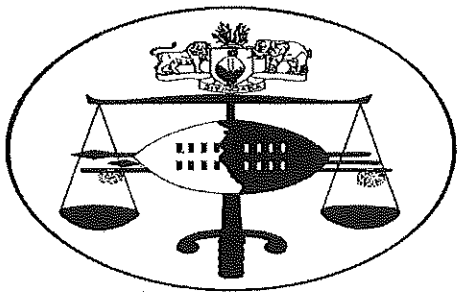


IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

CASE NUMBER 24/2024

In the matter between:

MBALI GAMEDZE Appellant

And

FIRST NATIONAL BANK 1st Respondent

NKOSINGIPHILE MKHONTA N.O. 2nd Respondent

NEUTRAL CITATION: *Mbali Gamedze v First National Bank and Another (24/2024) [2025] SZICA 07 (25th February, 2025)*

CORAM: N. NKONYANE JA, D. MAZIBUKO JA, A.M. LUKHELE JA

HEARD : 25 November 2024

DELIVERED : 25 February 2025

SUMMARY---Labour Law---Appellant was charged with misconduct at the workplace---She raised preliminary points on two occasions that her matter was time-barred as the disciplinary action was not commenced and finalised within thirty calendar days after the misconduct was brought to the attention of Management as stipulated in the code---Chairperson dismissed the objections---Appellant challenged the Chairperson's final ruling before the Industrial Court---Industrial Court upheld the Chairperson's ruling---Appellant filed an appeal against the Industrial Court's decision before the Industrial Court Appeal.

Held (1)---Where an accused employee wishes to raise an objection that the disciplinary hearing is time-barred, it is advisable that the accused employee should do so at the outset of the hearing.

Held (2)---A chairperson who is appointed to conduct a disciplinary hearing within a specific time frame that is stipulated in the code, has a duty to finish the disciplinary hearing within that period except where the extension is by agreement between the parties or is due to some exceptions stated in the code or is attributed to some intervening impossibility.

Held (3)---In casu, the lapse of the thirty calendar days was attributed to the exceptions stated in the code, alternatively, the cause of the delays was beyond the control of the Employer. An objection based on time-bar cannot therefore be sustained. The Appellant's appeal is accordingly dismissed.

JUDGEMENT

INTRODUCTION

[1] The Appellant ("the Employee") is employed by the 1st Respondent ("the Employer") as a Credit Analyst. The 2nd Respondent is cited in these legal proceedings in his capacity as the Chairperson of the disciplinary hearing which was instituted by the Employer against the Employee.

[2] The Employee is facing the charge of disclosing and or sharing confidential/sensitive information concerning the Bank or its clients to third parties in breach of article 5.3.7 of the Employer's disciplinary code.

[3] At the hearing, on two occasions, the Employee raised preliminary objections that the disciplinary hearing was time-barred as thirty (30) calendar days had elapsed without disciplinary action being finalised, contrary to the provisions of article1.4.8 of the Employer's disciplinary code which provides that a disciplinary action should be commenced and

finalised not later than thirty days after the misconduct had been brought to the attention of Management. On both occasions the Chairperson dismissed the objections.

[4] The Employee was dissatisfied with the Chairperson's rulings and she approached the Industrial Court to challenge the said rulings. The Industrial Court dismissed the Employee's application. The Employee did not accept the Industrial Court's decision and she filed the present appeal before this Court.

URGENT APPEAL HEARING.

[5] After having lodged the appeal in this Court, the Employee thereafter filed an urgent application to have the appeal enrolled and heard as a matter of urgency. The Court after having heard the parties rendered its Ruling on 12th November 2024 and granted the application to have the appeal enrolled and heard on an urgent basis.

[6] The appeal was accordingly enrolled as a matter of urgency and it was heard by the Court on 25th November 2024.

ISSUE IN DISPUTE.

[7] The Employee's appeal consists of two main grounds and four sub-arguments. Ground one was amended. The amendment was necessitated by the fact that when the appeal was filed, the Industrial Court had not yet handed down its written reasons for the judgement. A formal application to amend the grounds of appeal was filed. The Court granted the application.

[8] The essence of the Employee's grounds of appeal is that the Industrial Court erred in law in its interpretation of the clauses of the code that deal with time-bar. According to the Employee, on a proper interpretation of the clauses that regulate the taking of disciplinary action, the Industrial Court ought to have found that the time frame within which to commence and conclude the disciplinary action had elapsed and her objection ought to have been upheld and the disciplinary hearing set aside as being time-barred.

[9] The issue for determination by this Court therefore is whether or not the Industrial Court correctly interpreted the clauses of the disciplinary code that regulate the time frame within which to take disciplinary action.

FINDINGS OF THE INDUSTRIAL COURT.

[10] The main article dealing with disciplinary action against an accused employee at the Employer's establishment is article 1.4.8. That article contains the following;

> ***"1.4.8. Disciplinary action shall be taken and finalised as soon as possible after the misconduct has been brought to the attention of Management, in any case not later than thirty (30) Calendar Days. However, this period may not apply if the delay is attributed to technical and operational processes and Management produces evidence to that effect."***

[11] The Industrial Court in its judgement made the following findings; the incidence that led to the Employee being charged occurred on 21st March 2024. The incidence however came to the attention of the bank's Management on 24th May 2024. Between 24th May 2024 and 26th June 2024 the Employee was booked off sick. The disciplinary hearing was set to commence on 04th July 2024. When the Employee appeared before the disciplinary hearing panel, she raised the preliminary objection based on time-bar. The Chairperson

delivered his ruling on 24th July 2024, about twenty days later, dismissing the objection.

[12] When the ruling was delivered by the Chairperson on 24th July 2024, the parties agreed that the disciplinary hearing would resume on 09th August 2024. On 09th August 2024 the Employee once again raised the objection that the disciplinary hearing was time-barred. She argued that a period of thirty calendar days had lapsed within which to commence and finish the hearing after the misconduct had been brought to the attention of Management.

[13] The Industrial Court after having analysed the evidence before it came to the conclusion that the preliminary point raised by the Employee constituted a technicality, which is referred to in article 1.4.8. (See: Paragraph 12 of that Court's judgment). The Industrial Court also went on to hold that the Chairperson was bound to first rule on the preliminary point before continuing with the disciplinary hearing as envisaged by article 1.4.16 of the code. That article provides as follows;

> ***"1.4.16. The Chairperson of a hearing shall rule on a preliminary point, if there is any, (for example, time bar or any other procedurally non-***

compliance issue), before continuing with the Disciplinary Hearing."

[14] Further, the Industrial Court held at paragraph 14 of its judgment that;

"14. For all intents and purposes, the preliminary point raised by the Applicant is a technicality, which does not delve into the merits of the alleged misconduct allegations against the Applicant."

[15] The Industrial Court's interpretation of the code was that the process of disciplinary hearing is divided into two phases, that is, the first stage deals with preliminary issues arising, and the second stage deals with the merits of the charge that the accused employee is facing. In support of this position, the Industrial Court relied on article 1.1.12 of the code which defines disciplinary hearing in the following terms;

"1.1.12 'Disciplinary Hearing' means a meeting convened with the purpose of enquiring into any allegations of misconduct."

[16] The Industrial Court therefore came to the conclusion that the raising of the preliminary point was a technicality and did not form part of the misconduct being investigated by the disciplinary hearing panel. The Industrial Court also came to the conclusion that the delay caused by the raising of the preliminary objection was a technicality which was catered for in article 1.4.8 of the code and therefore it was an exception to the thirty days period stipulated therein.

[17] Effectively, the Industrial Court concluded that in terms of the code, the disciplinary hearing takes place in two phases. The first phase is when the Chairperson deals with the preliminary point. The second phase is when the Chairperson deals with the misconduct or the merits of the case against the accused employee. Therefore, the Industrial Court came to the conclusion that since the matter had not yet reached the 'merits' stage, the question of delay does not even arise as the disciplinary hearing had not yet started when taking into account the definition of disciplinary hearing found in article 1.1.12 of the code. The Employee's application to have the ruling of the chairperson reviewed and set aside was accordingly dismissed by the Industrial Court.

ISSUE FOR DETERMINATION.

[18] The issue to be determined by this Court is whether or not the Industrial Court's interpretation of the relevant articles of the code was correct in law.

ANALYSIS AND APPLICABLE LEGAL PRINCIPLES.

[19] It is not in dispute that the disciplinary code in question is a negotiated document between the Employer and the Employee's trade union by the name of Swaziland Union of Financial Institutions and Allied Workers ("SUFIAW"). The document was signed by the parties on 03rd December 2021. It is therefore a legally binding document. According to article 1.2.1 the document is applicable to all employees within the bargaining unit of the Union. It is common cause that the Employee The applicability of the code to the Employee is therefore not in issue.

[20] The main purpose of a disciplinary code is to promote consistency and predictability in managing disciplinary matters at the workplace. (See: **Thembinkosi Fakudze** Vs **Nedbank (Swaziland) Limited & Another (76/18) [2018] SZIC 27** (12th April 2018). In *casu*, the parties agreed that disciplinary action shall be taken and finalised not later than

thirty calendar days. This is in terms of Article 1.4.8 of the code. There are two exceptions, namely technical and operational processes. All that this means is that the disciplinary action may exceed the stipulated thirty calendar days if Management produces evidence that the delay was attributed to technical and/or operational processes.

[21] The question that presents itself therefore is; what constitutes technical and operational processes. The dictionary describes operational as:-

"...relating to the operation of an organization."

Concise Oxford English Dictionary: 11th edition, Oxford University Press 2004: at page 1002.

To understand the phrase 'operational processes' in the present context, it simply means the day to day activities that a company performs to keep it running. It means therefore that if there is a strike action, it hinders the operational processes, so the disciplinary hearing cannot proceed. The period during which the strike action takes place is not, therefore, reckoned when counting the thirty calendar days' period within which to start and conclude the disciplinary hearing.

[22] Another example of interruption of the *dies* is when the chairperson, initiator, witness or the accused employee falls ill and is unable to participate in the disciplinary hearing. The number of days on which the participant is rendered medically unfit, cannot be taken into account when the thirty-day period is reckoned.

[23] The other consideration that is be taken into account in terms article 1.4.8 is technical processes. The word technical is defined as:-

"...relating to a particular subject, art, or craft, or its techniques- requiring special knowledge to be understood."

or

"according to a strict application or interpretation of the law or rules."

Concise Oxford English Dictionary: 11th edition, Oxford University Press 2004, page1478.

In the context of article 1.4.8, technical processes must be understood to mean, *inter alia,* the investigation process that

culminated in the Employee being charged with the misconduct. If, for example, after the matter was brought to the attention of Management, a need arose for further investigation by an expert in the field related to the incidence, causing the thirty-day period to be exceeded, the accused employee cannot claim immunity on the basis that the period of thirty days that is stipulated in the code has lapsed. Technical process can also refer to the actual conduct of the disciplinary hearing. If, for example, at the commencement of the hearing any party raises a preliminary point, the Chairperson would be required to exercise his technical know how to interpret and apply the law in order to make a ruling on the issue.

[24] The Chairperson of a disciplinary hearing is expected to be independent and impartial. He must not be suspected to be subservient to the will of the Employer. **(See: Graham Rudolph v Mananga College & Leonard Nxumalo N.O. case number (94/2007) [2007] SZIC 50 (27 August 2007).**

THE FIRST PRELIMINARY OBJECTION.

[25] The Employee was served with the notice to attend the disciplinary hearing on 28th June 2024 (page 21 of the Record). The hearing was to be held on 04th July 2024. It was on that date of her first appearance that she raised the preliminary point based on time-bar. The Employee argued that the detection date of the incidence was 24th May 2024 and that on the 04th July 2024, thirty days had lapsed and therefore the Employer had no jurisdiction to pursue the matter in light of article1.4.8.

[26] On behalf of the Employer it was argued that the Employee was not available for the disciplinary hearing to commence. The evidence revealed that she went away on sick leave immediately after the detection of the incidence and returned to work on 26th June 2024. She was therefore served with charges on 28th June 2024 when she returned from sick leave.

[27] The chairperson dismissed the preliminary point in the following terms;

"2.5. Article 1.4.8 of disciplinary code makes provision of operational or technical issue. My assessment of the above

is an operational issue as the sick leave matter is governed by the leave policy. My assessment is that due to the employee being away on sick leave the bank could not have reasonable executed its rights to a disciplinary enquiry given the merits of the matter at hand."

[28] The ruling of the chairperson cannot be faulted as there were sick notes attached to prove that the Employee was on sick leave. The days that the Employee was away from work due to sickness interrupted the *dies*. Exhibit "FNB 3" (page 77 of Record) shows that the Employee returned to work on 26th June 2024. From 26th June 2024 up to 04th July 2024 when she appeared before the disciplinary hearing panel was about nine calendar days. The first sick note, Exhibit "FNB 1" (Page 75 of the Record) shows that the Employee was admitted in hospital on 24th May 2024, the very same day that the incidence was detected. She was discharged on 25th May 2024 and was given seven days off-duty to return on 31st May 2024. When she returned on 31st May 2024 she was given another seven days-off duty. The Employer referred her to Ezulwini Private Hospital (EPH) where she was attended on 05th May 2024 and was booked off duty for twenty one days to return to work on 26th June 2024.

[29] The Employee was therefore clearly ill-advised to raise the objection based on time-bar when she appeared before the disciplinary hearing panel on 04th July 2024. Since the matter got to the attention of Management on 24th May 2024, she could not attend the disciplinary hearing because she was on official sick leave until 26th June 2024. On the 04th July 2024 therefore only eight days could be taken into account when reckoning the thirty-day period referred to in article 1.4.8 of the code. That meant that the Employer still had twenty two calendar days remaining within which to prosecute its case.

SECOND PRELIMINARY OBJECTION.

[30] When the preliminary point was raised on 04th July 2024, it took the Chairperson twenty days to deliver the ruling as he eventually handed it down on 24th July 2024. As already pointed out in paragraph 24 herein, the Chairperson is independent of the control of the Employer in the discharge of his duties. The delay of twenty days cannot therefore be attributed to the Employer. It should follow therefore that as on 24th July 2024, the twenty two days that were remaining were still intact.

[31] When the ruling was delivered on 24th July 2024, the hearing was postponed until 09th August 2024 for continuation. On the following day on 25th July 2024, the Employee indicated her intention to review the Chairperson's ruling. The Employee was entitled to exercise her right to review the ruling and the Employer was legally bound to respect the exercise of that right by the Employee. That period during which the Employee indicated that she wanted to file review proceedings served to interrupt the *dies* as the Employer (being represented by the initiator) could not proceed with the disciplinary hearing under those circumstances.

[32] The Employee however ended up not pursuing the review process. On the following day, the 26th July 2024 the Employer through its Industrial Relations Specialist, Linda Matimba, started to liaise with the Employee's representative with a view to securing a date for the continuation of the hearing. The parties eventually settled for 09th August 2024. On the 09th August 2024 the Employee again raised an objection based on time-bar. The Chairperson delivered his ruling on 22nd August 2024, about thirteen calendar days later and dismissed the objection.

[33] The hearing could not proceed pending the ruling of the Chairperson. The delay of thirteen days cannot be imputed to the Employer because the Employer is not in control of the proceedings. Although the Employer is the one that initiated the disciplinary hearing (being represented by the initiator) the conduct and control of the proceedings are vested in the Chairperson. The period of thirteen days therefore interrupted the *dies* within which to finalise the hearing. On the 22nd August 2024 therefore, there were still twenty two days remaining within which to finalise the hearing.

[34] The Employee did not accept the Chairperson's ruling that was delivered on 22nd August 2024. She therefore launched review proceedings before the Industrial Court on 26th August 2024. It is not clear what happened during the four days between 23rd August 2024 and 26th August 2024. The lapse of the four days however does not advance the Employee's case as there were twenty two calendar days remaining within which to finalise the hearing. The Court says this because even if the four days were to be subtracted, the employer would still be left with eighteen calendar days. The Chairperson was therefore correct in dismissing the objection raised based on time-bar.

INTERPRETATION OF THE CODE.

[35] It was argued on behalf of the Employer that it was mandatory that the Chairperson first dealt with the time-bar issue before the disciplinary hearing could proceed. In essence, the argument was that the preliminary point raised did not form part of the disciplinary hearing when regard is had to the provisions of article 1.4.16 which provides that ***"the chairperson of a hearing shall rule on a preliminary point, if there is any (for example, time-bar or any other procedurally non-compliance issue), before continuing with the Disciplinary Hearing."***

The Industrial Court agreed with the Employer's argument. In paragraph 16 of its judgment The Industrial Court made the following finding;

"....This therefore means that technicalities such as time bar are not for purposes of enquiring into allegations of misconduct but part of the preliminary issues which the chairperson has to first determine before continuing with the actual disciplinary enquiry against the employee concerned."

[36] Before this Court and also relying on the finding by the Industrial Court, it was argued on behalf of the Employer in paragraph 6 of the heads of argument that;

> ***"6. The first two clauses referred to above are clear in that they separate the inquiries. Issues of time bar are to be dealt with separately as they do not form part of the enquiry as per the definition on page 37. The Court a quo was therefore not wrong in its judgment."***

[37] With respect, this Court does not agree with the position adopted by the Industrial Court and the Employer in their interpretation of the code on this issue. The fact that the code says that the chairperson shall rule on a preliminary point before continuing with the disciplinary hearing, does not add anything new and it is not a magic formula to the conduct of a disciplinary hearing or any legal proceedings before a court of law. The Court says this because of the following reasons;

37.1 Once a preliminary objection is raised, procedurally, that issue must be addressed first before continuing with the hearing. If, for example, a litigant or an accused employee raises a preliminary point that the chairperson

should recuse himself, the chairperson is expected to make a ruling on that issue first before continuing with the hearing. The reason for that is not hard to see. If the chairperson does not address that issue first, but proceeds to conduct the hearing and it is later found that he should have recused himself, the proceedings will be rendered irregular and a nullity.

37.2 It follows therefore that even if clause 1.4.16 did not form part of the code, the Chairperson would still be required to make a ruling if a preliminary point was raised by any affected party.

37.3 Clause 1.4.16 is framed in clear language. It provides that the chairperson shall rule on a preliminary point **before continuing** with the disciplinary hearing. The chairperson can only **continue** with something that has already started. The question that arises is: where else could the accused Employee raise the preliminary objection except at the hearing before the Chairperson.

37.4 Where an accused employee intends to raise an objection that the disciplinary hearing is time-barred, that

employee should do so at the outset of the hearing. The chairperson is required to make a ruling on the objection before continuing with the hearing. **(See: Gerald Dube Vs Public Service Pensions Fund, case number (604/2006) [2009] SZIC 06 (12 February 2009).**

[38] In the view of this Court, the code was framed in very clear and unambiguous language and the maxim *"interpretatio cessat in claris"* aptly applies. This maxim simply means that interpretation ceases in clear things, that is, when a text or law is clear and unambiguous, there is no need for further interpretation. In *casu*, the code is clear that disciplinary action should be commenced and finalised within thirty days after the misconduct has been brought to the attention of Management. There are, however, two exceptions that are stated in the code, namely; technical and/or operational processes that could necessitate an extension of the stipulated period. In the present matter these two exceptions did come into play, for example, when the accused Employee fell ill and when the Chairperson postponed the hearing pending delivery of the rulings.

[39] It is not in dispute between the parties that the incidence occurred on 21st March 2024, and that the misconduct came to

the attention of Management on 24th May 2024. On that same day the Employee fell sick and was admitted in hospital. She was discharged on the following day, 25th May 2014 and was given a number of days to be off-duty in order to recuperate. She returned to work on 26th June 2024. The period between 24th May 2024 and 25th June 2024 therefore does not count as the Employee was officially not at work.

[40] It is important to distinguish the factual bases on which the two preliminary objections were raised. On the first occasion, being 04th July 2024, the objection was raised based on the time frame between 24th May 2024 up to 04th July 2024. That was the period during which the Employee was mostly on sick leave. It was clearly proper for the Chairperson to exclude the days that the Employee was away on sick leave. The objection was therefore correctly dismissed.

[41] The second preliminary objection was based on the period from 26th June 2024 up to 09th August 2024. The argument in the second instance was based on the conduct of the Chairperson. The Chairperson delayed for a period of about twenty calendar days from delivering the ruling. The amount

of time taken by the Chairperson to deliver the ruling is not in dispute.

[42] It was not argued, nor was it suggested that the delay in delivering the rulings was caused by, or could be attributed to any of the parties, that is, the Employer or the Employee.

[43] Disciplinary action is defined in article 1.1.10 as follows;

"Discipline Action" means action initiated by Management in response to unacceptable Employee conduct, performance, or behaviour."

Although the phrase is rendered as *"Discipline Action"* in the code, the Court will safely assume that it was a typographical error, and that the parties meant to say *"Disciplinary action"*. In *casu*, Management initiated the disciplinary action on 28th June 2024 when the employee was served with the letter of suspension and also with the notice to attend the disciplinary hearing on 04th July 2024. To date, the disciplinary hearing has not been finalised by the Chairperson. The reasons behind the failure to finalise the hearing are well known. They are; the indisposition of the Employee, the postponements pending rulings by the Chairperson and the Court proceedings initiated

by the Employee. None of these reasons can be attributed to the Employer. It would therefore be unfair to saddle the Management with blame for the failure to take and finalise the disciplinary action against the Employee within the period stipulated by the code because these circumstances were beyond its control.

CONCLUSION.

[44] The Industrial Court's interpretation of the code that a disciplinary hearing in terms of the code is divided into two phases in which one has nothing to do with the other was clearly wrong. A disciplinary hearing is a process. An affected party may raise an objection at any point, as and when the circumstances require, and the Chairperson has a duty to make a ruling thereon before he continues with the hearing. Besides a preliminary objection, which must be raised at the outset, a party may raise an objection at any point during the hearing, for example, an objection relating to the admissibility of evidence. The Chairperson would be required to make a ruling before he proceeds with the hearing.

[45] A chairperson who is appointed to conduct a disciplinary hearing within a specific time frame, has a duty to start and finish the proceedings within that stipulated period, except

where the extension is due to some exceptions stated in the disciplinary code, agreement by the parties or some other intervening impossibility.

[46] **COSTS.**

In this matter the employer/employee relationship still exists between the parties. The usual practice in this jurisdiction is that the Courts are not keen to issue an order for costs where the employer/ employee relationship still exists in order to promote the spirit of good industrial relationship at the workplace. There are no compelling reasons in this matter to persuade this Court to depart from that practice. The Court will accordingly make an order that each party is to pay its own costs.

ORDER.

[47] In the circumstances, the Court will make the following order:

a) The appeal is dismissed.

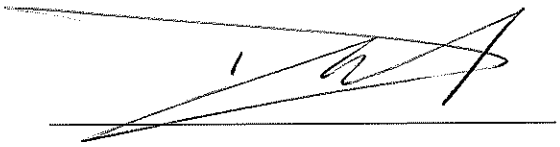
b) The judgment of the Industrial Court dated 10th September 2024 is hereby confirmed.

c) There is no order as to costs.

N. NKONYANE

Judge of the Industrial Court of Appeal

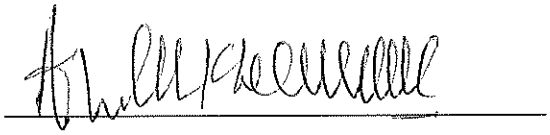
I agree



D. MAZIBUKO

Judge of the Industrial Court of Appeal

I agree



A.M. LUKHELE

Judge of the Industrial Court of Appeal

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