IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 411/06**

In the matter between:

BHEKIWE DLAMINI **APPLICANT**

And

SWAZILAND WATER SERVICES CORPORATION **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE: **ACTING JUDGE**

GILBERT NDZINISA: **MEMBER**

DAN MANGO: **MEMBER**

FOR APPLICANT: **MR. M. SIBANDZE**

FOR RESPONDENT: **ADV. P. FLYNN (INSTRUCTED BY SIBUSISO SHONGWE & ASSOCIATES)**

JUDGEMENT 21.07.06

[1] This application was brought by the applicant against the respondent on a certificate of urgency.

[2] The applicant seeks an order in the following terrns:-

1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a rule nisi be issued calling upon the respondent to show cause on a date to be appointed by the Honourable court why an order in the following terms should not be made final:

2.1. That the respondent intended disciplinary hearing against the applicant originally scheduled for the 7th June 2006 be and is hereby interdicted.

2.2. Declaring that the respondent's aforesaid intended Disciplinary Hearing is time barred in terms of the Disciplinary code applicable to the applicant and/or that the respondent has allowed an unreasonable lapse of time after becoming aware of the alleged misconduct with the effect that respondent is no longer entitled to take disciplinary action against the applicant.

ALTERNATIVELY

2.3. That the applicant's suspension, having been for the

purposes of investigation has been overtaken by events and the applicant is hereby reinstated to her employment pending finalization of the disciplinary hearing.

2.4. Directing that the applicant's disciplinary hearing be presided over by an Independent Chairperson to be appointed by the respondent and such appointment to take place within seven (7) days and notified to the applicant.

3. Directing that prayer 2.1, above operate with immediate and interim effect pending the finalization of this application, should such finalization not take place on the **4th July 2006.**

4. Granting costs of this application on the scale as between attorney and own client in the event the respondent opposes the application.

5. Further and/or alternative relief.

[3] The respondent duly filed its answering affidavit in opposition of the application, and the applicant filed its replying affidavit.

[4] In terms of prayer 2.1 the applicant is asking the court to interdict an intended disciplinary hearing scheduled to take place on the 7th June 2006. The application was brought before the court on the 4th July 2006.

[5] The applicant stated in prayer 2.1 that the disciplinary hearing was originally scheduled for

the 7th June 2006. The next date of hearing is not known yet. The question of urgency was however not raised in court, the court will accordingly deal with the matter on the basis that urgency is not in issue.

[6] In court the respondent pointed out that it has no problem with prayer 2.4 being granted. The respondent was also of the same view that it would be in the interest of justice that an independent chairperson be appointed to chair the intended hearing. The subject of this judgement will therefore be prayers 2.1, 2.2 and 2.3.

[7] From the applicant's Founding Affidavit, the reason of the postponement of the hearing was that on the 7th June 2006, her doctor scheduled her to undergo an operation on the 12th June 2006 and she was granted sick leave until the 30th June 2006.

[8] The facts of the application are briefly as follows; the applicant is employed by the respondent as the Regional Manager for the Central Region. In 2005 the respondent initiated a competition between its four regions, which was called the Safety, Health, and Environmental Competition. The applicant's region won and was awarded a cow. It transpired that the other regions were also given a cow. The applicant's subordinates asked her to make the respondent to bear the catering costs for their party so as to make them different from the other regions because they had won the competition.

[9] Although the applicant said she believed that there was no money for the event, the Commercial Services Supervisor assured her that money was available in the budget for the event. The caterers were accordingly engaged and the applicant authorized the payment for the invoice. When this carne to the attention of the Operations Director, he was of the view that the respondent should not be made to pay, as there was no budget and advised that the employees should pay for themselves, as that was what happened in the other regions.

