IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 311/2007**

In the matter between:

SAZIKAZI MABUZA **Applicant**

and

STANDARD BANK OF SWAZILAND LIMITED **1st Applicant**

ERROL NDHLOVU N.O. **2nd Applicant**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**P. FLYNN**
FOR RESPONDENT	**:**	**P. KENNEDY**

J U D G E M E N T - 10/08/07

1. The Applicant is employed by the 1st Respondent as its Head of Human Resources. She is a senior managerial employee and a member of the 1st Respondent's Executive Committee ("Exco") which consists of all the senior executives who head the various business units of the 1st Respondent Bank.

2. On the 29th June 2007 the Applicant received a letter from the Managing Director of the 1st Respondent requesting her to attend a disciplinary enquiry to be held on 4th July 2007. The letter states that the Applicant is required to answer to charges of "Dishonesty as well as Abuse of Authority, Seniority and Trust making misrepresentations."

3. Particulars of the charges are set out in the letter, which goes on to state:

"The Bank views these charges against you very seriously. Please note that should this be sufficiently proven against you at the hearing you will be summarily dismissed.

You are entitled to have a representative of your choice (for example a fellow employee) and to call any witnesses that you may consider necessary…."

4. On or shortly after 29th June 2007 the Applicant received a second letter from the Managing Director couched in similar terms and supplementing the charges contained in the previous letter with three new charges; dishonesty, concealing vital information, and bringing the name of the Bank into disrepute.

This letter repeats that the Bank views the charges very seriously and should the charges be proven the Applicant will be summarily dismissed. It also reiterates the Applicant's entitlement to have a representative of her choice (for example a fellow employee) to represent her at the enquiry.

5. The Applicant attended the enquiry on 4th July 2007 accompanied by her attorney. The enquiry was chaired by the 2nd Respondent, who introduced himself as a "Senior Consultant Labour Relations based in Johannesburg." The bank was represented by Mr. Henk Nel, Manager Forensics of Standard Bank Africa. He was assisted by Mr. Mavela Motsa, the 1st Respondent's Manager Forensics.

6. At the commencement of the hearing the chairman pointed out to Applicant's attorney that it was an internal hearing and the attorney should justify his presence. Arguments then ensued as to the Applicant's entitlement to legal representation.

7. The Applicant's attorney advanced the following reasons for his client to be represented by an attorney:

7.1 The Applicant is entitled to be represented by a fellow employee, but that employee should be of equal status. Since the Applicant is a senior manager and a member of Exco the only fellow employees of equal status are Exco members, but for one reason or another it is not possible nor appropriate for any of the Exco members to represent her;

7.2 The managing director of the Bank is the complainant against the Applicant, in the sense that the charges have been initiated by him, and he is a material witness at the enquiry. An employee representative would find it difficult to confront his/her managing director at the enquiry;

7.3 The charges against the Applicant are regarded as very serious by the Bank and if proved will result in summary dismissal;

7.4 There is no prejudice that the Bank will suffer if the Applicant is permitted legal representation.

8. In opposing the application, the Bank's representative answered as follows:

8.1 The charges are not complex but are straightforward;

8.2 There are a number of fellow employees of equal status and higher in the Bank who could represent the Applicant;

8.3 The Bank would be prejudiced because this was an internal enquiry and it would set an unfortunate precedent if the Applicant were allowed legal representation;

8.4 The Applicant herself had objected to legal representation or representation external to the Bank in disciplinary proceedings pertaining to other employees.

9. The Banks representative conceded that the Managing Director will be a witness at the enquiry and that he could be regarded as the complainant because he signed the letter instituting the disciplinary proceedings.

10. The chairman of the enquiry considered the submissions and ruled

that the Applicant had no right to legal representation in an internal disciplinary hearing, but the chairperson may exercise a discretion in favour of granting legal representation after taking into consideration all relevant factors. He found that a case for legal representation had not been made out for the following reasons:

10.1 There are employees at the Applicant's level and above in the Standard Bank Group who are eligible to represent the Applicant, so the question of representation cannot be confined to the Bank in Swaziland.

10.2 The Managing Director cannot be regarded as the complainant. The complainant is the Bank itself.

10.3 The general rule is that an employee may be represented at a disciplinary enquiry by a fellow employee. This also applies to employees facing the possibility of a dismissal. There is no reason for the Applicant to be given exceptional treatment.

10.4 The charges do not involve questions of law, but only concern factual matters arising between employer and employee.

10.5 The Bank's representatives are from the forensic and internal audit divisions of the Bank. The Applicant can adequately meet the factual case adduced by her colleagues.

11. The enquiry was thereafter adjourned to enable the Applicant to arrange for representation by a fellow employee. After the adjournment the Applicant was called to a meeting with the Managing Director of the Bank. The chairman of the enquiry was present. He expressed the

opinion that it would be in the best interests of the Applicant for the matter to be settled without a disciplinary hearing. He offered to broker a settlement. An offer was made to the Applicant which she declined.

12. The Applicant thereafter instituted an urgent application in the Industrial Court, seeking a final order in the following terms:

12. 1 That the decision of the Second Respondent that the Applicant is not entitled to legal representation at the disciplinary enquiry is set aside.

12.2 That the Applicant is permitted to be legally represented at the disciplinary enquiry which the First Respondent intends to conduct.

12.3 That the contemplated disciplinary enquiry set for 13th July 2007 be held over to a date suitable to the representatives of both the Applicant and the First Respondent.

12.4 That the Respondents be ordered to pay the costs of the application.

13. The Respondents agreed to stay the disciplinary enquiry pending determination of the application.

14. In her founding affidavit the Applicant describes what transpired at the preliminary hearing on 5th July 2007. She concedes that the chairman at a disciplinary enquiry has a discretion to decide whether

the employee should be permitted legal representation, but she submits that the 2nd Respondent did not exercise his discretion fairly and judiciously. She submits in particular that:

14. 1 It is unreasonable and impractical to expect the Applicant to seek a representative amongst employees of the Standard Bank Group outside Swaziland. They are not known to her and she cannot entrust her representation to a person whose abilities are unknown to her;

14.2 The chairman never properly took into account the difficulties arising from the involvement of the Managing Director as a witness at the enquiry;

14.3 The chairman also failed to take into consideration the likelihood that the Applicant will be summarily dismissed should the charges be sufficiently proven;

14.4 On the issue of comparable representation, the chairman should have considered that the Applicant will be disadvantaged if she is represented by a fellow employee whilst the bank is represented by two forensic managers.

15. The Applicant also alleges that the chairman's participation in the meeting after the adjournment of the enquiry compromised him and indicates that he was not impartial at the preliminary hearing on the question of legal representation.

16. The 1st Respondent opposes the application. In an answering

affidavit deposed to by its legal adviser, the bank states that as Head of Human Resources the Applicant is well aware of the Bank's disciplinary policies and procedures, which are contained in a set of guidelines applicable to the Standard Bank Group. The relevant guideline with respect to representation provides that an employee has the right to "*be assisted by a trade union official or a work colleague when the alleged misconduct is of such a nature that it may lead to dismissal."*

17. The 1st Respondent's legal adviser points out that the guidelines do not provide for legal representation, so unless there are compelling circumstances in a particular case which justify a deviation from the norm, legal representation is not permitted. The legal adviser states that she is not aware of any case in which an employee of the Respondent has been represented by a lawyer in a disciplinary enquiry.

18. The 1st Respondent submits that there is no justification for the Applicant to receive special treatment:

18.1 She has a number of senior colleagues in Swaziland and in South Africa who are equal in status and capable of representing her;

18.2 The mere fact that the Managing Director is a witness at the enquiry does not disqualify a Swaziland-based colleague from representing the Applicant;

18.3 The Applicant has not taken reasonable steps to secure representation by an Exco colleague. The

Head of Marketing Samuel Dlamini is capable and willing to represent her, and has made an affidavit to that effect;

18.4 The Applicant has frequent contact with senior level employees in the Standard Bank Group outside Swaziland and she could obtain representation from a foreign colleague within the Standard Bank Group who does not report to the Managing Director of the 1st Respondent.

18.5 The Applicant is familiar with the disciplinary process due to her considerable experience in the field of Human Resources; the chairman and the bank's representatives at the enquiry are not lawyers; and the charges do not involve any complexities of a legal nature. The Applicant will suffer no disadvantage if she is not legally represented.

19. With regard to the 2nd Respondent's attendance at the meeting following postponement of the enquiry, the 1st Respondent denies that this indicates lack of impartiality and says that the issue can in any event be raised when the disciplinary enquiry resumes. The 2nd Respondent states in an affidavit that he participated in the meeting to assist in achieving a possible settlement, but if the Applicant objects to him continuing to act as chairperson he may recuse himself.

