

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.268/08

In the matter between:

DESMOND NKOSINATHIMAPHANGA

Applicant

And

**SWAZILAND NATIONAL COUNCIL OF
ARTS AND CULTURE**

Respondent

CORAM:

NSIBANDE S.: ACTING JUDGE

MANANA N. : MEMBER

NKAMBULE A.M.: MEMBER

FOR APPLICANT: M. MKHWANAZI

FOR RESPONDENT: S. MDLADLA

JUDGEMENT - 22/10/2008

[1] The Applicant initially launched an application before court on 12 June 2008 in which he sought the following order;

"1 Dispensing with the normal requirement of the rules of court relating to notices and service of documents and that this matter be heard as one of urgency;

2. Setting aside the suspension of the Applicant and a declaration that same is null and void ib initio.

3. Reinstating the Applicant to his position as Chief Executive Officer of the Respondent forthwith.

4. Costs

5. *Further and/or alternative relief. "*

[2] The matter was postponed on numerous occasions until the 23rd July, 2008 when it was removed from the roll to enable the parties to negotiate a settlement thereof. Having failed to settle, the matter was set down for argument on 14th August, 2008 wherein it was again postponed to 25th August, 2008.

[3] However, before the matter could be argued, the Applicant launched on 19th August, 2008 a new application in terms of which an order in the following terms was sought;

"1. *That the rules of court relating to forms and service of notices and documents be dispensed with and this matter be heard as one of urgency.*

2. *That pending final determination of this application, a rule nisi do hereby issue calling upon the Respondent to show cause why an order in the following terms should not be made final;*

2.1. interdicting and restraining the Respondent from conducting the pending disciplinary proceedings against the Applicant.

2.2. costs as between attorney and own client scale (sic).

3. That prayers 2.1 operate with immediate effect pending final determination of this application.

4. Further and/or alternative relief. "

[4] What transpired, when the matter was heard on 19th August, 2008 was that on 13th August, 2008, the Applicant was served with a letter advising him that his suspension pending investigation had fallen away and that he was now suspended pending finalization of a disciplinary hearing. Indeed by letter dated 12th August, 2008, Applicant was invited to a disciplinary hearing to be held on 20th August, 2008. The charges and/or allegations he would have to answer at the hearing were contained in the said letter.

[5] The initial application, having been instituted for purposes of setting aside the suspension pending investigation, was obviously overtaken by events and the court will concern itself with the 2nd application launched on 19th August, 2008.

[6] The Applicant is the Chief Executive Officer of the Swaziland National Council of Arts and Culture. He assumed this position on 19th November, 2001 on a renewable two year contract. The contract has been renewed since then and a copy thereof is attached to the papers filed in Court.

[7] The Applicant was initially suspended from executing his duties and functions as Chief Executive Officer of the Respondent on 7th February, 2008. Such suspension would be effective pending investigations against him for gross misconduct. The said letter was issued by the chairman of Respondent's executive board.

[8] On 12th August, 2008, the Respondent wrote to Applicant inviting him to appear before a disciplinary tribunal. The charges and/or allegations leveled against the Applicant were set out in that letter.

[9] Another letter was addressed to the Applicant dated 13th August, 2008 advising him that the investigations against him were completed and that his suspension pending the investigation had fallen aside. He was informed that he was now being suspended pending the finalization of disciplinary hearing against him.

[10] The letters dated 12th and 13th August, 2008 were both issued by the vice-chairman of the Respondent's executive board. The Applicant's complaint is that because it is the vice-chairman of the executive board that has issued these letters, his suspension is irregular and therefore liable to being set aside. He argues that the power to discipline him lies with Council and not with the executive board and that the board is exercising powers it does not have and should therefore be interdicted from proceeding with the disciplinary action it has commenced. It is Council rather than the Board that ought to suspend him and call him to a disciplinary hearing.

[11] The Applicant's contention is that his contract of employment refers to the Council as being his employer and excludes the board. Further **article 6.4.1** of his contract of employment states categorically that it is council that may suspend him pending a disciplinary investigation. **Article 6.4.1** reads:

"Pending a disciplinary investigation, the Council may suspend the contractee, if he is suspected of having committed a material act of misconduct, including the breach of the code of ethics which if proved would justify the termination of this contract. "

Further that **article 7.18** of the Respondent's constitution vests the power to discipline on Council and that no provision is made in the constitution for Council to delegate these disciplinary powers to the board or to any other person. In any event, it is argued even if Council could delegate these powers, there is no evidence that it has done so. Finally the Applicant argues that the powers and functions of the Board as set out in the constitution do not bestow upon it disciplinary authority over him.

[12] The Applicant referred the court to the case of **THOBILE BHEMBE VS SWAZILAND GOVERNMENT, MINISTER FOR EDUCATION, PRINCIPAL SECRETARY MINISTRY OF EDUCATION AND THE TEACHING SERVICE COMMISSION (I.C.) CASE NO.5/2001** for the principle that the court could interdict the internal disciplinary process of the Respondent in view of the fact that an unauthorized person was carrying out the disciplinary process.

[13] The Respondent's argument was that its constitution establishes an executive board which is responsible for the leadership of the Respondent and that the Respondent acts through this board. The responsibility to discipline the chief executive officer lies with the board as an executive board.

[14] The Respondent further argued that the contract of employment recognizes that the council acts through the board by using the words board and council interchangeable throughout the document. An example of this is in articles 5.3 and 5.4 of the contract which read thus;

ARTICLE 5.3 - *"The board shall notify the contractee of the intended renewal or otherwise of the contract one month before the expiry of the contract"*

ARTICLE 5.4 - *"where council omits to give the notice in article 5.3 of this contract the contract will be deemed to be renewed automatically. "*

[15] The Respondent argued that the board was the proper body to discipline the Applicant, in the exercise of its executive function and that being an executive board, there would have

to be a provision in the constitution limiting its executive powers if the intention was that it not have exercise such over the Applicant.

[16] The constitution of the Respondent establishes the executive board by article 10 thereof.

ARTICLE 10.1 reads:

"There is hereby established an Executive Board Council which shall be responsible for the leadership, vision and policy implementation of the policies of the Council... "

[17] The powers and functions of the board are spelt out in article 11 of the constitution and do not specifically include the power to suspend and/or discipline the chief executive officer.

[18] Article 7.18 of the Respondents constitution relied upon by the Applicant for the proposition that it is the council that is vested with authority to discipline reads thus:

"The Council shall have the power to exercise disciplinary powers in cases of breach of the provisions of this constitution. "

[19] The Court, having had occasion to read the Respondent's constitution is of the view that article 7:18 refers to issues of discipline relating to members of council who breach the constitution. The charges leveled against the Applicant relate to breaches of his employment contract and not the constitution. It can not be said in our view, that this constitutional clause vests power to discipline the Applicant on the Council.

[20] One may add that in terms of the Respondent's constitution council is composed of members registered in terms of the constitution. Each member appoints two representatives to Council on an annual basis and such appointments are to be submitted to the Chief Executive Officer, in writing before a meeting commences. Council is obliged to hold two meetings each year, being an Annual General meeting in July and a semi-annual general meeting in November. All other meetings, called extra-ordinary general meeting -are called by written request of at least 50% of the members.

[21] The Board, on the other hand is obliged to meet at least once every two (2) months. The executive nature of the board means that it has managerial responsibility in the business of the Respondent. It is the decision making body of the Respondent.

[22] **Article 15** of the Respondent's constitution provides that:

"There shall be a Chief Executive Officer of Council who shall be nominated by the Board in accordance with the rules and procedures of council and who shall be appointed by the Minister in terms of section 8 of the Public Enterprises (Control and Monitory) Act 1989. "

[23] **Article 6:1** of the Applicant's contract of employment states that the board, *"may recommend to the Minister for Home Affairs to terminate this contract for:*

6.1.1. serious misconduct

6.1.2. incapacity

6.1.3. material violation of the memorandum of agreement, Council's constitution or of any articles guiding the corporate government in respect of the Council. "

[24] In the court's view, the above clauses presuppose that the board in exercising its power to nominate a Chief Executive Officer to the Minister will interact with a potential chief executive officer and interview him to establish his suitability for the post before it can nominate him for appointment. Also where the Chief Executive officer is alleged to have committed some serious misconduct the Board will be obliged to establish the serious misconduct alleged. In this respect a finding that the chief executive officer has committed such misconduct would have to be made through a fair disciplinary enquiry at which the accused chief executive officer would have an opportunity to defend himself.

[25] Further, in terms of the contract of employment it is the Board that must notify the contractee of an intention to renew or otherwise, the contract. To do so the Board would have to consider the merits of renewal or otherwise of the contract and take the appropriate decision.

[26] It is the court's finding that on a reading of the Respondent's constitution and the contract of employment, the board has executive authority over the Applicant and has the authority to institute disciplinary proceedings against him including suspending him. It would be absurd, in the courts view, to give the board the power to nominate the chief executive officer and also to recommend the termination of his contract without the power to discipline him.

[27] **Article 6.4.1** of the employment contract represents, in the courts view, an example of the inelegant manner in which the contract was drafted. As stated earlier the contract uses Council and Board interchangeably. The Respondent's constitution is also drafted in this unsatisfactory manner.

[28] Taking into account all the above observations and all the circumstances of this case the court will dismiss the Applicant's application. There will be no order for costs.

The members agree

S. NSIBANDE
ACTING JUDGE