

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 386/07

In the matter between:

JAMES BOND

APPLICANT

And

YKK SOUTHERN AFRICA (PTY) LTD

1st RESPONDENT

LISA METZER

2nd RESPONDENT

CORAM:

NKOSINATHI NKONYANE : JUDGE

DAN MANGO : MEMBER

GILBERT NDZINISA : MEMBER

FOR APPLICANT : Z.D. JELE

FOR RESPONDENTS: M. SIBANDZE

JUDGEMENT 24.08.07

[1] This is an urgent application brought by the applicant against the respondents for an order:

"1. Dispensing with requirements of the Rules of court relating to service, forms and time limits, and permitting that this matter be heard as one of urgency.

2. That a *rule nisi* do hereby issue, calling upon the respondents to show cause on a date and time to be determined by the above Honourable Court why an order in the following terms should not be made.

2.1. That the 1st and 2nd respondents be and are hereby interdicted from proceeding with a disciplinary hearing scheduled for Johannesburg on Tuesday the 21st August 2007 against the applicant pending the finalization of this application.

2.2. That the disciplinary hearing, preferred by the 1st respondent against the applicant be held in Swaziland.

2.3. That the decision of the 2nd respondent to the effect that the disciplinary hearing be held in Johannesburg, be and is hereby set aside.

2.4. That the 2nd respondent be and is hereby removed as chairperson of the disciplinary hearing.

3. That the respondents pay the costs of this application.

4. Further and/or alternative relief."

[2] The application is opposed by the 1st respondent.

[3] An employee charged with misconduct is entitled to a fair disciplinary hearing. The components of a fair disciplinary hearing include, *inter alia*, the right to be informed of the charges in proper time for one to prepare himself, the right to appeal, the right to be represented, especially in serious charges that may result in summary dismissal, the right to call witnesses and the right to cross-examine the

employer's witnesses.

[4] The employer has a right to prefer charges against any employee who has or is suspected of having committed any misconduct. The right to hire, discipline and dismiss an employee is the sole prerogative of the employer.

[5] In the present case the applicant stands to face a disciplinary hearing scheduled to be held in Johannesburg, South Africa. He has approached this court for an order that the disciplinary hearing be held locally.

[6] The applicant was employed by the 1st respondent in May 1984. He has been in the continuous employment of the 1st respondent since that period. He is currently holding the position of Export Manager responsible for regional sales in Africa and overseas, but excluding South Africa, Lesotho, Namibia, Zimbabwe, Botswana and Malawi. His superior is Mr. Lester Davies who is also based locally in Matsapha. From an operational point of view the applicant reports to Mr. Andrew Taylor who is based in the Johannesburg branch of the 1st respondent.

[7] The applicant is currently on suspension with full pay.

[8] The chairperson of the disciplinary hearing has been appointed. She is the 2nd respondent and is based in Johannesburg. She is an Attorney and the hearing is scheduled to be conducted in her offices.

[9] The applicant wrote a letter addressing it to Mr. Taylor and indicated that he will not attend the disciplinary hearing if it is to be held in Johannesburg and that he was willing to attend a hearing held in Swaziland. In that letter the applicant also requested to have legal representation.

[10] These issues were referred to the 2nd respondent for her determination. She ruled in favour of the applicant on the issue of legal representation and ruled against him on the question of the venue. The applicant said he did not know that these issues were going to be referred to the 2nd respondent for her determination

and that had he known of that, he would have made elaborate submissions on the question of venue. He feels that as it is, he did not get an opportunity to make full submissions on that question. He now thinks that the 2ⁿ respondent will not be fit to preside over the hearing as she has had some contact with the 1st respondent without his knowledge. The applicant says it is clear that no one is prepared to listen to him on the question of the venue thus he has approached the court.

On the question of perceived bias on the part of the chairperson, that issue can adequately be dealt with by the chairperson. The applicant is at liberty to raise that issue before the chairperson (See: **NDODA H. SIMELANE V. NATIONAL MAIZE CORPORATION (PTY) LTD (IC) CASE NO. 453/2006.**)

The court is being asked to address a very delicate question. The court must strike a balance between the right of the 1st respondent to decide where the venue shall be and the interests of the applicants and his right to a fair hearing.

The court in determining the questions raised in this matter will get guidance from the decisions of this court in the cases of **GRAHAM RUDOLPH V. MANANGA COLLEGE & ANOTHER (IC) CASE NO. 94/07** and that of **SAZIKAZI MABUZA V. STANDARD BANK OF SWAZILAND LIMITED & ERROL NDLOVU N.O. (IC) NO. 311/07** and the cases referred to therein. The court will also consider the principles of law raised in the South African case of

MANTZARIS V. UNIVERSITY OF DURBAN -WESTVILLE & OTHERS (2000) 5 LLO 459 (L.C.).

[14] The 1st respondent's arguments that the hearing be held in South Africa are as follows:

14.1. Practical considerations dictate that it be held in South Africa because all its witnesses are in that country.

14.2. There was no authority cited in court that a disciplinary Hearing cannot be held outside the country

14.3. It has not been shown that grave injustice would result if the hearing is held in South Africa.

14.4. It has not been shown that this is an exceptional case where the court may interfere with the discretion of the employer as to decide where the hearing would be held.

[15] On behalf of the applicant it was argued that;

15.1. The applicant is resident in Swaziland and is employed by a company that is based in Swaziland and therefore the laws of Swaziland should be applicable to his hearing.

15.2. His witnesses are based in Swaziland.

15.3. It is likely that new issues may arise during the hearing necessitating a quick rebuttal by means of evidence that is locally available.

15.4. He will need to call witnesses who are not employees of the 1st respondent and are not likely to agree to go to South Africa for a number of days.

[16] The court believes that all the parties involved want justice to be done. Justice in this matter will be seen to be done if both parties' witnesses are able to attend. The court cannot know at this stage what evidence will be led at the hearing. But clearly, should it happen that during the hearing certain evidence is led against the applicant which requires rebuttal by the applicant and the applicant is unable to do so because he could only have access to that piece of evidence if he is in Swaziland, it cannot thereafter be said that justice has been done.

[17] The 1st respondent can argue that the applicant will be free to ask for postponement should the need arise. We do not know how many times the applicant will want to do that, if at all. If the applicant does apply for postponements

because he wants to access information in Swaziland, he will be at the mercy of the chairperson. The chairperson may, using her discretion, decline to grant the application. Will the applicant come out of that hearing feeling that justice has been done?

[18] The charges against the applicant involve acts of dishonesty when dealing with certain companies in the course of his duties. That clearly shows that he will need those individuals from those companies in his defence.

[19] It was argued that the applicant was not candid to the court as he did not disclose the names of the witnesses. We do not think that that should be held against the applicant. It may well be that he will need to call some of the witnesses depending on the evidence that will be led against him at the hearing.

[20] It was further argued on behalf of the 1st respondent that there will be no prejudice on the part of the applicant as the 1st respondent has undertaken to pay for the travel and accommodation costs of the applicant's witnesses and attorney. The charges against the applicant are serious. They involve acts of dishonesty. If the applicant is found guilty, can it be said that the hearing was not tainted when one takes into account that his accuser spent his money to have the applicant's witnesses and attorney to come to the hearing?

[21] Attorneys are guided by ethical considerations in carrying out their duties. No attorney worth his salt would want to attend a hearing of his client knowing that it is his client's accuser who will finance his travelling expenses. The applicant in this case will have to compromise and look for an attorney who is not his choice, but one who is desperate and is prepared to go against the dictates of the legal profession. Further, the 1st respondent says it will foot the bill for traveling and accommodation expenses only. That clearly means that the applicant will cater for the food and other expenses of his witnesses and attorney. That could be avoided if the hearing were to be held in Swaziland. Why should the applicant be out of pocket when there are simple ways of avoiding that?

[22] There was no evidence or any suggestion that there are no suitable candidates

in Swaziland who could be appointed to chair the hearing. The only reason proffered by the 1st respondent why the hearing should be held in South Africa was that its witnesses and the chairperson are based there.

[23] The future of the applicant is at stake. If he is found guilty, he might lose his job. He is therefore the most important person in the whole arrangement. According to him he will feel most comfortable if the hearing is held locally.

[24] It is the view of the court that the rights of the accused to a fair hearing are paramount to the considerations of convenience of the 1st respondent. The court therefore comes to the conclusion that taking into account all the circumstances of this case there are compelling factors to justify a deviation from the norm.

[25] Taking into account all the above observations and all the circumstances of this case the court will make the following order;

1. that the disciplinary hearing instituted by the 1 respondent against the applicant be held in Swaziland.
2. no order for costs is made.

The members agree.

**NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT**