

**IN THE INDUSTRIAL COURT OF SWAZILAND  
HELD AT MBABANE**

CASE NO. 453/06

In the matter between:

**NDODA H. SIMELANE**

**Applicant**

and

**NATIONAL MAIZE CORPORATION (PTY) LTD**

**Respondent**

**CORAM:**

**P. R. DUNSEITH:                      PRESIDENT**

**JOSIAH YENDE:                      MEMBER**

**NICHOLAS MANANA:                MEMBER**

**FOR APPLICANT:                      M. SIBANDZE**

**FOR RESPONDENT:                    P. FLYNN**

**R U L I N G - 31/07/06**

1. An employee charged with misconduct is entitled to a fair disciplinary hearing.

2. It has been the view of Labour courts and Labour jurists in South Africa for many years that one of the essential requirements of a fair disciplinary hearing is that the employee be afforded the right to be represented at the hearing if he/she so wishes.

see **Mahlanqu v CIM Peltak (1986) 7 ILJ 346 IC at 357;**

**Bassett v Servistar (Pty) Ltd 2(1978) 8 ILJ 503 IC;**

**Cameron: "The Right to a Hearing Before Dismissal - Problems & Puzzles" (1988) 9 ILJ 147 at 154;**

**Rycroft: A Guide to SA Labour Law (2<sup>nd</sup> Ed) 208;**

**Van Jaarsveld: Principles of Labour Law 289;**

4. The International Labour Organization in its Termination of Employment Recommendation No. 166 of 1982 suggests that "a worker should be entitled to be assisted by another person when defending himself.....against allegations regarding his conduct or performance liable to result in the termination of his employment".

5. The Code of Practice attached as a guideline to the Industrial Relations Act 2000 (as amended) also recommends that every employee should be given the right to be accompanied at his disciplinary hearing by an employee representative - see article 44.

6. This court confirms that it is also a requirement of fair labour practice in Swaziland that an employee is entitled to be assisted by a representative when defending himself/herself against charges of misconduct at a disciplinary hearing, and that the employer must expressly and timeously inform the employee of such right so as to give the employee the opportunity to arrange representation.

7. This does not however mean that an employee is entitled to be represented by a legal practitioner at his/her disciplinary hearing. On the contrary, it appears to be settled law that there is no general right to legal representation at a disciplinary hearing.

See **CUPPAN V CAPE DISPLAY SUPPLY CHAIN SERVICES (1995) 16 ILJ 846 D**

**MEC, Department of Finance, Economic Affairs & Tourism, Northern Province v Mahumani (2004) 25 ILJ 2311 (SCA).**

7. In Mahumani's case (supra at 2312) the Supreme Court of Appeal pointed out that, notwithstanding the general rule, there may be special circumstances where fair disciplinary process requires that representation by a legal practitioner be afforded to an employee:

*"Although in terms of our common law a person does not have an absolute right to be legally represented before tribunals other than courts of law, the common law does require disciplinary proceedings to be fair and if, in order to achieve such fairness in a particular case legal representation may be necessary, a disciplinary body must be taken to have been intended to have the power to allow it in the exercise of its discretion, unless, of course, it has plainly and unambiguously been deprived of any such discretion".*

8. In **Majola v MEC, Departments of Public Works, Northern Province & Other (2004) 25 ILJ 131 (LC)** the court stated as follows:

*"Employers have a general duty to ensure that employees have a fair hearing prior to disciplinary action being taken against them. Whether legal representation is indispensable to ensuring a procedurally fair hearing is a discretion conferred on the chairperson of the enquiry. The chairperson must exercise that discretion judiciously having regard to all the circumstances of the particular case"*

9. In the present matter before court, the applicant was required to attend a disciplinary hearing on the 30<sup>th</sup> June 2006 to answer to charges of:

- gross insubordination
- violation/breach of procurement procedures.
- poor work performance.
- incompatibility.

10. The Respondent appointed an external and independent person to chair the enquiry, one Mr. Ernest Hlophe who is a labour law consultant and erstwhile alternate member of the Industrial Court.

11. The Respondent notified the Applicant of his right to be represented by a fellow employee at the enquiry. The Applicant responded in writing to say that due to his seniority in the company he cannot be expected to ask a subordinate to represent him and he will be represented by his attorney. Indeed, the Applicant's attorney accompanied him to the enquiry and the Respondent objected to his presence.

12. Instead of determining whether the applicant should be permitted legal representation, the chairperson referred this issue to the parties to be settled between them, and adjourned the hearing.

13. There was nothing wrong with the chairperson in the first instance giving the parties an opportunity to reach consensus on the issue of representation. Unfortunately the parties were unable to reach agreement.

14. The Respondent wrote to the Applicant's attorneys as follows:

*"1 Mr. Simelane is not entitled to be represented by an attorney as this is an internal disciplinary hearing. If we were to permit legal representation not only*

*would we be contravening our own policies but we would be setting a dangerous precedent.*

*2. It is not in the interest of the National Maize Corporation to have attorneys involved at internal hearings and there are no compelling circumstances in this particular matter to warrant such. Mr. Simelane will be prosecuted by an employee of NMC who has no training, the Chairman of the hearing has no legal training as well. There is in our view, merit in having Mr. Simelane's hearing handled in such circumstances.*

*3. Discipline and the conduct of disciplinary hearings is the prerogative of the employer and as far as we are concerned Mr. Simelane has been accorded all rights that are required for a fair hearing."*

This communication correctly records that the Applicant has no absolute right to be represented by an attorney, but incorrectly assumes that the decision whether there are compelling circumstances which warrant legal representation is the prerogative of the respondent when in fact the decision must be made by the chairperson of the enquiry.

The Respondent followed up its position in a subsequent letter (NS 27) by stating unequivocally that *"it is definitely our intent to exclude attorneys at this stage and we intend to exercise that right."*

The Respondent did however concede that it would allow representation from outside the organization but restricted this to an employee from one of the other parastatal organizations in Swaziland.

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)**

Since the chairperson is external and independent, the court is confident that he can exercise his discretion judiciously and fairly, taking into account all the relevant factors.

By way of guidance, the court indicates that the following considerations should be taken into account by the chairperson in deciding whether legal or other external representation is indispensable to ensuring a procedurally fair hearing:

- (e) Whether a fellow employee of equal status to the applicant is available to represent him;
- (f) if not, whether representation by a subordinate would be unreasonably degrading to the applicant and/or hamper him in the presentation of his defence;
- (g) whether an employee of the organization can satisfactorily represent the interests of the applicant in circumstances where the Chief Executive Officer is the complainant;

21.4 in circumstances where external representation is appropriate, whether it is reasonable to restrict the applicant's choice to an employee from another local parastatal;

- (h) whether the charges are sufficiently complex or legalistic as to warrant the involvement of an attorney;

- (i) whether the charges may result in the dismissal of the applicant;
- (j) whether the respondent will be unreasonably prejudiced if the applicant is permitted a representative of his choice, and in particular a legal representative;

22. These considerations are by no means exclusive. The parties may raise other factors, and the chairperson may exercise his discretion taking into account all issues which he may consider relevant.

23. In order to assist the chairperson in reaching a fair decision on the issue of representation the court considers it to be fair and proper that the Applicant is permitted representation by his attorney at this initial stage of the enquiry.

24. The court makes the following order:

(a) The chairperson of the disciplinary enquiry into alleged misconduct by the Applicant is directed to hold a preliminary hearing to determine whether the Applicant should be allowed representation by a legal practitioner (or any other person nominated by him);

(b) The Chairperson shall permit the parties to be represented by legal practitioners, if they so wish, at such preliminary hearing;

**(c) The respondent shall furnish the chairperson with a copy of this judgement;**

**(d) Subject to the foregoing, the application is dismissed.**

**(e) There is no order as to costs.**

**P.R. DUNSEITH**  
**PRESIDENT OF THE INDUSTRIAL COURT**