20. The Applicant filed a replying affidavit in which she details the reasons why in her view each of the Exco members are disqualified from representing her.

21. With regard to Samuel Dlamini she says it would be most inappropriate for him to represent her at the enquiry because he is lower in status, and he is currently acting in her position whilst she is suspended.

22. The Applicant states that the only personal interaction she has had with her colleagues outside Swaziland was during a conference over a period of one week. In any event, these colleagues rely on union representation by the SA Society of Bank Officials (SASBO) and are not well versed in labour matters.

23. The matter was eventually argued on the 27th July 2007, and the court is indebted to counsel for their comprehensive and helpful submissions.

24. Both counsel are in agreement that there is no general right to legal representation at a disciplinary hearing but there may be special circumstances where fair disciplinary process requires that legal representation be afforded to the employee.

Simelane v National Maize Corporation (IC case No. 453/06 at page 3).

"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" - **Majola v MEC, Department of Public Works, Northern Province & Others (2004) 25 ILJ 131 (LC).**

25. In **Simelane v National Maize Corporation (supra)** the employer denied the employee legal representation. The court directed the chairperson of the disciplinary enquiry to make a preliminary determination whether the Applicant was entitled to legal representation, and emphasized that neither the employer nor the court should usurp the discretion of the chairperson on this issue.

26. In the present matter before court, the chairman exercised his discretion by disallowing legal representation, and the court is being asked to overturn the decision of the chairman on the grounds that he did not exercise his discretion judiciously and fairly.

27. Mr. Kennedy for the 1st Respondent submits that it is undesirable for the court to intervene in an unconcluded disciplinary enquiry and to substitute its decision for that of the chairperson on an issue essentially interlocutory in nature. He argues that if employees facing discipline are allowed to interrupt the proceedings by rushing to court for relief, this will "open the floodgates" to numerous applications from disgruntled employees seeking to obstruct the disciplinary process.

28. Mr. Kennedy also points to the general principle of law that in general, in the absence of compelling and exceptional circumstances an applicant should exhaust his or her alternative remedies before approaching the court. The procedural fairness of a disciplinary enquiry is best judged holistically at the end of the enquiry, and if the enquiry results in an employee's dismissal he/she will be entitled to challenge the dismissal inter alia on the ground of procedural unfairness - including the unfairness of denying legal representation.

29. The submission therefore is that the Applicant has an alternative remedy and she has prematurely and inappropriately rushed to court.

30. The attitude of the courts has long been that it is inappropriate to intervene in an employer's internal disciplinary proceedings until they have run their course, except in exceptional circumstances.

    This approach arises from a principle long established in our courts, that as a general rule a superior court will not entertain an appeal or application for review, when such appeal or review seeks to interfere with uncompleted proceedings in an inferior court.

    Lawrence v Assistant Magistrate, Johannesburg 1908 TS 525;

    Walhaus v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A);

    Ismail & Others v Additional Magistrate, Wynberg & Another 1963 (1) SA (1) A.

31. This general rule is however subject to a limited qualification. In **Walhaus' case (supra) at 119H-120E** the court held:

    "By virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief by way of review, interdict or mandamus – against the decision of a Magistrates Court given before conviction. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances …. and will do so in rare cases where grave

injustice might otherwise result or where justice might not by other means be attained ….."

32. The principle in the Walhaus case (supra) has been extended to apply equally in civil proceedings and in the labour law field

Newell v Cronje 1985 (4) SA 692 E at 699;

Towles, Edgar Jacobs Ltd v President, Industrial Court and Others (1986) 7 ILJ 496 (c) at 499 I-J;

Van Wyk v Midrand Town Council & Others 1991 (4) SA 185 (W);

Ndlovu V Transnet Ltd t/a Portnet (1997) 18 ILJ 1031 (IC);

Moropane v Gilbeys Distillers & Vinters Ltd (1998) 19 ILJ 635 (LC);

Police & Prisons Civil Rights Union v Minister of Correctional Services and Others (1999) 20 ILJ 2416 (LC);

Mhlambi v Matjhabeng Municipality v Another (2003) 24 ILJ 1659 (O).

33. In **Van Wyk v Midrand Town Council (supra at 189 C-D) Lazarus J** stated:

"There is no difference between the principles applicable to interfering with criminal proceedings in a lower court and proceedings in a disciplinary enquiry before a disciplinary board."

34. We do not think that any distinction can or should be drawn between statutory disciplinary tribunals and private disciplinary enquiries in

the Industrial Court may intervene in uncompleted disciplinary proceedings " *in rare cases where grave injustice might otherwise result or where justice might not by other means be obtained*" appeals to one sense of justice.

35. The intervention of the court, though in the nature of a review, is based upon the court's power to restrain illegalities and promote fairness and equity in labour relations

Van Wyk v Midrand Town Council & Others (supra) 187-8

Section 8 (4) of the Industrial Relations Act 2000 as read with Section 4 (1) (b).

36. Whether the court will intervene depends on the facts and circumstances of each particular case. It is not sufficient merely to find that the chairperson of the disciplinary enquiry came to a wrong decision. In order to justify intervention the court must be satisfied that this is one of those rare or exceptional cases where a grave injustice might result if the chairperson's decision is allowed to stand. (see **Weber and Another v Regional Magistrate, Windhoek & Another 1969 (4) SA 394 (SWA) at 399 D).**

37. The possibility of the court being overwhelmed by a flood of ill-conceived or undeserving applications for relief cannot justify the court refusing altogether to entertain applications for intervention in disciplinary proceedings – otherwise relief would be denied to those rare cases where a miscarriage of justice might otherwise occur.

38. It has been held that the failure to furnish sufficient particularity to disciplinary charges is likely to result in a grave injustice.

Van Wyk v Midrand Town Council & Others (supra) 188-9;

Mhlambi v Matjhabeng Municipality v Another (supra).

In Mhlambi's case, Musi J said:

"To be able to prepare oneself for a hearing, be it a court trial or a disciplinary hearing, is an ingredient of the right to a fair hearing, for without proper preparation one's capacity to defend oneself is compromised."

39. In the case of **Rudolph v Mananga College (I.C. Case No. 94/2007)** this court did not require an employee to wait until the termination of a disciplinary enquiry before challenging the refusal of a chairman to recuse himself. We stated (at p.16) that the court has often expressed its reluctance to interfere with the prerogative of an employer to discipline its employees or to anticipate the outcome of an incomplete disciplinary process. At the same time, the court will interfere to prevent a procedural unfairness which may cause the Applicant irreparable harm.

40. In **Van Wyk v Minister of Correctional Services & Others (2005) 26 ILJ 1039 (E) at 1049** the court was prepared to review and set aside a decision to refuse legal representation because legal representation by a lawyer was necessary for a procedurally fair disciplinary hearing. However in **Chamane v The Member of the Executive Council for Transport, Kwa-Zulu Natal & Others [2000] 10 BLLR 1154 LC** it was held that there was no basis for the submission that a grave injustice would occur if the decision of the chairperson to disallow legal representation was not reviewed. Lyster

J said that the employee was at liberty to challenge the decision of the chairperson once the proceedings were finalized, but it was not appropriate that he does so at an interlocutory stage.

41. We do not agree with this conclusion of Lyster J in Chamane's case :

41.1 In circumstances where procedural fairness requires that an employee be legally represented but such representation is denied, *"it would follow inexorably that the ensuing enquiry would be vitiated at its inception and that all subsequent phases of the disciplinary proceedings would suffer the same fate."*

-per **Marais J.A. in Hamata Peninsula Technicon Internal Disciplinary Committee and Others (2002) 23 ILJ 1531 (SCA) AT 1533 D.**

41.2 In our view, an unfair procedural decision which has so "*pervasive and fatal an effect upon all phases of the disciplinary proceedings"* (**Hamata (supra) at 1533A**) qualifies as one of those rare cases where grave injustice might result if the decision is allowed to stand.

41.3 The potential injustice arising from an unfair denial of legal representation is certainly no less than the injustice that might result from lack of particularity in the charges so that the employee does not know what case he has to meet, or

> the prejudice that might result from a chairperson's improper refusal to recuse himself. In none of these exceptional cases would justice be served by compelling the employee to go through a disciplinary enquiry irremediably flawed *ab initio.* The option of seeking relief once the disciplinary proceedings have been finalized is not an effective alternative to an immediate intervention by way of interdict or review, since the consequences of a dismissal can rarely be fully redressed by compensation, and reinstatement is frequently rendered impracticable because of delays in litigation and altered circumstances.

42. In the premises, we are of the view that the court may entertain the application at this stage, notwithstanding that the disciplinary enquiry has not been finalized.

43. The court will not come to the assistance of the Applicant unless it is satisfied that the chairman did not exercise his discretion judiciously.

44. The duty resting on the chairman of a disciplinary enquiry to exercise his discretion "judiciously " means that he is required to listen to the relevant evidence, weigh it to determine what is probable, and reach a conclusion based on the facts and the law. The court cannot interfere with his decision where he has applied his mind to these matters, even if the court disagrees with his conclusions on the facts or the law. No more is required of the chairman than

that he should properly apply his mind to the matter. However, where he fails to properly apply his mind at all to one or more of the issues he commits a gross irregularity, because then he has failed entirely to perform the function which was required of him. He has failed to exercise his discretion judiciously. His decision will then be reviewable.

National Transport Commissioner & Another V Chetty's Motor Transport 1972 (3) SA 726 A at 735 F.

Nationwide Car Rentals v Commissioner, Small Claims Court Germiston & Another 1998 (3) SA 568 (W).

45. In the present matter, we are of the view that the 2nd Respondent failed to apply his mind at all to one of the most important factors raised by the Applicant in her plea for legal representation: namely, whether an employee of the 1st Respondent can satisfactorily represent her interests at the enquiry when the Managing Director is involved in the charges.

46. The Applicant's representative raised the issue squarely at the preliminary hearing and the following exchange is recorded in the minutes:

"*REP* *As we mentioned that the complainant in this matter is the Chief Executive Officer and I think it would place even those officers even if they were able to represent her in a very difficult position having to face the Chief Executive Officer in proceedings of such a serious*

nature.

CHAIRMAN: *Is he the complainant?*

REP *The charges emanate from the Managing Director and in fact in one of the charges is expressly referred to in relation to the traveling claims that were allegedly submitted to him which is not [only] making him a complainant in respect of that charge but a witness as well."*

47. The Bank's representative Mr. Nel confirmed that the Managing Director *"has been involved in the charges and will act as witness in some of the incidents."* Asked by the chairman if the Managing Director is the complainant, Mr. Nel states that he "*acts as the employer. We are here to represent the Bank's case but I think that having signed the letter he is probably the complainant."*

48. It is a reasonable concern deserving of consideration that a fellow-employee may be reluctant to represent the Applicant in defending charges initiated by his/her Managing Director; inhibited in cross-examining the MD; and intimidated by the prospect of having to confront the MD and contradict his evidence.

49. Instead of addressing this concern, the chairman confined his deliberation to the semantic question whether the complainant is the Managing Director or the Bank. Having concluded that it is the Bank, he did not apply his mind any further to the real issue of concern.

50. The chairman was referred at the preliminary hearing to the judgement of the Industrial Court in the case of **Simelane v National Maize Corporation** (supra). This judgment sets out by way of guidance certain considerations to be taken into account by the chairperson of a disciplinary enquiry in deciding whether legal representation or other external representation is indispensable to ensuring a procedurally fair hearing. One such consideration is expressed as *"whether an employee of the organization can satisfactorily represent the interests of the Applicant in circumstances where the Chief Executive Officer is the complainant."* The chairman misdirected himself by confining himself to distinguishing this guideline - *"the complainant here is not the CEO, which is what they say in the National Maize Corporation judgement "* (Record page 82) – instead of addressing the relevant issue of concern highlighted by the guideline, namely the inherent difficulties that arise when the Chief Executive Officer is directly involved in disciplinary charges, whether as complainant / initiator or witness.

51. The Bank's Global Guidelines on Disciplinary Process and Procedure afford the employee the right to be assisted by a work colleague, and the Applicant argued for legal representation at the preliminary hearing *inter alia* because she has few work colleagues of equal status and those available are disqualified for one reason or another. The chairman dealt with this issue in his ruling by stating that the Applicant *"is a member of a bigger family called the Standard Bank Group within which there are plenty of her colleagues at her level and above that are eligible to represent her."* (Record page 81).

52. We do not think that colleagues employed by different corporate entities in foreign countries albeit in the same banking group can realistically be considered as “work colleagues”.

53. The possibility of representation by an employee from a bank in the Standard Bank Group outside Swaziland is therefore not apparent from the Group Guidelines. This possibility was not suggested during argument at the preliminary hearing, neither by the chairman nor the Bank’s representative. The Applicant was given no opportunity to address the enquiry on the feasibility of this proposition. As appears from her affidavit in the present application, she has a number of grounds for objecting to the proposal, but the chairman made his ruling without giving her a chance to canvas the issue. In our view, this was a serious irregularity which prejudiced the Applicant at the preliminary hearing.

54. The Applicant has queried the impartiality of the 2nd Respondent as chairman of the disciplinary enquiry due to his participation in the meeting that took place after the enquiry was adjourned and his offer to broker a settlement. According to the Applicant, the chairman is employed by the Standard Bank Group as Senior Manager, Industrial Relations for Standard Bank Africa. In our view it was not irregular for senior managers of the banking group to attempt to resolve a sensitive disciplinary matter and to seek to avoid holding a formal enquiry. This was in the interests of the Applicant as well as the Bank. There is no suggestion that the discussion encroached on the merits of the disciplinary charges or that any undue pressure was exerted on the Applicant. We do not consider that the attendance or conduct of the chairman at this meeting gives rise to a reasonable suspicion of bias.

55. Nevertheless, for the reasons set out in paragraphs 46 – 54 above, we find that the 2nd Respondent did not exercise his discretion judiciously at the preliminary hearing on the question of legal representation. His decision must be set aside and the question considered afresh in the light of all the facts, including the new facts canvassed in the affidavits before court. The court is in as good a position to make a fresh decision as the chairman on the facts, and in our view it is fair and proper that we should determine the issue instead of remitting it to the chairman for reconsideration. It may be difficult for a lay person to disabuse his mind of his previous judgment, to give proper weight to factors which he previously overlooked, and to revisit issues on which he has already pronounced. Moreover the 2nd Respondent has suggested that he may recuse himself in the event that the Applicant objects to his continuing to act as chairman, and it is not in the interests of expediting the stalled disciplinary process that the preliminary issue of legal representation may have to be considered *de novo* by a new chairman.

56. The Applicant is justified in viewing the charges against her in a serious light, and regarding her employment as being in jeopardy if the charges are proven against her at the hearing. It is not surprising then that she wishes to be properly represented at the hearing.

57. The Global Guidelines provide for representation by a trade union official or a work colleague when the alleged misconduct is of such a nature that it may lead to dismissal. The Applicant is not eligible for

membership of a union or staff association because of her status as an executive manager. It remains to consider whether she can be represented by a work colleague.

58. The pool of work colleagues of equal status to the Applicant is limited to senior managers who are members of the Bank's Executive Committee ('Exco'). The Applicant has given reasons why none of her work colleagues on Exco can represent her. We find these reasons convincing. Two of the Exco members are also members of the board of directors of the Bank, and they in fact signed the board resolution to oppose the present application. These members are answerable to the Bank's shareholders and board of directors and are closely identified with the Bank as employer. It would be awkward and inappropriate for either of them to represent an employee in disciplinary proceedings instituted by the Bank. The Head of Risk was involved in preparing the disciplinary charges. The Head of Finance is on maternity leave. The Applicant is not on good terms with the Head of Credit, and she has no confidence in the Head of Treasury to adequately represent her. The Head of Operations refuses to represent her. The Head of Marketing is not a member of Exco. He is of lower status than the Applicant, but more importantly he is presently acting in the place of the Applicant as Head of Human Resources. As such he is responsible for disciplinary matters at the Bank, and it would be anomalous for him to represent the Applicant.

59. The Applicant also submits that no employee of the 1st Respondent can satisfactorily represent her interests at the enquiry in circumstances where the Managing Director is involved in certain of the charges and shall have to be cross-examined as a witness. This

is a valid concern. Members of Exco work far more closely with the MD than other employees at the Bank, so in addition to the natural reluctance of an employee to confront his/her 'boss' there is also the inhibiting factor of a close personal relationship.

60. In our view the Applicant has shown on a balance of probabilities that satisfactory representation cannot be obtained from amongst her work colleagues at the Bank.

61. The 1st Respondent submits that the Applicant is familiar with disciplinary matters and procedures and the requirements of labour law by virtue of her qualifications and experience in the human resources field. There is therefore no reason for her to feel intimidated by the disciplinary charges or proceedings at the enquiry. The implication is that the Applicant does not need representation to the same extent as, say, a less sophisticated employee. This may be so, but the right to representation is a central aspect of fairness, in respect of unsophisticated employees and senior managers alike. (See **Bassett v Servistar (Pty) Ltd (1987) 8 ILJ 503 (IC)** and the remarks of Edwin Cameron in his article **The Right to a Hearing before Dismissal – Problems and Puzzles (1988 ILJ p147)**). The benefits of representation go beyond the availability of technical advice and assistance to include moral support and objective guidance. As the aphorism goes, "a lawyer who represents himself has a fool for a client." The Applicant has a right to representation, and if such representation cannot be found within the bank, then other options must be considered.

