IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 683/09**

In the matter between:

BONGINKHOSIDLAMINI **APPLICANT**

And

SIKHUMBUZO SIMELANE **1st RESPONDENT**

CONCILIATION MEDIATION AND
ARBITRATION COMMISSION **2nd RESPONDENT**

CORAM:

D. MAZIBUKO: **JUDGE**

A. M. NKAMBULE: **MEMBER**

M. MTHETHWA: **MEMBER**

MR. LWAZI MNDZINISO **FOR APPLICANT**
MR. ZWELI JELE **FOR RESPONDENT**

JUDGEMENT - 4th FEBRUARY 2010

1. The application before Court was brought on a certificate of urgency. The Applicant is an employee of the Respondent who is under suspension with pay pending finalisation of a disciplinary hearing. The 1st Respondent is the chairman of the disciplinary hearing. The second Respondent commonly referred to by the acronym CMAC is established in terms of section 64 (2) of Industrial Relations Act No.1 of 2000 as amended. The 2nd Respondent is the Applicant's employer.

2. According to Applicant a disciplinary hearing was instituted against him by 2nd Respondent about 22nd April 2009. Applicant was charged with various offences the details of which do not appear on the affidavit. Applicant has approached Court for relief on the following prayers;

> *"1. Dispensing with the normal provisions of the rules of this Honourable Court as relate to form, service and time limits and hearing this as an urgent one.*
>
> *2. Interdicting and restraining the 1st Respondent from proceeding with the on-going disciplinary hearing against the Applicant set to continue on the 12th January at 1600 hrs, pending the finalization of this application.*
>
> *3. That the 1 Respondent be and is hereby removed from Acting as Chairperson in the on-going disciplinary hearing of the Applicant*

4. That the 2nd Respondent be and is hereby ordered to appoint a new Chairperson of the on-going disciplinary hearing of the Applicant.

5. That the disciplinary hearing of the Applicant begins de novo under the Chairperson to be appointed under prayer 4 above.

4. Directing that prayers 2 above operate as a rule nisi with immediate and interim effect returnable on a date to be determined by this Honourable Court.

6. Granting Applicants the costs of this application at Attorney client scale against the Respondent.

7. Granting Applicant any further or alternative relief"

The matter is opposed by 2nd Respondent. An answering affidavit has been filed and the Applicant has also filed a replying affidavit. The 1st Respondent has filed a letter dated 15th January 2010 in which the 1st Respondent has stated that he will abide by the order of Court.

3. The Applicant argues that about the 9tn December 2009 the 1st Respondent as chairman of the disciplinary hearing pronounced a guilt verdict against Applicant in the same disciplinary hearing which is being challenged before Court presently. Upon finding the Applicant guilty of the charges preferred against him, the 1st Respondent thereafter invited Applicant and 2nd Respondent to make written submissions regarding sentence.

3.1. The Applicant was dissatisfied with the guilt verdict as well as the directive to file written submissions as opposed to oral submissions. The Applicant then filed an urgent Court application challenging the verdict and the directive regarding

written submissions. The application was successful. The Court set aside the guilt verdict and allowed the Applicant to make oral submissions. The Court further directed that the hearing should resume before the same chairman (1st Respondent) subject to some admonition directed towards the chairman. A written judgement on the matter was handed down under case 683/09 dated 21st December 2009.

3.2. The disciplinary hearing was to proceed as directed by Court. The 11th January 2010 was the date on which the hearing had been scheduled to proceed, but it did not. Instead, on that day the Applicant applied for the 1st Respondent to recuse himself from the hearing and that the matter should commence *de novo* before another chairperson. The 1st Respondent refused that application. Upon receipt of the response by 1st Respondent the Applicant approached this Court on an urgent application.

3.3. The Applicant argues that since the 1st Respondent pronounced the Applicant guilty in the disciplinary hearing on the 9th December 2009 (which verdict was set aside by Court), the 1st Respondent is now biased into thinking that Applicant is guilty and no amount of argument will persuade 1st Respondent otherwise. The Applicant is therefore prejudiced in that the continued disciplinary hearing is only a formality and that another guilt verdict is highly likely to follow. The Applicant believes that he will not get a fair hearing from 1st Respondent.

3.4. In opposition, the 2nd Respondent argued that the Applicant's fear of prejudice is baseless. When the Industrial Court handed down its judgement dated 21st December 2009, the Court had considered the same issue complained of. The

Court came to the conclusion that there is no danger of the 1st Respondent being influenced by the decision he had made earlier on the 9th December 2009 in which he pronounced a guilt verdict against the Applicant.

3.5. According to the 2 Respondent the Court applied its mind to the issue of prejudice when it ordered that the disciplinary hearing should proceed before the same chairman. Further that the Court directed the chairman to disabuse his mind of his previous judgement. It is the Court that directed the 1st Respondent to continue as chairman of the disciplinary hearing.

3.6. It was argued further that if the Court were to order the 1st Respondent as chairman to be removed from the hearing on the basis of his previous verdict on the matter, that order would amount to a review of the Industrial Court judgement of the 21st December 2009. The Industrial Court cannot review a judgement of another Industrial Court.

3.7. The Court agrees with the 2nd Respondent on this issue. The judgement of the Industrial Court dated 21st December 2009 clearly indicates that the Court did apply its mind to the issue of potential prejudice on the part of the 1st Respondent owing to the guilt verdict which 1st Respondent pronounced against Applicant on the 9th December 2009. On page 10 paragraph 26 the learned Sibandze JP states as follows;

> *"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."*

The Court thereafter referred the matter back to 1st Respondent for continued hearing. The Court was not required to decide on the recusal of the 1st Respondent in the matter before it. The Court however raised the issue *mero motu* as is it entitled to, and it made its judgment on the facts before it.

3.8 The Applicant has prayed that this Court should *inter alia* interdict the 1st Respondent from proceeding with the ongoing disciplinary hearing against Applicant. Further that the Court should order the removal of the 1st Applicant as chairman and have him replaced. The Applicant's prayers have the effect of contradicting the judgment of the Industrial Court dated 21st December 2009. We as a bench of the Industrial Court cannot make a judgment that is contrary to that of another bench of the Industrial Court in the same matter and on the same facts. If this Court were to do that it would be sitting as a review Court. As aforestated, the Industrial Court cannot review a decision of another Industrial Court.

3.9. If the Applicant is not satisfied with the judgement of the Industrial Court, the Applicant has a remedy to challenge that judgement before another Court of competent jurisdiction.

4. The Applicant's further complaint is that in the cause of the disciplinary hearing the 1st Respondent has on several occasions rejected his applications without reason. To support that allegation, the Applicant referred to an instance which allegedly took place in the cause of the disciplinary hearing wherein it is alleged the 2nd Respondent called an expert witness without giving the Applicant prior notice and reasons for calling the expert. According to Applicant the absence of prior notice to call an expert witness deprived him a chance to arrange evidence to challenge the alleged expert. Applicant

stated that he objected to the 2nd Respondent calling the expert witness but the 1st Respondent ruled against the Applicant.

4.1 The Applicant does not state the date it is alleged this incident took place. Further, the Applicant has not given the names and particulars of the alleged expert witness in his founding affidavit. There is no indication as to the nature of the evidence that was adduced at the hearing by the alleged expert if at all and how it damaged the Applicant's defence or strengthened the 2nd Respondent's case. If indeed the alleged expert testified, there is no indication as to why the Applicant did not ask for a postponement in order to prepare material for cross examination. In his replying Affidavit the Applicant referred to the alleged expert only as Mr. Richardson but did not give the required details as aforementioned. There is therefore insufficient material before Court to assist the Court in deciding the manner which the 1st Respondent exercised his discretion on this issue.

4.2 What makes matters worse is that the Applicant did not provide the Court with a copy of the proceedings of the disciplinary enquiry. The Court is therefore not in a position to ascertain the facts as alleged by Applicant and the basis on which the 1st Respondent exercised his discretion. The Court is unable to make a finding of fact without the benefit of the record. During his argument, the Applicant's counsel Mr. Lwazi Mdziniso was informed by Court that the record of the hearing is necessary to support this allegation. Notwithstanding, Counsel failed to make the record available. The Court is therefore not in a position to make a determination of fact on this issue.

