IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CIVIL CASE NO. 1258/2021

In The Matter Between

Swaziland Uninion Of Financial Institutions & Allied Workers	1st Applicant
Charles Mthethwa	2nd Applicant
And	
Acting Judge Of Industrial Court OfEswatini	1st Respondent
Standard Bank	2nd Respondent
Eswatini Nomfundo Myeni NO	3rd Respondent

Neutral citation: *Swaziland Union of Financial Institutions & Allied Union v Acting Judge of the Industrial Court of Eswatini & 2 Others (1258/21) SZHC 143 [2021} (JO September 2021).*

Coram : D Tshabalala J

Heard :09/08/21
Delivered : 08/09/21

Summary: *Administrative law - Judicial Review of a decision of Judge of Industrial Court - Reviewable irregularities - gross unreasonableness - error of law and conflict of interest creating potential bias established. Judgment of the Court a quo reviewed and set aside. The mater reverted to the court a quo to be heard on the merits.*

JUDGMENT

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[l] This is an application brought under a certificate of urgency, for an order to review in terms of Section 19 (5) of Industrial Relation Act 2000 and set aside judgment of the Acting Judge of Industrial Court on upheld points *in limine* issued on the 7th July 2021, on the grounds that it is grossly unreasonable and/or that it constitutes a serious error of law. The Applicant further seeks the following orders:

../ *referral of the matter back to the Industrial Court for a determination of the merits of the Applicant's application under Industrial Court case No. 170/2021;*

../ *dispensing with normal forms of service and time limits and hearing the matter as on urgent basis;*

../ *issuing a rule nisi calling upon the Respondents to show cause why an order should not be issued stopping the intended or soon to be convened disciplinary hearing against the 2nd Applicant (sic) Respondent, pending fanalization of this matter in Court;*

../ *that the rule nisi operates with immediate interim relief pending finalization of this matter.*

Background

[2] The 2nd Applicant is employee of the 2nd Respondent, Standard Bank Eswatini. The Bank/employer instituted disciplinary proceedings against the 2nd Applicant which commenced on 27th April 2021. On that day the employee's representative raised a preliminary point to the effect that the hearing was time barred as a period of 35 days[1] had elapsed since the employer became aware of the matter. The chairperson of the hearing (3rd Respondent) heard submissions from both parties and delivered her ruling in terms of which she found that the employer became aware of the incident giving rise to the disciplinary hearing on the 25th November 2020. The chairpersons' finding was that following knowledge of the matter investigations were necessary to ensure *"concrete basis and informed/acts for any charge against an employee."* The chairperson stated that in her view the employer formed an opinion by at least the 15th or 16th April 2021. She concluded that the matter was not time barred and recommended that the disciplinary process proceeded on the merits. Further that should the employee be dissatisfied with her finding he could object at the end of the hearing.

[3] In short the preliminary point was dismissed and the matter ordered to proceed. The chairperson's decision was based on her view that the count for the *dies* started on the date the employer formed conclusive opinion to prefer charges as opposed to the earlier date when it became aware of a transgression, in this case the 25th November 2020, and therefore 35 days period had not lapsed. The 2nd Applicant dissatisfied with the chairperson's decision launched on urgent basis with the *court aqua* an application for the following orders, *inter alia,*

[1] Period stipulated in the company's disciplinary code which forms part of negotiated collective agreement.

i. *a rule nisi operating with immediate interim effect temporarily stopping the on going disciplinary hearing against the 2nd Applicant, pending finalization of the matter before the court;*

ii. *order declaring that the disciplinary hearing was time barred in terms of clauses*

1.11-1.12 of the collective Agreement signed by the parties;

iii. *an order declaring that the l8[1] Respondent is precluded in terms of Clause 1.11.2 of Collective Agreement, from proceedings with the hearing, having reported a criminal case against the 2nd Applicant.*

Alternatively,

iv. *An order reviewing and setting as being grossly improper and/or in reasonable the decision of the 3rd Respondent of the 2?fh April 2021;*

v. *cost of suit.*

vi. *further and I or alternative relief*

[4] In his founding affidavit before the Industrial Court the Applicant pointed out that the matter came to the knowledge of the employer on the 25tli November 2020 and disciplinary charges were preferred against him on the 16th April 2021, which he reckoned was almost 5 months after becoming aware of alleged transgression. Further, that according to clause 1.11.2 of the said code, where police were involved in the matter the employer was required to await police report and may not proceed with disciplinary hearing pending police determination.

[5] In the *court a quo* the Respondent raised points of law which the court upheld and consequently dismissed the application without hearing the merits, hence the present application for review of that decision.

[6] The matter was argued before me on the 9th August 2021 after which judgment was reserved. The Applicant's case raised main points for review

as gross unreasonableness and grave error of law against judgment of the Industrial Court. The Applicant also raised the issue of conflict of interest against the Acting Judge which he alleges led to lack of impartiality. The Applicant argues on that basis that the Acting Judge should have recused himself from hearing his application. The Applicant alleges that the conflict of interest arises from the fact that he had consulted the 1st Respondent and requested him to represent him in this very matter at the time that arose between him his employer. However, he eventually ended up with another law firm. The Applicant alleges that at the time the learned Acting Judge made a disclosure to which his attorney did not object to his hearing the matter, his Counsel did not have the full facts of the interaction the Applicant had with the Acting Judge, other than what the latter disclosed that they went to same gym. I deal with this aspect of the matter later in this judgment.

[7] The facts of the matter before the Industrial Court concerned a challenge to decision of 3rd Respondent chairperson of disciplinary hearing which is captured above at paragraph [2] of this judgment. The points of law raised by the Respondents and upheld by the *Court a quo* can be summarised thus:

1. That the application was not urgent, that alleged urgency was self created.
2. The application for stay of disciplinary hearing was improperly before court.
3. No exceptional circumstances (cogent facts) were shown to exist to warrant the court to intervene and interfere in complete disciplinary hearing.

[8] The *court a quo* upheld the first two points of law and dismissed the application. The court stated that it had refrained from considering the third

point of law which challenged existence of exceptional circumstances warranting the court's interference as aforesaid. In excluding consideration of this point the court *a quo* stated that it had direct bearing on merits, a factor which he said exposed him to potential conflict of interest, owing to his relationship with the Applicant, which he declared at the start of the hearing.

[9] In his founding affidavit before this court the Applicant avers that in upholding the points oflaw the *court a quo* committed an error oflaw bound to lead to incurable injustice to the Applicant.

[10] On urgency, the Applicant states that the *court a quo* erred in finding that there was undue delay caused by the Applicant's internal appeal against the chairperson's ruling instead of bringing the matter to court for review immediately. The Applicant submits that the internal appeal was in line with the established principle to exhaust internal remedies prior to approaching the court for relief. The Applicant submits that the finding that urgency was self-created is not justified in the circumstances where he also had to await a response to his application for stay of disciplinary proceedings from the employer. The employer's response declining stay of the hearing was furnished on the 24 May which coincided with resumption of the hearing.

[11] The Applicant argues before this court that there are exceptional circumstances warranting the court to intervene in an incomplete disciplinary process, being that he stands to suffer irreparable harm if the interdict is not granted. That the Respondents may unlawfully proceed with the hearing and take a harmful decision against him, yet their action to proceed with the hearing may be found to be unlawful given that the period

of 35 days had elapsed smce the employer became aware of the transgression.

[12] The Respondent's position on urgency is that the *court a quo's* decision was correct in that the 2nd Applicant's founding affidavit was wanting on Rule 15 requirements [2] that the litigant seeking that a matter be enrolled as one of urgency must comply with. The employer highlights that the hearing had in fact resumed on the 24 May 2021 and postponed indefinitely, pending *loco inspection* logistics, while the court application was launched on the 26th May 2021. The employer submits that there was no imminent threat of disciplinary hearing proceeding to warrant that the matter be enrolled on an urgent basis, and severely abridged timelines.

[13] The Applicant argues however, that even though relief was sought after commencement and postponement of the hearing indefinitely, the proceedings were still on-going in the sense that they could resume any time, and therefore urgent application for stay was justified.

Analysis and findings

[14] The first question is whether relief sought is based on reviewable irregularities. The Respondent's contention is that there are no reviewable irregularities[3], suggesting that the application is nothing more than an appeal disguised as review.

[15] The court is satisfied that the application seeks relief for reviewable questions, in so far as it alleges gross unreasonableness, error oflaw and lack of partiality or bias on the part of the presiding officer.

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[2] Industrial Court Rules.

[3] see para 10 of founding affidavit at page 106 of Book of pleadings.

'See pages 5 and 21 of the Book of pleadings.

Urgency

[16] In coming to the conclusion that there was no urgency owing to the number of days that elapsed since the ruling of the 2nd Respondent, up to the launching of the urgent application that challenge the ruling, the *court a quo* appears to have placed emphasis on the lapse of time, while down playing activities that the Applicant pursuit in the meantime, for instance the internal appeal and directing request for stay of proceedings to the employer. This court considers it immaterial that the employer ruled that the chairperson's ruling was not appealable in terms of disciplinary code or procedure. This was a procedural issue and as long as the Applicant was *bona fide* in pursuing the internal appeal the time spent cannot be condemned as resulting in self-created urgency. The same applies to the Applicant's motivation to the employer by letter of21 May to stay disciplinary proceedings until after another matter in court. Again, if this was a genuine engagement by the Applicant, (there is no indication that it was not), then it may not in my view, properly or reasonably be rejected out of hand or counted as self-created urgency.

[17] I am persuaded in the circumstances that the *court a quo* failed to consider relevant factors in deciding that there was no urgency in the matter. Moreover, the fact that the disciplinary hearing re-convened on the 24 May 2021 and adjourned, does not detract from the fact that it was still pending and could resume any time, hence the need for urgent interim order for its stay. Conclusion of the *a quo* could not have been reasonable, that the adjournment of the proceedings until further notice, for *loco inspection* arrangements to be made, totally dissipated the risk that the urgent

application sought to avert by seeking stay of the proceedings before the Industrial Court.

Application for stay not properly before the court

[18] The *court a quo's* decision that the Applicant should have approached the 2nd Respondent, as chairperson of the disciplinary proceedings for an order for stay of the hearing as matter of strict procedure, prior to approaching the Industrial Court is said to be based on common practice. There is no legal instrument brought to attention of the court for such a requirement, be it statute or court rules. The learned Acting Judge *a quo* pronounced that it was common practice for the chair of disciplinary hearing to hear such an application so as to, *inter alia*, not burden the courts with applications. It is obvious that common practice which is not a binding or legal rule cannot trump statutory powers of the Industrial Court under the Industrial Relations Act 2000 ad amended, to hear labour disputes and ancillary issues arising therefrom.[5] Indeed a stay of proceedings is a tool for an aggrieved party that requires fair evaluation to enable fair, effective dispute resolution.

[19] The Industrial Court of Appeal (ICA) in **Trevor Shongwe v Machawe Sithole NO and Another** [6] having found that there was no provision either in the IRA 2000 or Court Rules stipulating that disciplinary proceedings have to be stayed formally on application by disciplinary chairman, before the affected employee may approach the Industrial Court for reliefin respect of those proceedings, dismissed a similar point law raised by the employer. The ICA noted however that the requirement for first application to be made

[5]See Section 2 Industrial Relation Act 2000.

[6] Case No. 8/2000

before a chairman might be relevant in cases of recusal made against chairman of disciplinary hearing.

[20) This court accordingly finds that the *court a quo* misdirected itself on law in holding that it had no jurisdiction to entertain the application for want of the application for stay before the 2nd Respondent.

Peremption

[21] The Respondent submitted that by attending and participating at the hearing on the 24 May, 2021 which was after the adverse ruling on prescription of the charges, the Applicant acquiesced to the ruling, and cannot thereafter challenge the ruling. According to the common law doctrine ofperemption, a party who acquiesces to a judgment can't subsequently seek to challenge the judgment to which he has acquiesced. This was stated by the court in **Hartley Roegshaan and Another v First Rand Limited** and **Another** [7] The court quoted from the case **ofDabner v South African Railaways and Harbours** [8] wherein Innes CJ state thus -

> *"The rule with regard to peremption is well settled ... if a conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal.*
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> *And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.* "

[7] ZA G.
[8] 1912 AD 242.

[22] In its letter of the 21 May 2021 to the pt Respondent, the Applicant's representative shows intention to challenge the ruling of the chairperson in court. The Applicant sought the stay of the disciplinary proceedings pending outcome at a similar matter that pending in court, for cost considerations, presumably on the belief that the outcome will inform how the parties decided go forward with their dispute.

[23] The fact that after receiving a negative response on the 24th May the Applicant proceeded to prepare court papers on the same day[9] negates presumption of acquiescence to the ruling on the part of the Applicant despite his participation at the hearing, which was also on the same day.

[24 The court in **Philani Clinic Services v Swaziland Revenue Authority** makes reference to an act from which the only reasonable inference that can be drawn by the other party is that he accepts and abides by the judgment, and so intimates that he has no intention of challenging it, he is taken to have acquiesced in it.[10] The Applicant's intention to challenge the chairperson's ruling in court expressed in the letter of25 May, as aforesaid, presents doubt that the only inference to be drawn from participation in the hearing while awaiting 2nd Respondent's response, was acquiescence in the ruling. Accordingly, acquiescence cannot have been proven. It must be considered non-proven.

Whether the Acting Judge ought to have recused himself

[24] It is one of the Applicant's grounds for review and setting aside of the judgment of the *court a quo* that the learned Acting Judge ought to have

[9] The papers that were infamously not filed and served on the Respondent until the 264th May

[10] Hish court Case No 36/2012

recused himself because he was conflicted. It is common cause that the Acting judge *a qou,* before commencement of the matter, mentioned to the parties' Counsels that he knew the Applicant from attending the same gym, and inquired from the Counsels whether they had any problem with him hearing the matter, to which there was no objection.

[26] According to the Applicant's version, upon being charged for misconduct by the 2nd Respondent he sought legal advice from the Acting Judge and requested him to represent him at his disciplinary hearing, to which he agreed. That he briefed the Acting Judge with the facts of the matter. Howeve , they could not meet as the Applicant could not find him at his office for purpose of opening a file, resulting in his engaging the services of another attorney. The Applicant alleges that he continued discussing his case with the Judge even thereafter.

[27] After the application was filed the Applicant alleges that he was never aware that it was being heard by the 1st Respondent as his attorney never told him. The Applicant submits that from his prior knowledge of the facts of his case, the 1st Respondent was conflicted, that he cannot trust that the judgment issued by the 1st Respondent is impartial, fair and just in the circumstances.

· The Applicant submits that the 1st Respondent should have recused himself from hearing the application. Further that, he should have made a full disclosure in court, the failure of which he says resulted with interests of justice not being served in his case.

[28] The Applicant submits that this is sufficient ground to review and set aside

the judgment. Applicant's attorney BS Dlamini has filed a confirmatory

affidavit in terms of which he particularly confirms that the I st Respondent did not disclose in court the extent of interaction with the 2nd Applicant that it went as far as being consulted on the disciplinary matter between the 2nd Applicant and the 2nd Respondent, as alleged by the 2nd Applicant. Applicant's Counsel avers that had a full disclosure been made he would have objected to the 1st Respondent hearing the matter and asked him to recuse himself.

[29] The 1st Respondent attested to a supporting affidavit to the Respondents' answering affidavit in which he sets out his side of the story. The pt Respondent categorically denies inviting the Applicant to open a file with him for his matter nor discussing it later after their first encounter. The Ist Respondent's version is that he received a call from the Applicant who indicated that he wanted legal assistance on a criminal matter that had been instituted by his employer against him. He indicated to the Applicant that criminal law was not his area of practice and declined any assistance and that was the end of their discussion.

[30] The I st Respondent avers that he made a full disclosure at the start of the hearing of the application concerning his relationship with the Applicant. He never communicated with him subsequent thereto. He was therefore not obliged to recuse himself from the case. He maintains that the nature of his relationship with the 2nd Applicant was simply that they attended the same gym. They are neither friends nor acquaintances, safe that they greet each other.

[31] It is not clear from the Acing Judge's supporting affidavit whether the facts of the case were shared to him by the 2nd Applicant. However, he states that he felt conflicted to proceed with the application on the merits. It is

not clear

what caused him discomfort or conflicted to deal with merits. Was it because the facts of the matter were shared with him or he was simply being cautious? The question is if the presiding officer believed there was a conflict of interest ifhe dealt with the matter on the merits, was it then proper on the other hand to hear and decide the points of law raised on the same matter? Where did the conflict he referred to start and where did it end? The 1st Respondent states in the judgment under attack, that he refrained from considering the third point of law raised by the 2nd Respondent to the effect that the Applicant has failed to establish existence of exceptional circumstances (cogent facts) warranting the court to intervene in incomplete disciplinary proceeding, as follows:

> *"Legal submissions were made by the parties and legal authorities in support thereof were filed with the court. However, on hindsight, I later came to the realization that this point has a direct bearing on the merits of this matter which I indicated from the onset that it will not be appropriate for me to deal with owing to a potential conflict of interest I may share in relation to the 2nd Applicant. For that reason I have not dealt with the Respondent's third point of law. It may still form part of the arguments on the merits should the Applicant still decide to bring the matter to court for determination on the merits at a later stage."*[11]

[32] From his own admission, the learned Acting Judge noted the likelihood ofa conflict concerning the merits of the case, and this tainted the perception on his impartiality on the matter, which is an element that is crucial to fair hearing concerns raised. The latter part of the legal maxim 'justice must not only be done but seen to be done' relates to perception rather than the actual.

[11] Paragraph [125] - [126] of the Judgment a quo page 87 of the Book of Pleadings

It is the latter part of the maxim that 'justice must be seen to be done' that was affronted in the mind of the Applicant as a litigant.

[33] It is appreciated that possible conflict of interest occurred to the presiding officer, in hindsight as he states. This is reflective of the slippery terrain that may arise unexpectedly in the course of duty on the bench, calling for alertness on the part of judicial officers in general. I find that there was a slip-up in this matter, and that indeed the 1st Respondent should have recused himself rather than attempt to limit himself to deal with points of law yet. Points oflaw do not arise in a vacuum, they are often intertwined with facts.

[34] All litigants have a right to appear before and to have their cases adjudicated fairly by an impartial court. With that said, the application succeeds and the court makes the following order:

[34.1] Judgment of the *court a quo* delivered on the 7th July 2021 is reviewed and set aside.

[34.2] The matter is referred back to the Industrial Court to be heard and determined on the merits.

[34.3] The disciplinary hearing against the Applicant that had been adjourned on the 24 May 2021, is hereby stayed until finalization of the application on the merits by the Industrial Court.

[34.4] Costs of suit against 1st Respondent.

D. Tshabalala
Judge

For Applicant: BS Dlamini

BS Dlamini & Association

For Respondents: ZD Jele

Robinson Bertram