62. As previously stated, we do not consider that employees of foreign banks within the Standard Bank Group can properly be described

as “work colleagues” of the Applicant. The Bank is prepared to go outside its own guidelines by permitting representation from within the broader Standard Bank “family”. This is a tacit acknowledgment of the difficulty of finding a suitable representative amongst the Applicant’s colleagues at work.

63. There is no reason on the evidence to believe that the Applicant enjoys anything more than a superficial acquaintance with her foreign human resources counterparts. Recruitment of a representative from these counterparts will present obvious logistical problems in arranging transport and accommodation, presumably at the Applicant’s expense. However, the real practical difficulty lies in identifying a competent person of independence and equal status, with suitable character and experience in labour relations, who is moreover willing to undertake such a responsibility. In our view it is unreasonable to expect the Applicant to randomly choose a representative from amongst her foreign counterparts, nor would it be proper for the bank without her consent to choose a representative on her behalf. The Bank has a legitimate interest in keeping disciplinary proceedings “within the family” and this policy must be given due weight, but this does not mean that the Applicant can be compelled to entrust the defence of her livelihood to a virtual stranger.

64. Representation by a group employee from outside Swaziland does not appear to us to be a realistic proposition. In that case some form of expert representation is the only reasonable alternative to representation by a work colleague. The court mooted the idea of representation by SASBO, but the Applicant is not a member of this organization, and it is unlikely that SASBO will avail its services to a

non-member. Also, labour laws and practices in Swaziland are not the same as those in South Africa. If an outsider is to represent the Applicant, then why not a local lawyer who has been trained for the task?

65. It has been said that lawyers make the disciplinary process legalistic and expensive. They are accused of prolonging the proceedings and causing delays due to their unavailability. On the other hand, lawyers usually do ensure a proper ventilation of the issues and the observance of fair procedure. Whilst allowing legal representation may place small employers at a disadvantage because of additional cost and time factors, we do not believe a multinational corporation such as the 1st Respondent will be unfairly disadvantaged or prejudiced.

66. The charges against the Applicant appear to be straightforward but as is stated by John Grogan, *"the presiding officer cannot know how the hearing will unfold, or what issues it might throw up. It may accordingly be perilous to hold at the outset that a matter is so "simple' that legal representation is not required."* **(Grogan: Is there a Lawyer in the House? Legal Representation in Disciplinary Proceedings (2005) 21 Employment Law Part 3 page 8)**. The 1st Respondent certainly considered the charges to be sufficiently complex to warrant the involvement of two forensic managers. If the issue of the chairman's recusal is not resolved by consensus, a possible recusal application will certainly justify the involvement of a lawyer – see **Van Eyk v Minister for Correctional Services and others [2005] 6 BLLR 639 (EC).**

67. In the article mentioned above (**Is there a Lawyer in the House? Legal Representation in Disciplinary Proceedings)** Grogan analyses recent case law and concludes that "*it will now take a bold presiding officer to dismiss an application for legal representation in disciplinary hearings in which employees are charged with any but the most trivial misconduct".* We do not believe our law has evolved to this extent. It is true that the Constitution of Swaziland now confers a right on public service employees to legal representation at disciplinary enquiries before their respective service commissions (section 182 of the Constitution), but in the private sector the general rule still applies - there is no general right to legal representation, but such representation should be permitted in exceptional circumstances where it is necessary to ensure a procedurally fair hearing.

MEC, Department of Finance, Economic Affairs & Tourism, Northern Province v Mahunani (2004) 25 ILJ 2311 (SCA) AT 2312.

68. We are of the view that the Applicant should be permitted legal representation if she is to have a procedurally fair hearing. We accordingly grant an order in the following terms:

(a) The decision of the 2nd Respondent that the Applicant is not entitled to legal representation at the disciplinary enquiry is set aside.

(b) The Applicant is permitted to be represented by a lawyer at the disciplinary enquiry.

(c) The Respondents shall pay the costs of the

application.

(d) The taxing master shall not be bound by the tariff of costs with respect to the costs of the Applicant's counsel, and may allow such larger sums as he/she thinks reasonable.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT