IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 683/09

In the matter between:

BONGINKOSI DLAMINI **Applicant**

And

SIKHUMBUZO SIMELANE CONCILIATION MEDIATION ARBITRATION COMMISSION **1st Respondent**

2nd Respondent

CORAM:

S. NSIBANDE J.YENDE N. MANANA PRESIDENT **MEMBER** **MEMBER**

MR. L. MNDZINISO MR. S. SIMELANE **FOR APPLICANT FOR RESPONDENT**

RULING ON POINTS OF LAW - 21/12/09

1. The Applicant has applied on a certificate of urgency for an order:

"1.1 Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this matter as an urgent one.

1.2 *Staying the directive by the chairperson to submit mitigating factors on the 11th December 2009.*

1.3 *Staying the execution of the decision by the chairperson to formulate his recommendations and forwarding them to the 2nd Respondent on or before 14th December 2009.*

1.4 *Directing the 1st Respondent to allow the Applicant to make oral closing submissions in the on going disciplinary hearing between the 2nd Respondent and the Applicant.*

1.5 *Alternatively declaring the factual findings of the 1st Respondent on the on going disciplinary heahng between the 2nd Respondent and the Applicant and which he chairs, null and void and of no force or effect pending the oral submissions to be made by the Applicant.*

1.6 *Directing that prayers 1.2, 1.3 and 1.4 above operate as a rule nisi with immediate and interim effect returnable on a date to be determined by this honourable Court.*

1.7 Granting Applicants the costs of this application.

1.8 Granting Applicant any further or alternative relief."

2. It is common cause that the Respondent was employed by the Applicant on or about September 2005 as a driver/messenger and that on 22nd April 2009 he was charged with various counts of misconduct and called to attend a disciplinary hearing on the 6th and 7th May 2009. In the meantime he was suspended on full pay.

3. It is common cause also that the Chairman of the disciplinary hearing the 1st Respondent issued his factual findings on the 9th December 2009 and pronounced the Applicant guilty on all four charges he faced. Having delivered his verdict, the 1st Respondent then called on the Applicant and the 2nd Respondent to file written submissions on mitigating and aggravating factors (as the case maybe) no later than 4.30 p.m. on Friday 11th December 2009,so that he could finalise the hearing by making his recommendations to the 2nd Respondent.

4. The Applicant complains that by being directed to file written submission on mitigating factors he is being denied the opportunity to express himself more clearly as he would if he were to give oral submissions of the mitigating factors. He submits that the evidence in mitigation is so much more critical given the fact that the case was closed before he had called all his witnesses and the Chairman's factual findings rendering four verdicts of guilty were delivered without Applicant being given an opportunity to make closing submissions. He now stands to be dismissed and it is crucial that he is heard properly on mitigation.

5. Applicant complains further that he was not allowed to make closing submissions following the closing of the case. Applicant states that he was advised

to file written closing submissions on 20th November 2009 but was unable to do so because his representative was bereaved. Applicant brought that fact to the 1st Respondent and further applied to make oral submissions to the 1st Respondent as opposed to written submissions. He suggested the 27 November 2009 as a suitable date for making the oral submissions. The 1st Respondent agreed to the oral submissions and also agreed to the date suggested by the Applicant. Unfortunately his letter dated 24th November did not reach the Applicant until the afternoon of the 27th November. By then it was too late to utilize the day.

6. Following the late arrival of the 1st Respondent's letter of 24th November the Applicant wrote to 1st Respondent seeking the rescheduling of the oral submissions and pointing out that the failure to utilize the 27th November was not due to any wilful default on his part but was due to the late arrival of the letter agreeing to the date. In the meantime 1st Respondent addressed a letter to the Applicant advising him that in 1st Respondent's view no useful purpose would be served by meeting for purposes of making oral submissions. 1st Respondent called for written submissions to be filed on or before 4:30pm on 7th December 2009.

7. Although Applicant wrote to 1st Respondent to complain about having to make written closing submissions it appears his letter did not get to 1st Respondent because 1st Respondent continued to issue his factual findings without receiving any submissions, written or otherwise, from the Applicant. Applicant's letter was faxed to the 2nd Respondent. 1st Respondent's factual findings were delivered on 9th December 2009.

8. Applicant received the factual findings which pronounced his guilt on all four counts he had faced. Applicant was also directed to file his mitigating factors in writing on or before 4:30pm on Friday 11th December 2009 failing which the 1st Respondent would *"formulate a recommendation based on labour law and industrial relations principles applicable in this matter and deliver same in writing before 4:30 pm on 14th December 2009."*

9. The Applicant complains, firstly that 1st Respondent formulated his findings without affording him an opportunity to make closing submissions; that Applicant's failure to appear on the 27th November 2009 was not out of his wilful default but caused by the late arrival of the letter confirming the date. Applicant applies that he be allowed to make the oral closing submissions alternatively for the court to set aside the factual findings pending closing submissions which must be delivered orally. Secondly Applicant complains having made his factual findings, 1st Respondent has now directed that submissions on mitigating factors be made in writing denying Applicant an opportunity to make oral submissions. Being unable to

address the 1st Respondent on these issues the Applicant has approached the Court for relief.

10. The 2nd Respondent opposes the application and has filed its answering affidavit in which it raises points *in limine,* namely ;

10.1 that the urgency relied upon by the Applicant is self-created because Applicant was aware as of 27th November that the 1st Respondent would proceed to make factual findings if closing statements were not made on that day yet he did nothing to safeguard his rights;

10.2 that this court has no jurisdiction to interfere in this matter since it is an on-going disciplinary matter;

10.3 that the Applicant seeks final interdicts whereas he has not made the necessary averments in his founding affidavits that would entitle him to final interdicts;

10.4 that the Applicant has not shown on his papers that 1st Respondent has failed to exercise his discretion judiciously and that therefore his decision should be set aside.

11. **URGENCY**

The Applicant bases the urgency of the application on the fact that the submissions on mitigating factors were to be filed on 11th December 2009, the 1st Respondent having already pronounced on Applicant's guilt without hearing his closing submissions. He fears that if he is not allowed to submit on mitigating factors orally, he will not be able to eloquently express himself in writing and the obvious result, in the circumstances is that 1st Respondent will recommend that he be dismissed. Respondent's point misses the fact the Applicant was given a day within which to prepare written submissions on mitigating factors and was further not given an opportunity to address the 1st Respondent on whatever difficulties he may have in making written submissions within the set time frames. In fear of having a recommendation made without his submissions on mitigating factors, the Applicant approached the court with haste. In our view the Applicant can not be faulted and in the exercise of our discretion we hold that there is sufficient reason to dispense with the usual procedures and time frames and hear the matter as an urgent one. In the circumstances the point regarding urgency is dismissed.

12. **JURISDICTION TO INTERFER IN AN ON-GOING DISCIPLINARY HEARING.**

The Respondent submits that the Applicant has not made out a case for the Court to interfere in an on-going disciplinary hearing and has not made averments in his founding affidavit to show that this is one of those rare cases that justify that the court should interfere.

13. It is now settled law that the Industrial Court may intervene in uncompleted disciplinary proceedings where grave injustice might otherwise result or where justice might not by other means be obtained.

(See **Sazikazi Mabuza v Standard Bank of Swaziland IC Case No. 311/05 ; Graham Rudolph v Mananga College IC Case No. 94/07; Lynette Groening v Standard Bank Swaziland Limited & Muzi Simelane N.O. IC Case No. 222/08).**

14. This Court has indicated further that it can also intervene in completed disciplinary proceedings so long as the employer has not acted upon the outcome of the disciplinary hearing by, for example, terminating the services of the employee. In the case of **Gcina Dlamini v Nercha & Sikhumbuzo Simelane N.O. IC Case No. 633/08** the Court stated that "/'f *would be extremely artificial to say that this principle* (that the court can intervene in uncompleted disciplinary proceedings) *applies only to uncompleted disciplinary proceedings, and the court cannot in any circumstances intervene to remedy a grave injustice in the proceedings once they have been completed."*

15. The Applicant's complaint as set out in his papers is that there has been a grave injustice perpetrated on him by the Respondents which resulted in 1st Respondent refusing to allow him to make closing submissions at the close of the case against him. Applicant complains further that the 1st Respondent's directive that he submit his mitigating factors in writing will result in grave injustice if allowed to stand because he is able to more eloquently express himself orally than in writing and should be allowed to do so.

16. In our view an accused employee's closing submissions as well as submissions in mitigation are an integral part of the right to be heard which itself is an ingredient of the right to a fair hearing. When an accused employee is denied the right to make closing submissions and his guilt is pronounced without such submissions having been made he is in effect denied the right to adequately defend himself and therefore denied the right to a fair hearing. As the Court stated in **Graham Rudolf v Mananga College (supra),** the Court will interfere to prevent a procedural unfairness which may cause the Applicant irreparable harm.

17. The potential injustice arising from an unfair denial of the right to be heard by refusing to hear an accused employee's closing submissions and also imposing on him a method of submitting mitigating factors is no less than the injustice that may arise from a refusal to allow legal representation. It renders the hearing irremediably flawed *ab initio* and there is no point in compelling an employee to go through such flawed proceedings.

18. In the premises we are of the view that this is one of those rare cases where a grave injustice might result if the 1st Respondents decision is allowed to stand. The Court will entertain the application at this stage.

19. The 2nd Respondent further complained that the Applicant had not made out a case for the interdicts he sought because he had not established a clear right to the relief sought nor had he demonstrated that he had no alternative relief.

20. We disagree with the 2nd Respondent. The right to a fair hearing is clearly established in our law. That right is compromised when the Applicant is not allowed to make closing submissions for unclear reasons and then forced to submit on mitigating factors in a manner not suitable to him and which is against standard practice.

21. Applicant has no alternative remedy in these circumstances. We align ourselves with the following words said by Dunseith P in the matter of **Sazikazi Mabuza (Supra) -** *"The option of seeking relief once the disciplinary proceedings have been finalised 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 impractical because of delays in litigation and altered circumstances."*

22. The Court can only come to the Applicant's assistance if it is satisfied that if it is satisfied that the chairman did not exercise his discretion judiciously. The Court cannot interfere where he has applied his mind to the relevant issues, weighed it to determine what is probable and reached a conclusion based on the facts and the law.

23. In the present case the court is of the view that 1st Respondent failed to apply his rnind to one of the most important factors raised by the Applicants. The failure of the oral closing submissions which should have been heard on 27th November 2009 cannot, by any stretch of the imagination be imputed on the Applicant. It falls squarely on the shoulders of the Respondents. Having agreed to oral submissions, it was incumbent on the Respondents to ensure that the Applicant was informed

timeously. They failed to do so and only got the letter confirming the date of hearing to him on the day of the hearing. That Applicant had suggested the date is neither here nor there; he was entitled to await confirmation of his suggested date in the event it was suitable to the Respondents.

24. The oral submissions were critical to the Applicants case given the fact that his case had been closed before he had finished leading his defence. Applicant pointed out squarely why he thought he should be allowed to make oral submissions but instead received the 1st Respondent's factual findings without any reference to his letter of 4 December 2009. It seems to us that the 1st Respondent considered the delays in finalizing the disciplinary hearing and wrongly attributed them to the Applicant even pointing out that the proceedings were delayed as a result of, among other things, litigation. It is common cause that Applicant is the only party that brought an application to Court in this matter.

25. Having failed to meet for oral submissions on 27th November 2009, the Applicant was given no opportunity to address the 1st Respondent on his objections to written submissions and why he did not appear on the set date. The 1st Respondent simply went ahead and formulated his factual findings without such submission. We consider that to have been a serious irregularity that prejudiced Applicant.

26. For these reasons we find that 1st Respondent did not exercise his discretion judiciously on the question of oral submissions. The decision to proceed and make factual findings must be set aside and the Applicant must be given an opportunity to make oral submission on closing his defence. The 1st Respondent is an attorney and will in our view be able to disabuse his mind of his previous judgement and to give proper weight to factors which he previously did not consider because of the lack of submissions by Applicant and to revisit issues on which he has already pronounced.

27. In the circumstances it is our view that the matter be remitted to 1st Respondent for purposes of hearing the Applicant and 2nd Respondent on closing submissions.

In the premises, the court makes the following order:

(a) The factual findings delivered by 1st Respondent on 9th December 2009 are hereby set aside.

(b) Applicant is to be permitted to make oral closing submissions at a date to be arranged by the parties.

(c) Respondents shall pay the costs of this application.

The members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT