed to the Chairperson. We note that whereas that request was made to the 2nd Respondent, a ruling is still awaited. We agree that in such a case, it was premature for the Applicant to then rush this request on this court. There is value in allowing deserving questions to be addressed by deserving structures. The* ***Graham Rudolf v Mananga College case is authority*** *on who should decide the question of representation in internal hearings by a legal representative, including under what circumstances this court would intervene."*

25.3 Commencing with the ***Graham Rudolph*** judgment, that judgment dealt with who may decide on legal representation in disciplinary hearings. The reference of the Court *a quo* to this judgment clearly was in this context and did not deal with premature approaches to the Court *a quo*.

25.4 As regards the ***Ndoda Simelane*** judgment, this judgment is to the exact opposite effect of what Mr Dlamini was contending and the Court *a quo*'s finding *in casu* that the application had been

[10] ***(453/2006) [2006] SZIC 70 (31 July 2006)***

premature, is in accordance with this judgment, the pertinent portion of which reads:

> *"The Applicant reacted by instituting the present application seeking an order to allow him representation by a person of his choice, including legal representation by an attorney or a non-employee of the Respondent.*
>
> ***The Applicant seems to have "jumped the gun" by coming to court instead of attending at the disciplinary hearing and requiring the chairperson to make a decision on the question of legal representation.*** *Perhaps the applicant did not appreciate that he had a right to do so; or perhaps he feared that the Respondent would preempt the decision of the chairperson by refusing his attorney access to the hearing. Whatever the reasons, the fact remains that*
>
> *19.1 the chairperson Mr. Hlophe has a discretion to decide whether the Applicant should be permitted legal representation by an attorney or a non-employee of the Respondent of his choice;*
> *(c) he has not yet exercised his discretion or brought his mind to bear on the issue; and*
> *(d) the court is loathe to usurp the discretion of the chairperson of a disciplinary enquiry unless he has unreasonably fettered or abdicated his discretion.* ***(CF. Mahumanis case at p 2315 para 14)"***[11]

[26] It then follows that this ground, had it been phrased as a question of law, too would be doomed to failure.

[11] Underlining Court's own; paragraph numbering as appears in reported version of that judgment

C.2 PROSPECTS OF SUCCESS

[27] The standard of such prospects to be shown, is interchangeably described in the general case law as *"reasonable"*, *"good"* or *"favourable"* and are required to be shown in different types of applications, such as for condonation and leave to appeal.

[28] The following test formulated in **S v Smith**[12] in our view would apply to whichever nomenclature may be employed, and substituting *"trial court"* for *"Court a quo"*:

> ***"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success. That the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."***

[12] **2012 (1) SACR 567 (SCA) ([2011] ZASCA 15)** Paragraph [7]

D CONCLUSIONS AND ORDER

[29] The issue of urgency *per se* to a significant extent has been overtaken by events, including the application for amendment of the Notice of Motion; the application for urgent enrolment was filed on 1st August 2022 and ultimately argued some five (5) weeks later on the 9th September 2022.

[30] The prospects of success need be considered nevertheless not only because it would determine whether an urgent date be allocated for hearing the appeal or whether the appeal be enrolled in the ordinary course, but also because the Employer is seeking costs in respect of the urgent enrolment application.

[31] The Court holds the following preliminary view:

31.1 The stated grounds of appeal do not amount to questions concerning matters of law as decided by the presiding Judge and in the circumstances, they are not justiciable by this Court.

31.2 The Notice of Appeal does not set out any point of law, as is required by **Rule 6(4)**.

31.3 It is not the duty or obligation of this Court to infer or to articulate a question of law from stated grounds of appeal; it is the duty of an Appellant or their Counsel to clearly and succinctly set forth same in the Notice of Appeal.

31.4 In all the circumstances, the Employee's prospects of success are remote and the application for urgent enrolment falls to be refused.

31.5 As for costs, the issue of costs should be reserved for the main appeal after the appeal had been argued in full.

[32] Accordingly, it is the Order of this Court that:

1. The application for urgent enrolment of the appeal is dismissed and the appeal is to be enrolled for hearing in the ordinary course.

2. The question of costs is reserved for the main hearing of the appeal.

J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree

N.NKONYANE
JUSTICE OF APPEAL

I agree

D. MAZIBUKO
JUSTICE OF APPEAL

For the Appellant: Mr. A Dlamini of B.S. Dlamini & Associates
For the Respondent: Mr. S M Simelane of S. M. Simelant & Co