5. The Applicant complains further the 1st Respondent ignored submissions and arguments that were allegedly made by his previous representative a certain Mr. Sipho Mnisi on some of *'the issues that go into the crux of the disciplinary hearing'.*

5.1. The affidavit does not state the alleged submissions and argument that were ignored and how that will affect his case at the hearing.

5.2. Since the record of the disciplinary hearing is not before Court the Court is unable to verify the allegations made by Applicant. Applicant has not stated the date/s in which he alleges the arguments and submissions were made.

5.3. The Applicant's former representative a certain Mr. Sipho Mnisi has filed a supporting affidavit dated 13th January 2010. In his affidavit Mr. Mnisi does not confirm the allegation made by Applicant concerning himself i.e. that he (Mr. Mnisi) made certain submissions and arguments which were ignored by 1st Respondent. Mr. Mnisi does not deal with this allegation at all.

5.4. The Applicant has therefore failed to provide evidence to support his allegation and the Court cannot come to his assistance.

6. The Applicant makes a further complaint against 1st Respondent as follows:

"The 2nd Respondent's Initiator, an admitted Attorney of this Honourable court and also a Legal Advisor of the 2nd Respondent, once communicated with my erstwhile Representative, Mr. Sipho

Mnisi, to the effect that he (2nd Respondent's Initiator) had agreed with the 1st Respondent to impose a verdict of "not guilty" on condition that I did not disclose serious corruption practices by the Manzini Senior Commissioner who is my Supervisor as her job would be stake", (sic)

6.1. The Applicant's former representative Mr. Sipho Mnisi has referred to this complaint in his affidavit as follows;

> *"I also confirm that at the commencement of the Applicant's disciplinary hearing, in May 2009, I was approached by Mr. Ndumiso Mthethwa, who the Initiator of the 2nd Respondent at the on-going disciplinary hearing against the Applicant, who advised me that he had spoken to the 1st Respondent, Mr, S'khumbuzo Simelane , to find the Applicant not guilty, on condition that I did not lead and the Applicant did not testify on the alleged corrupt practices by the 2nd Respondent's Senior Commissioner based in the Manzini Region, Ms Makhosazane Khoza, who also happens to be the Applicant's supervisor, as her job would be at stake." (sic)*

6.2 The Applicant argues that the 1st Respondent as chairman of the disciplinary hearing, has been compromised by entering into an agreement with Mr. Ndumiso Mthethwa (2nd Respondent's initiator) on matters that will affect the outcome of the disciplinary hearing. The 1st Respondent therefore lacks impartiality, independence and integrity.

6.3. Mr. Ndumiso Mthethwa has filed an affidavit in support of the 2nd Respondent's answering affidavit. Mr. Mthethwa has denied holding such a discussion with Mr. Mnisi. Further he denied holding such a discussion with the 1st Respondent. The affidavits of Mr. Mnisi and Mr. Mthethwa contradict each other. The Applicant does not say that he

witnessed the alleged conversation between Mr. Mnisi and Mr. Mthethwa. The Applicant was informed by his previous representative (Mr. Mnisi) about the alleged conversation. The Applicant therefore cannot give such evidence as it amounts to hearsay which is inadmissible. The Applicant does not state in his affidavit the date on which he was informed about the alleged conversation.

6.4. In his argument the current representative of the Applicant (Mr. Lwazi Mdziniso) informed the Court that the alleged conversation between Mr. Mnisi and Mr. Mthethwa was brought to his attention in January 2010. This was at the time when he was taking instructions to bring the present application before Court. He does not know when his client (Applicant) was notified about the alleged Mnisi/Mthethwa conversation.

6.5. In his affidavit Mr. Mnisi states that the alleged conversation between himself and Mr. Mthethwa took place in May 2009 at the commencement of the Applicant's disciplinary hearing. What the Court finds difficult to understand is the reason Mr. Mnisi kept such serious allegation a secret until January 2010. It is not clear why Mr. Mnisi allowed the hearing to continue yet he has information which indicates that the 1st Respondent has compromised himself and that his client (Applicant) will not have a fair hearing. If such conversation took place as alleged, Mr. Mnisi should have reported it immediately or as soon as practical to Applicant. It is not likely that Mr. Mnisi could have kept such sensitive information to himself.

6.6.1. Assuming that Mr. Mnisi informed the Applicant about the alleged conversation sometime in the year 2009, there is no explanation by Applicant why he did not confront the 1st Respondent or apply to Court for an appropriate order.

6.6.2. Assuming that Mr. Mnisi informed the Applicant concerning the allegation in January 2010, there is no explanation why Mr. Mnisi did not reveal such sensitive information to his client all this time.

6.6.3. The Applicant's counsel could not answer these questions in his argument.

6.6.4. When the parties were before the Industrial Court in December 2009 under Case 683/09 on another urgent application, the Applicant had a duty and opportunity to raise this complaint in his papers, but he did not. The prayers that Applicant requested before Court appear clearly in the Industrial Court judgement aforementioned and the said complaint does not feature at all.

6.7. Mr. Sipho Mnisi describes himself in his affidavit as an articled clerk currently attached to BZ Attorneys in Manzini. As an articled clerk the said Mr. Mnisi is governed in his professional conduct by the Legal Practitioner's Act 15 of 1964 as amended. Mr. Mnisi had a legal duty and opportunity to report the alleged conversation (Mr. Mnisi/Mthethwa) if indeed it occurred. Mr. Mnisi is therefore aware of steps that he should take in the event that such a sensitive issue comes to his attention. Failure by Mr. Mnisi to report the alleged irregularity (Mnisi/Mthethwa conversation) creates doubt that it ever occurred. There is no explanation in Mr. Mnisi's affidavit aswell as the Applicant's affidavit as to why a conversation that allegedly took place in May 2009, could be brought to Court for the first time in January 2010.

6.8. Since the alleged conversation (Mnisi/Mthethwa) is denied by Mr. Mthethwa, that created a dispute of fact which could not be resolved on affidavit. The Applicant had to refer the dispute to oral evidence. There was no application made before Court to refer the matter to oral evidence. The Court could only confine itself to the affidavits before it.

The evidence on the affidavit is insufficient to assist the Applicant.

6.9. The Court is not persuaded that the alleged conversation took place. This allegation is highly unlikely and is not acceptable to the Court.

7. The Applicant has further complained that at the disciplinary hearing some of the witness that were called by 2nd Respondent had been schooled and paid to testify against him. He states further that he (Applicant) was willing to bring those witnesses at the disciplinary hearing but the 1st Respondent showed no interest in that matter.

7.1. The Applicant has failed to disclose the identity of the alleged witnesses and of the person(s) who allegedly paid them. The details regarding the schooling and payment are missing. The Court needs to know what were the witnesses schooled to testify at the hearing and whether or not they actually testified. If payment was made, was it in cash or kind and how and where was it paid?

7.2. The Applicant admits that he did not witness the alleged schooling or payment of the witnesses. As a matter of fact the Applicant avers that such information was brought to his attention by some of the witnesses themselves. The Applicant does not state who exactly brought this information to his attention. There is no affidavit from a single witness to support this allegation. There is further no allegation that such a witness actually testified at the disciplinary hearing and whether in his testimony he used the material in respect of which he has been schooled. The Applicant has failed to provide evidence to support his claim and it therefore fails.

8. The Court is of the view that the Applicant has failed to make a case in support of the prayers as contained in the Notice of Motion. The application therefore fails.

9. The 2nd Respondent has been put through an expense in defending this matter and succeeded in his defence. The normal practice is that costs follow the event. The Applicant should pay the 2nd Respondent's costs. An order is accordingly made as follows;

The application is dismissed with costs at party and party scale.

The members agree.

DUMSANI MAZIBUKO
JUDGE OF THE INDUSTRIAL COURT

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