[10] It seems that the applicant and her staff did not pay for the catering service by Fedics Food

Service as per the advice of the Operations Director, Mr. Ike Herbst. After learning about this, Mr. Herbst wrote a letter to the applicant dated 12th April 2006 asking her to explain within five days how she catered for the staff party. She replied by a letter dated 26th April 2006 and stated that there were no irregularities in the way that she handled the matter and that standard procedure was followed. It appears that in the meantime the applicant and Mr. Herbst pursued the matter by telephone. It transpired that during the telephone conversation not so kind words were traded. It is on the basis of that unfortunate telephone conversation that the applicant is arguing, *inter alia,* that it was the reason why the respondent decided to institute the disciplinary proceedings.

[11] The applicant wants this court to set aside the holding of the intended disciplinary hearing against her because she says that it was merely motivated by the altercation that she had with the then Operations Director Mr. Herbst. She also argued that the respondent should not continue to hold the disciplinary hearing as it was time barred in terms of the disciplinary code which she argued was applicable to her situation.

[12] The application before court is important in that it raises a contentious issue that the court must deal with a view to give clear directions on it. This is the issue of management disciplinary authority. On this subject **JOHN GROGAN IN HIS BOOK " WORKPLACE LAW" [2005] 8™ EDITION** states as follows at page 102 where he deals with the subject of suspension:-

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

In the present case the applicant is on suspension with full pay. In terms of the suspension letter dated 23rd May 2006, she was suspended pending the finalization of the investigation process and any other proceedings that may be preferred against her.

It is common cause that the investigation process is complete. Her suspension therefore is now pending the disciplinary hearing. The charges against her have already been preferred. As per the authority cited above, the respondent has the right to suspend the applicant with full pay pending disciplinary action.

The court noted that the letter of suspension states that the suspension is in terms of section 39(i) (b) of the Employment Act. That section of the Act however deals with suspension without pay. It states that suspension without pay shall not exceed a period of one month. The court will not however make any finding as to the validity of the suspension as that point was not addressed in court.

Furthermore, the Industrial Court of Appeal in the case of **SWAZILAND ELECTRICITY BOARD V. MASHWAMA MICHAEL BONGANI & 2 OTHERS, APPEAL CASE NO.21/2000** had occasion to deal with the question of the right, of management to hold a disciplinary hearing. In that case the respondents had obtained an order in the court a quo preventing the appellant from conducting a disciplinary hearing. On appeal that order was set aside. At page seven of the judgement, Sapire P, as he then was, quoted with approval a passage from **GROGAN'S 'RICKETS' BASIC EMPLOYMENT LAW ON PAGE 86** as follows:-

"The power... to initiate disciplinary steps against transgressors is one of the most jealously guarded territories of managers everywhere, forming as it does an integral part of the broader right to manage."

An almost similar application was recently brought before the President of this court. That was in the matter of **ARCHIE SAYED V. USUTU PULP COMPANY LTD., I.C. CASE NO. 433/06.** In that matter the applicant was seeking inter alia, an order interdicting the respondent from

conducting a disciplinary enquiry against him. At page 11 of the judgement the Court President referred, inter alia, to the case of **NDLOVU V. TRANSRIET t/a PORTNET 1977 I LJ 1031 (LC)** where the court refused to interdict a disciplinary enquiry into an alleged misconduct, and held that a court will rarely, if ever, intervene to prevent an employer form holding a disciplinary enquiry.

In the present application the applicant entreats the court to intervene because, it argued, the respondent took an unreasonably long time to institute the proceedings. The applicant also argued that the respondent was time barred in terms of the disciplinary code.

We are unable to agree with the applicant that the respondent allowed an unreasonably long period to pass and that therefore it must be taken to have waived its right to carry on with the proceedings.

We do not agree with the applicant's contention that the respondent became aware of the alleged misconduct on the 10th March 2006. On that day the alleged misconduct had not taken place. The applicant on that memorandum marked "BD.4" made an endorsement asking the Finance Manager to oblige. The Operations Director also made an endorsement on that same document in which he told the applicant that she and her staff should pay the invoice, as the amount therein was not budgeted for.

[21] On the 10th March 2006, it would appear, the Operations Director was expecting that the applicant and her staff were going to oblige and pay as he had advised them that there was no money. It cannot therefore properly be said the respondent was aware of the alleged misconduct on the 10th March 2006.

[22] The alleged misconduct occurred when it became clear that the applicant and her staff were not going to pay for the party because then it would mean the respondent would have to pay when it had made it clear to the applicant that the staff party was not budgeted for. The specific date is not known to the court. What is clear however is that, on the 12th April 2006 Mr. Herbst wrote to the applicant saying that certain irregularities have been found in the manner that she handled the provision of the food for her staff party. She was asked to respond within five days and give an explanation.

[23] It seems to the court that that should be date on which the respondent could be said became aware of the alleged misconduct. That is the only document where the issue of irregularity was mentioned. That letter is annexure "BD.5".

[24] It cannot therefore be said that there was an unreasonable length of time that was allowed to pass between the period when the respondent became aware of the alleged misconduct on

the 12th April 2006, and the time when the respondent suspended the applicant on the 23rd May 2006 pending investigations and hearing on the 7th June 2006.

[25] There is no allegation that no investigations were carried out and that therefore the charges are a sham.

[26] As regards the question of the applicability of the disciplinary code, the court will observe as follows; the code is not applicable to the applicant because she is not a member of the union at the respondent's place. The applicant argued that the code was applicable to her by virtue of article 3.1, which states that:-

"This code shall be equally applicable to all employees."

[27] Employee in the code is defined as per the definition of employee as found in the Industrial Relations Act 1996. It is true that the applicant is an employee of the respondent. When a recognition agreement is entered into, the parties define which category of employees it is going to apply to. In terms of article 2.4. All employees from Grade D3 upwards including secretarial staff were, however, excluded.

[28] There was undisputed evidence that there is in existence a staff association at the respondent's place. The recognition of the staff association was granted by the respondent in 2001. The recognition agreement of the staff association has not yet been signed. It is still in a draft form.

[29] The importance of the existence of this draft document is that it shows that the parties' intention is that the members of the staff association are to be governed by a disciplinary code different from that of the members of the union. As the intention of the parties is clear, the court has no reason to speculate whether or not the union's disciplinary code is applicable to the applicant or not.

[30] In terms of the draft recognition of the staff association, the corporation's disciplinary code and procedures is applicable to the members of the staff association. The applicant admitted under paragraph 16.3 of her replying affidavit that the corporation's rules and regulations are applicable to her. She argued however that they are applicable to her only by virtue of being

the corporation's internal procedures and part of her contract of employment.

[31] She argued that such corporation's internal procedures would not be applicable if they took away or lessen rights granted to her in terms of the disciplinary code agreed between the trade union and the respondent. We do not agree with the applicant's argument. How can a document for a trade union be applicable to her when she is not a member of the union?

[32] The next day of hearing was not fixed by the respondent after the hearing did not take place on the 7th June 2006.

[33] Having carefully considered all the evidence before the court the court will make the following order;

1. THAT THE RESPONDENT IS ENTITLED TO HOLD A DISCIPLINARY HEARING WITHIN A REASONABLE PERIOD.

2. THAT THE APPLCIANT BE ALLOWED TO COMMUNICATE WITH THE EMPLOYEES OF THE RESPONDENT IN ORDER TO ALLOW HER TO PROPERLY AND MEANINGFULLY PREPARE HER DEFENCE.

3. THAT THE RESPONDENT IS TO APPOINT AN INDEPENDENT CHAIRPERSON TO PRESIDE IN THE DISCIPLINARY HEARING AND SUFFICIENT NOTICE BE GIVEN TO THE APPLICANT TO ALLOW HER TO OBJECT IF SHE DEEMS FIT.

4. EACH PARTY TO PAY ITS OWN COSTS.

The members agree.

NKOSINATHI NKONYANE A.J.
INDUSTRIAL COURT