IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 440/09

In the matter between:

ABEL NSIBANDZE **APPLICANT**

And

STANLIB SWAZILAND (PTY) LTD **1st RESPONDENT**

LIBERTY LIFE SWAZILAND (PTY) LTD **2nd RESPONDENT**

CORAM:

D. MAZIBUKO: **JUDGE**

A. M. NKAMBULE: **MEMBER**

M.T.E. MTETWA: **MEMBER**

MR. Z. SHABANGU: **FOR APPLICANT**

MR. R.WOEDSTRAR: **FOR ESPONDENT**

JUDGEMENT -12th NOVEMBER 2010

Final interdict, requirements for are mandatory, failure to comply is fatal to application, disciplinary enquiry competent forum to deal with disciplinary charges, court will interdict or stop disciplinary enquiry only in exceptional circumstances.

1. The Applicant, Mr Abel Nsibandze is employed as a country managing director by the 1st and the 2nd Respondents.

2. The 1st Respondent, Stanlib Swaziland (Pty) Ltd is a company registered in Swaziland trading as Stanlib. The 2nd Respondent, Liberty Life Swaziland (Pty) Ltd is a company registered in Swaziland trading as Liberty Life.

3. The Applicant has alleged in his founding affidavit that he was first employed by the 1st Respondent in March 2006 as a general manager. About February 2007 the 1st Respondent was incorporated into Liberty Group of companies (2nd Respondent). The Applicant continued to work as a general manager. About November 2007 the Applicant was promoted to country managing director. The parties are in agreement that the Applicant works for both the 1st and the 2nd Respondents as a country managing director based in Swaziland hence the joinder of the two (2) Respondents.

4. The Applicant has approached the court by way of an urgent application for relief as follows;

(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.

(2) Setting aside the charges preferred against the Applicant and contained in a notification of a Disciplinary Enquiry dated

29th July 2009.

(3) Alternatively, interdicting and restraining the Respondents from proceeding with the Disciplinary Enquiry against the Applicant meant to proceed on the 17th August 2009 on the basis that same is a sham and an Unfair Labour Practice.

(4) Granting Applicant the costs of this application in the event of an opposition thereto.

(5)Granting Applicant any further or alternative relief.

5. On the 24th June 2009 the Applicant was suspended from work by the Respondents by letter dated the same day. The letter of suspension is attached to the Applicant's founding affidavit and is marked **SI.**

6. About the 29th July 2009 the Applicant was served with a notice to attend a disciplinary enquiry. The notice had a list of ten (10) charges which the Respondents had preferred against the Applicant. The charges read as follows;

CHARGE 1

The request by yourself to go to a jazz festival in Cape Town during March 2008, was turned down by Lanz Zulu, your immediate superior at that stage. You failed to comply with the instruction and went to the said festival;

CHARGE 2

You were instructed on various occasions not to copy e-mails to

senior executives on the review of your salary matter. Despite such instructions, you continued to do so;

CHARGE 3

On numerous occasions you wei\e instructed and advised that all meetings with you in respect of your continued employment relationship with yourself were off the record and without prejudice. Despite these instructions, you continued to ignore same and placed without prejudice and confidential discussions on the record;

During or approximately June 2009 and before your suspension, you made a telephonic request to your superior, Jerome Mouton, to go to Mozambique with a Liberty Life Property employee. The said Mouton instructed you not to go but despite this being so, you proceeded to Mozambique.

CHARGE 5

You are charged with adopting a management style of insolence, incompatibility, insubordination and undermining of authority towards the Line Manager and Senior Management of Liberty Life.

1. This refers to your failure to take cognizance of Liberty Life Group's line of authority and line of management which was transgressed by your self on various occasions, for example taking your requests past your direct superiors to the Deputy CEO and the CEO of the Liberty Life Group.

CHARGE 6

6.1. On 24th June 2009 you contravened the instructions and conditions of your suspension by accessing the company's

premises without authority.

6.2. You refused/failed to hand in your laptop and access card on close of business on 24 June 2009 as instructed.

CHARGE 7

Non-compliance with the company's credit card policy

In terms of Liberty Life's Company Credit Card Policy all card holders are:

> *(a) To ensure that all expenditure is accounted for and reconciled; and*
>
> *(b) Retain receipts and provide explanations for all company credit card transactions. Despite numerous instructions to comply and up to date, you failed to comply with the said policy.*

CHARGE 8

Irregular use of a company credit card as in as much as you attached your unauthorised signature to various credit card transactions in respect of a company credit card, which card did not belong and were not issued to you.

CHARGE 9

A detoriation and complete breakdown of the trust relationship between Liberty Life and yourself in the following respects:

9.1. You acted in an unprofessional manner in your relationship

with senior managers and leadership structures.

9.2. Your conduct was unbecoming of a senior manager by persisting with your unfounded demands for huge salary increases and bonuses;

9.3. You published information that was submitted to you by Liberty Life on a confidential basis;

9.4. You published sensitive information disclosed to you during settlement negotiations to various parties and authorities.

CHARGE 10

Creating a working environment with your management style that causes a risk to Liberty Life, its clients and its operations in Swaziland. You have become a law upon yourself ignoring practice and procedures of the company in your day to day dealings with credit card not belonging to yourself, not reconciling monthly credit card expenses and in general setting an unprofessional standard for subordinates.

Signed:

LIBERTY SWAZILAND /STANLIB SWAZILAND

The Charges are referred to as annexure **S4.**

7. Upon receiving annexure **S4** the Applicant was prompted into launching the present urgent application. The application focuses on two (2) main prayers namely;

7.1. to set aside the charges that the Respondents have preferred against the Applicant in annexure **S4,**

7.2. alternatively to interdict and restrain the Respondents from proceeding with the disciplinary enquiry which the Respondents had scheduled for the 17th August 2009 on the basis that the charges are a sham and unfair labour practice.

8. The applicant wants the disciplinary charges set aside for three (3) reasons, namely;

(a) the charges are based on an improper motive. The Respondents' motive is to dismiss the Applicant from work.

(b) The Applicant has a good defence to each one of the charges and is innocent of the offences with which he is charged.

(c) The Respondents have already taken a decision to dismiss the Applicant from work. The Respondents intended to misuse the disciplinary enquiry to regularise a dismissal which is irregular.

9. The Applicant alleges that at the time he was promoted to country managing director an oral agreement was concluded with the Respondents to the effect that his salary and benefits will be increased. From the affidavits before court it appears that the parties did not agree on specific figures to be paid to the Applicant on his new position. The Applicant took up his new post in November 2007. In the course of 2009 the Applicant registered his
complaint to the Respondents concerning his salary. The Applicant felt that he was underpaid. The parties had several meetings and telephone discussion concerning the issue of the Applicant's salary but failed to reach an agreement. The parties differed in opinion.

The Applicant argued that his salary was inadequate taking into consideration the added responsibility. The Respondents argued

that the new salary paid to the Applicant was commensurate with his position as country managing director. The differences in opinion created tension between the parties. Both parties were unhappy with the manner the discussion was proceeding. The Applicant felt that the chief executive officer of the Respondents a certain Mr Bernard Katompa had insulted him by calling him 'rubbish'. The Respondents on the other hand felt that the Applicant is failing to give respect to his superiors at work. Each side had a complaint against the other. Mr Katompa denied that he called the Applicant 'rubbish'. He stated that he used the word 'rubbish' to refer to the Applicant's analysis of the salaries of the Respondents' employees and not the Applicant himself. The Applicant allegedly drew inferences which were not supported by facts.

10.About the 4th June 2009 the parties met at Ezulwini (Swaziland) to discuss the matter further. The Applicant was accompanied by his lawyer at that meeting (Mr Hlophe). The Respondents also brought along their lawyer (Mr Du Plessis).

The Applicant alleges that at that meeting he was told that he should tender his resignation and that upon doing so he will be paid an equivalent of three (3) months salary. The Applicant refused to resign because he felt he had done nothing wrong. There was no need for him to resign from work. The pay offer was increased to four (4) months salary. The increased offer did not change the Applicant's position. According to the Applicant he was told by the Respondents that he is 'swimming against a tide' and that the Respondents will suspend him from work. The Applicant protested that he had done nothing wrong to deserve suspension. The Applicant was told that the Respondents will find reasons to suspend him. The Applicant was suspended by letter dated 24th June 2009 annexure **SI.** According to the Applicant the

suspension is based solely on reasons which the Respondent has looked for and which are disingenuous. The Applicant fears that the reasons used by the Respondent to suspend him will further be used to dismiss him at the disciplinary enquiry. The reasons for the suspension are materially the same as the disciplinary charges contained in annexure **S4.** The Applicant has prayed the court to set aside the charges because they are based on an improper motive. The Applicant avers that he is being charged with disciplinary offences because he refused to tender his resignation when directed to do so by the Respondents.

The Applicant alleges further that the invitation which he received from the Respondents to tender his resignation was a ploy by the Respondents to get rid of him (Applicant) from work. When that failed the Respondents devised other means to get rid of him by charging him with trumped up disciplinary charges.

11 .The Applicant has advanced another reason for his prayers before court. The Applicant avers that he has a good defence to each one of the ten (10) disciplinary charges which he is facing. The weight of his defence indicates that the Respondents do not have prospects of success in prosecuting the charges. The nature of the defence shows further that the charges are not genuine. The motive behind the charges is to get rid of the Applicant from work. The pending disciplinary charges are a sham because the enquiry is designed to achieve an improper and unjust result. The Applicant argues that the enquiry is an unfair labour practice perpetrated by the Respondents. The Applicant argues further that he needs protection from the court from the injustice and unfair labour practice. In the paragraphs that immediately follow the Applicant has introduced his defence to the charges and has in the process

paraphrased the charges. The defence and the paraphrase have (for the sake convenience) been reproduced in accordance with the Applicant's submission.

12. CHARGE 1:

The Applicant is accused of attending a Jazz Festival in Cape Town in March 2008 contrary to the Respondent's instruction. The Applicant went with a group of friends to the festival at the Respondents' expense.

12.1 The Applicant's avers that this charge is a sham because the Respondents have not explained the reason for the delay in charging him. The incident occurred in March 2008 the charge was preferred in July 2009.

12.2 The Applicant admits that he attended the Jazz Festival as alleged in the charge. The Applicant went with a team or a group of people whom he referred to as a client who gave the Respondents good business. As managing director the Applicant avers that he was entitled to entertain certain valuable clients using his discretion within a budget which he had been allocated. He added that he had full mandate to use the budget in the manner he did and was not answerable to any person in the manner he exercised his discretion.

The Applicant admits further that Mr Lanz Zulu attempted to restrain him from attending the festival. The Applicant stated that Mr Lanz Zulu had no success in restraining him because he (Applicant) believed that he was not answerable to Mr Lanz Zulu. So the Applicant went ahead to entertain the client at the festival despite Mr Zulu's instruction to the

contrary.

13. **CHARGE 2**

13.1 The Applicant is accused of deliberately disobeying instructions from senior management. It is alleged that the Applicant was instructed on several occasions not to copy electronic mails (e-mails) to senior executives on matters relating to the review of his salary. Despite such instructions the Applicant continues to copy the said e-mails.

13.2 The Applicant admits that such an instruction was given. The Applicant however avers that it was necessary for him to copy the e-mails to senior executive so that they would be informed concerning the discrimination and humiliation which he suffered at the hands of the senior management of the Respondents.

14.1 The Applicant is accused of placing confidential discussion on record, yet he had been told that all discussions between the Applicant and senior management relating to their employment relationship were off the record, confidential and without prejudice.

14.2 The Applicant admits that he placed on record discussion he held with senior management. He avers that matters concerning his employment relationship cannot be confidential to senior executives of the Respondents.

15. **CHARGE 4**

15.1 About June 2009 the Applicant requested permission from his superior at work to go to Mozambique with another

employee of the 2nd Respondent. The superior concerned, a Mr Jerome Mouton denied the Applicant permission. It is said that the Applicant went to Mozambique despite being denied permission.

15.2 The Applicant denies that permission to go to Mozambique was denied. His version was that permission was given by Mr Jerome Mouton orally over telephone. Later, after the Applicant had arrived in Mozambique, he alleges that he received a text message from Mr Jerome Mouton denying him permission.

16. **CHARGE 5**

(d) The Applicant is accused of adopting a management style of insolence , incompatibility and insubordination and is further undermining the authority of his line manager and senior managers of the 2nd Respondent. In particular the Applicant is alleged to have taken personal request to the chief executive officer (CEO) of the 2nd Respondent and his deputy. It is alleged that the Applicant's approach is contrary to established procedure of the Respondents.

(e) The Applicant admits that he referred the matter to the CEO of the 2nd Respondent and his deputy. The Applicant argues that it is company policy that before a matter can be reported outside the company structures for determination the relevant senior managers such as the CEO and his deputy must be informed.

He therefore acted within the perimeters of the company policy when he reported the matter to the CEO and his deputy.

17. **CHARGE 6**

17.1 The Applicant is accused of acting in breach of instructions and conditions relating to his suspension. On the 24th June 2009 by letter annexure **S I,** the Applicant was directed inter alia that while on suspension, the Applicant;

(f) Should not access the company premises without permission.

(g) Should hand in his laptop computer and access card at the close of business on the 24th June 2009.

17.2 The Applicant admits that the conditions aforementioned were indeed imposed on him. However the Applicant denies that he was in breach of the said conditions. He states that the suspension letter required him to hand in the lap top computer and access card only at the close of business on the 24th June 2009. At the time the Applicant left work on the 24th June 2009 he noticed that the chairman of the Respondents' board of directors had left work earlier. The Applicant had intended to deliver these items to the chairman. He did however deliver the said items to the chairman at a later date. The Applicant preferred to deliver these items to the chairman personally since the chairman is the person to whom the Applicant reported. It was therefore impractical to deliver the said items at the time stated by the Respondents.

18. ***CHARGE 7***

18.1 The Applicant is accused of acting in breach of the credit card policy of the Respondents. The Applicant was allocated a credit card to use on work related expenses. The use of the credit card was subject to certain conditions including the following;

(h) The Applicant was to reconcile and account for every expenditure incurred.

(i) The Applicant was to keep receipts and provide explanation for every transaction made on the credit card.

18.2 It is alleged that the Applicant was instructed on numerous occasions to comply with the aforementioned policy but he failed to do so.

18.3 The Applicant argues that he has not used the card which the employer allocated him for more than a year. He therefore needs further particulars regarding the dates and transaction for which it is alleged he used the card and failed to comply with the policy requirements.

19. **CHARGE 8**

(j) The Applicant is accused of irregular use of company credit card which the Respondents had issued for the use of another employee of the Respondents and not the Applicant.

(k) The Applicant admits the use of the credit card which the Respondents had allocated to another officer. The Applicant avers that he obtained permission from the credit card holder (employee) to use the card. According to the

Applicant there is no irregularity in the manner he used the card since the person to whom the card was allocated has not filed a complaint.

20.1 The Applicant is accused of causing a breakdown of trust relationship between himself and the Respondents. Inter alia the Applicant is alleged to have conducted himself in the following manner.

(l) The Applicant has allegedly made unfounded demands for huge salary increments and bonuses.

(m) The Applicant has published information concerning the Respondents which had been submitted to him in confidence as an employee.

20.2 The Applicant has argued that the demands for salary increment are justified and are consistent with the oral agreement which he concluded with the Respondents . Further, the Applicant argues that the discussions he held with the Respondents' management are not confidential and therefore can be shared with the Respondents' executive directors.

21. **CHARGE 10**

21.1 The Applicant is accused of creating a working environment with his management style that causes risk

to the 2nd Respondent, its clients and operations in Swaziland. The Applicant is alleged to have ignored practice and procedure of the company. In particular the Applicant is accused of;

(n) Conducting credit card transactions in an irregular manner;

(o) Failing to conduct monthly reconciliation of credit card expenses;

(p) Generally setting up an unprofessional standard for subordinates.

21.2. In reply the Applicant stated that he had recently been appraised by the Respondents as a star perfomer. The allegations made are contrary to the Respondents' own appraisal. The Respondents are therefore inconsistent in their dealings with him.

22. The third reason advanced by the Applicant in support of his prayers is that the Respondents have already taken a decision to dismiss him (Applicant) from work. The Applicant will therefore not be given a fair hearing because the decision to dismiss is taken already.

The Applicant has noticed that the Respondents have advertised his position at work on the internet (international computer network) and in a newspaper circulating in Swaziland namely Swazi OBSEVER. Copies of the advertisements have been attached to the founding affidavit marked **SII** and **S12** respectively. The Applicant avers that the Respondents are recruiting a managing director to replace him even though he is still occupying that position albeit on suspension.

The Applicant has further referred the court to a document marked **S13** annexed to the replying affidavit. This is a letter written by the chairman of the 2nd Respondent's board of directors to the chief immigration officer in the Ministry of Home Affairs in Swaziland. The letter is dated 16th June 2009 and is signed by Mr. Tineyi Mawocha as chairman of the 2nd Respondent's board of directors. The Applicant has directed the attention of the court to certain clauses in that letter. The letter reads as follows;

LIBERTY LIFE

16th June 2009

The Chief Immigration Officer
Ministry of home Affairs
Mhlambanyatsi Road Mbabane

Dear Sir, or Madam

RE: APPLICATION FOR WORK PERMIT - MARK GOBIE

We hereby apply for a two month work permit for Mr Mark Gobie, who will arrive in the country on the 23rd June 2009 from Johannesburg, South Africa. Mr Gobie is currently employed by Liberty Life South Africa where he occupies the position of senior manager operations. He will [be] in the country to train Swazi office employees, including the new managing director, who is being recruited locally.

We enclose a copy of Mr Gobie's Curriculum Vitae and current job descriptions. Should you require any additional information, please do not hesitate to contact our Human Resources Office. We trust you will consider the foregoing information favourably.

Yours faithfully

Tineyi Mawocha
Chairman
Liberty Life Swaziland

(q) The Applicant has interpreted the contents of that letter to

mean that the Respondents have taken a decision to replace him as managing director of the 2nd Respondent. As noted, annexure **S13** is introduced for the first time in the replying affidavit, it was not part of the annexures which are attached to the founding affidavit. The court does not have the privilege to read the Respondents' version to the contents of annexure **S13** as the Respondents had already filed their answering affidavit by the time this annexure was filed in court. Annexure **S13** appears to have been filed contrary to the rules. However for the purpose of this case the irregular filing of annexure **S13** will not make a difference on the outcome.

(r) According to the Applicant the outcome of the disciplinary enquiry is pre-judged. A decision to replace him as managing director has already been taken. The Respondents have taken steps to recruit a new managing director. The purpose of the pending disciplinary enquiry is to justify his dismissal as a managing director of the 2nd Respondent. The disciplinary enquiry is therefore a sham and it should be interdicted from taking place.

(s) The Respondents have filed an answering affidavit accompanied by several confirmatory affidavits. The Respondents have not challenged urgency in their argument though the issue was raised in their affidavit. The court has approached this matter on the basis that the dispute before court relates to the merits only. The matter was accordingly enrolled as an urgent application. The court is satisfied that a case for urgency has been made by the Applicant.

(t) The answering affidavit is deposed to on behalf of the Respondents by Mr Nicholas Haines who described himself as the human resources business partner of the 2nd Respondent. The Respondents admit that a meeting took

place in Swaziland on the 4th June 2009 between the Applicant accompanied by his lawyer (Mr Hlophe) and the Respondents who were also accompanied by their lawyer (Mr Du Plessis). The purpose of the meeting was to negotiate a settlement of the dispute between the Applicant and the Respondents. The Respondents admit that several meetings were held between the parties on this issue as alleged by the Applicant. The Respondents argue that the discussions held in the said meetings were without prejudice, off the record and highly confidential.

This allegation is supported by the Respondents' lawyer Mr. Adriaan Du Plessis in his confirmatory affidavit. The Respondents aver that the Applicant was told at the beginning of each meeting that the discussions were on a without prejudiced basis and off the record. It is further alleged that the Applicant agreed to treat the discussions confidential and without prejudice. The Respondents have raised an objection to the Applicant's conduct in placing on record discussion and negotiation which should be off the record.

(u) The court is not in a position to decide on the admissibility or otherwise of the contentious allegations in the absence of oral evidence. The parties would have to lead oral evidence on the condition and circumstances under which the said meetings were held. However for the purpose of this case that evidence will not be necessary. This case can be decided on other legal principles irrespective of whether the contentious allegations are admitted or not.

(v) The Respondents have in the alternative pleaded over on the merits of the application. The Respondents deny that the Applicant was put under pressure to exit his employment.

According to the Respondents the Applicant was given a chance to accept a no-fault termination of his employment which will be treated as a resignation with payment of salary for four (4) months. The Applicant stated that he needed time to think about that proposal, and time was given. According to the Respondents the relationship it had with the Applicant had deteriorated to such a stage that it was no longer feasible for the Applicant to continue working for the Respondents. The element of trust between the parties had broken down irretrievably. The Respondents felt the need for an amicable termination of the employment relationship. The Respondents were trying to avoid disciplinary action taken against a senior employee and the negative publicity that is likely to follow.

30. The Respondents deny the allegations made by the Applicant that the charges are trumped up or that the reasons for the suspension are fictitious. The Respondents aver further that the amount which they currently pay the Applicant as salary and benefits is fair, reasonable and suitable for a managing director. The Respondents further deny the alleged unfair labour practise or unfair treatment complained of by the Applicant.

31. The Respondents further deny that the charges are a sham. They allege that the charges are serious and that the Respondents have evidence to prove the allegations made therein. The Respondents have challenged the jurisdiction of the Industrial Court to decide on the legality or veracity of the charges. According to the Respondents the competent forum to decide on the charges is the chairperson of disciplinary enquiry.

32. The Respondents have further denied that the advertisements which have been placed on the internet and in the Swazi OBSERVER refer to the Applicant's position. The Respondents

aver that the advertisements refer to the position of Mr David Takis. Mr Takis was employed by the 2nd Respondent at the material time as a director. It is further alleged that Mr Takis was employed as head of the Life Business Operation of the 2nd Respondents. Mr Takis resigned in April 2009. Mr Mark Gobie was seconded to replace Mr David Takis in April 2009. According to Mr Mark Gobie, the Applicant's position is that of the country managing director. The Applicant is responsible for the Life Insurance Business and the Asset Management Unit of the Respondents. Mr. Takis was responsible for the Life Business Unit of the Respondents as a director.

33. The Respondents deny that they have taken a decision to dismiss the Applicant. Further they deny that they have begun recruiting a replacement for the Applicant. According to the Respondents they were recruiting a replacement for Mr David Takis in the advertisement complained of.

34. The Applicant's main prayer is to set aside the disciplinary charges that have been preferred against him. The Applicant avers that the charges are not genuine but are as a result of an unfair labour practice that is being perpetrated against him by the Respondents. Further the Applicant avers that he has a good defence to the charges which defence the Applicant has briefly introduced in the affidavit. For that reason the Applicant wants the charges set aside.

35. In order for the court to decide whether or not the charges as well as the disciplinary enquiry is a sham, the court will have to conduct a hearing of the charges. Both parties will have to lead evidence and debate the issues. It is only then that the court can make an informed decision on the competing interests.

The Applicant's interest is to set aside the disciplinary-charges

alternatively interdict the disciplinary enquiry from taking place on the allegation that it is a sham and an unfair labour practice. The Respondents' interest is to haul the Applicant to a disciplinary enquiry and have him prosecuted for the offences which it is alleged he has committed.

. It is not the duty of the Industrial Court to conduct a prehearing of the disciplinary charges which an employee is facing at the disciplinary enquiry. The court is not seized with jurisdiction to determine and compare the strength of the employer's case to that of the employee's defence relating to the disciplinary charges. Those are issues to be determined by the chairperson of the enquiry. The disciplinary enquiry is before the chairperson and not the court. Without a hearing of the disciplinary charges the court cannot make a decision on those charges.

37. It is common cause that the disciplinary enquiry was suspended pending finalisation of this matter. The door is therefore still open to the Applicant to move the present application before the chairperson of the disciplinary enquiry.

The chairperson has jurisdiction to decide inter alia on the guilt or innocence of the employee, the fairness or otherwise of the disciplinary charges and on matters procedural and factual relating to the enquiry. The chairperson has the power to look into the irregularity complained of in each of the charges when the matter comes before him. If the chairperson is satisfied that there is an irregularity which may result in a miscarriage of justice, he has the power to make an appropriate order to prevent an irregularity from occurring or reverse its consequences. The power of the chairperson is quasi-judicial. The learned author states as follows regarding the power of a chairperson at a disciplinary hearing;

"*Basically, the rules of natural justice require employers to act in*

a semi-judicial way before imposing a disciplinary penalty on their employees. A fair procedure is meant to discourage arbitrary and spur-of-the moment action against employees".

GROGAN J: WORKPLACE LAW, 10th Edition, Juta 2009 at Page 231.

The point being made is that the chairperson in a disciplinary enquiry has a semi- judicial function. His duty is to make certain inter alia, that the enquiry is conducted in a regular and fair manner in order to ensure that justice is done.

(w) The court is in agreement with the above quoted principle. Armed with semi-judicial power, the chairperson has jurisdiction to set aside any one or more of the disciplinary charges which the Applicant is facing provided a case has been made for such an order. The Applicant can therefore advance the same application and argument before the chairperson which has been made before this court.

(x) The Applicant has a fear that the outcome of the disciplinary enquiry has been pre-judged and that a decision to dismiss him has already been taken by the Respondents. There is no allegation in the Applicant's papers that at the disciplinary enquiry the Respondent will sit as judge and complainant. There is further no allegation that the chairman is biased in favour of the Respondents or that he has an interest which will compromise his impartiality. The chairperson has not been introduced in the papers before court. At this stage there is neither allegation nor proof that the chairperson is partial. There is nothing before court to suggest that the chairperson will fail to make a fair and proper decision on the Applicant's prayer regarding the disciplinary charges.

In the event that the chairperson decides to proceed and hear the parties on any one or more of the disciplinary charges, there is nothing to suggest that he will fail to make

a fair and proper decision regarding the guilt or innocence of the Applicant.

(y) The Applicant does not appear to appreciate the role of the chairperson as opposed to that of the complainant at a disciplinary enquiry. The Respondents are complainant at the enquiry. The Respondent may approach the enquiry with certain opinion and bias against the Applicant (accused). It does not follow that the chairperson shares the same opinion or bias.

(z) The outcome of a disciplinary enquiry is in the hands of the chairperson and not the complainant (Respondents). In the event that the chairperson returns a guilt verdict on anyone or more of the charges, he still has the power to decide on the appropriate sanction. The learned author states as follows on this subject;

> "*As in criminal proceedings, the decision of the presiding officer should be made in two distinct stages. First, the guilt of the accused employee should be determined on the evidence, without reference to the employee's disciplinary record.*
>
> *Secondly, and after the verdict is decided, a penalty should be determined which is appropriate to the offence and the particular employee*".

GROGAN J: WORKPLACE LAW, supra page 244

The learned author continues to state as follows;

> *The decision whether to dismiss the employee should be taken by the person who presided over the disciplinary inquiry or the appeal hearing, as the case may be.*

GROGAN J: DISMISSAL, Juta & co, 2010 at Page 246.

42. The point being made by the learned author in the preceding quotations is that it is the chairperson alone who decides on the guilt or innocence of the accused employee. In the event that the accused employee is found guilty, the chairperson alone should decide on the penalty. The complainant (employer) has no role to play in the decision making process. The employer cannot decide on the guilt of the employee in a disciplinary enquiry. The employer has an obvious interest in the matter as a complaint.

43. Some employers have disciplinary codes which empower the chairperson of the disciplinary enquiry to hear the case of misconduct and issue a verdict. Should the employee be found guilty the chairperson is enjoined to make recommendation to management regarding the appropriate sanction. In that case if the accused employee has brought convincing evidence to the chairperson that management is biased against him or for some reason management cannot issue a fair sanction, the chairperson would in such a case normally be expected to make an exception to the code regarding the power or authority to issue an appropriate sanction. That however is not the case that the Applicant has argued before this court. The point being made is that the chairperson has power and responsibility to protect the accused employee from a potential or actual irregularity or unfairness in the disciplinary enquiry which has come to his attention.

44. There is no allegation that the chairperson has pre-judged the matter or has already taken a decision to dismiss the Applicant. The chairperson has not even began his work. The Applicant has not challenged the chairperson at all in this matter. The application is misdirected as it presupposes that it is the Respondents who will determine the verdict of the enquiry or

have done so already (pre-judged).

Further, that the Respondents (and not the chairman) have taken a decision to dismiss the Applicant. Whatever bias or opinion the Respondents have, it does not preclude the chairperson from making an independent decision on the matter. There is nothing in the application to suggest that the chairperson is a mere puppet whose evaluation and decision will be subject to control by the Respondents. The Applicant's fear is unfounded. The Applicant's main prayer is misdirected and is hereby refused. The court finds that the Applicant has failed to make a proper case to support his prayer.

45.The Applicant has prayed in the alternative for an interdict restraining the disciplinary enquiry from taking place. The Applicant argues that the disciplinary hearing is a sham and unfair labour practice. The reasons given for the alternative prayer are the same as those on which the main prayer is based and are mentioned in paragraph 8 above.

46. The issues that are raised by the Applicant in his alternative prayer have already been dealt with by this court when analysing the Applicant's main claim. In order for this court to determine whether or not the charges are trumped up and whether the applicant has a good defence to the charges the court will have to conduct a prehearing of the disciplinary charges.

As afore stated, it is not the duty of the court to conduct a hearing or pre- hearing of the disciplinary charges. These are issues which should be determined by the chairperson. The chairperson can also determine whether or not the Applicant is being victimised. Without a pre-hearing of the charges the court is not in a position to make a decision on the alternative prayer as well. The disciplinary charges are pending before the chairperson and not the court. The court is not able to make a decision on a matter which is pending before another forum. The

Applicant has failed to make a case for the alternative prayer. The alternative prayer accordingly fails as well.

47. The employer has a right and a duty to discipline an employee who is suspected to have committed a work related offence. The employer is required to conduct a disciplinary enquiry to ascertain the guilt or innocence of the employee. A disciplinary enquiry is a mandatory step for the employer to take before an employee can be dismissed for misconduct. In the matter of SACCAWU and others Vs TRUWORTHS and others (1999) 20 ILJ the court was faced with a similar matter where an employee wanted to interdict an employer from conducting a disciplinary enquiry. The court states as follows on the issue,

> "*I agree with the Landman J that it is for an employer, not this court to decide whether or not an employee is guilty of misconduct. To do so this the employer must hold a disciplinary enquiry*".
>
> per SEADY AJ at page 643

We agree with the principle expressed by the court in the Truworths case. Since the Applicant alleges that he has a good defence to all the charges which have been preferred against him he must therefore appear before the chairperson in order to defend his innocence. The court cannot grant an interdict whose effect is to assist a litigant avoid due process of law.

48. In the matter of the MANTZARIS VS UNIVERSITY OF DURBAN WESTVILLE and others (2000) 21 ILJ 1818 (LC) the court was faced with an application inter alia interdicting the disciplinary enquiry. The court stated the principle as follows:

> "*Having reviewed the principles laid down by the High Court, the court found that the employee had other*

remedies available to him and that it should therefore not exercise its discretion in favour of granting a declaratory order. Furthermore, the effect of granting a declaratory order would be to bring an end to the disciplinary proceedings against the employee. In effect the employee wished the court to be the forum of first instance to rule on matters relating to employee misconduct and to rule on specific substantive issues that were to be addressed at the disciplinary enquiry. Although this was an attractive option for the employee, it was not the appropriate option".

per LYSTER at page 1820

49. The Mantzaris judgment makes the point clear that the court is loathe to be the forum of first instance to decide on matters of employee misconduct. We are in agreement with the reasoning in the Mantzaris case.

50. The court acknowledges that exceptional circumstances may exist in a given case which may lead the court to interdict an employer from holding a disciplinary enquiry. There is no exhaustive list of such exceptional circumstances which has been formulated.

Each case depends on its own merits. In the Truworths case (supra) the court stated that interference with trade union activities and on going unfair discrimination against an employee may qualify as exceptional circumstances. However in that matter the Applicant failed to prove the existence of exceptional circumstances.

51. The Applicant has argued that exceptional circumstances exist in his case which should persuade the court to grant an interdict to prevent the disciplinary enquiry from taking place.

The Applicant's argument is based on allegation of victimization and discrimination at the hands of the Respondents. According to the Applicant he entered into an oral agreement with the Respondent at the time when he was promoted to country managing director. According to the Applicant it was agreed that his salary and benefits would increase in proportion to his added responsibility. Despite the agreement the Respondents failed to pay the Applicant according to the Applicant's expectation.

The Applicant raised a complaint which resulted in an argument. Instead of addressing the salary issue the Respondent allegedly became oppressive towards Applicant. The Applicant was directed to resign and take a package equivalent (4) four months salary. The Applicant refused that offer. Thereafter the Applicant was told that he would be suspended from work for reasons to be looked for. Shortly thereafter he was suspended from work and subsequently charged with ten (10) counts of misconduct. The Applicant averred that the charges are as a result of his refusal to resign from work. Furthermore the charges are as a result of his bravery in standing up for his right concerning the Respondents' failure to pay an agreed salary plus benefits. He is being victimised for protecting his interests and enforcing his rights.

52. The Applicant averred further that he made several demands to the Respondents to increase his salary and benefits upon being promoted to country managing director. In the process the Applicant notices that junior colleagues at work had been assigned work which previously was done by him. The said junior employees had been given hefty salary increments.

The Applicant did not receive a salary increment. The Applicant felt that he was discriminated against by the Respondents. The Respondents have denied the allegations of victimization and discrimination. According to the Respondents the charges are based on elements of misconduct which the Respondents can prove. A salary increment has been given to the Applicant and all

other employees in accordance with the financial capability of the Respondents. The Respondents did not agree to pay the Applicant what the Applicant has demanded as satisfactory salary. Instead the Respondents agreed to pay the Applicant a salary which they consider fair and reasonable for his position and in accordance with his performance.

53.With the evidence before court, the court is unable to make a finding of discrimination and victimization. As aforestated there is no proof in the papers that the parties agreed on specific figures for the Applicant's salary and benefits. There is therefore a difference of opinion between the parties as to what is fair and reasonable salary due to the Applicant.

> The fact that the Applicant expected a higher increment than that which the Respondents are paying does not necessarily mean that the Applicant is being discriminated against. Even if there was an agreement on a specific figure to be paid the Applicant as salary it does not necessarily amount to discrimination when the Respondent fails to pay what was agreed upon.

54. It is not the duty of this court to compare and contrast the salaries of the Applicant to that of his colleagues. The difference in the salary increments of the Respondents' employees depends upon variables that are beyond the scope of this case. It is an assumption on the Applicant's part that he is not paid the salary that he expected because of discrimination. That argument is not supported by evidence. There is further no evidence that the Applicant's junior colleagues have been paid their salary increments at a scale higher than that of the Applicant. Even if that evidence was present the difference in the salary scale may be caused by factors other that discrimination.

55. The court is unable to make a finding that the disciplinary

charges are a result of victimization or any improper motive on the part of the Respondents. Without a pre-hearing of the disciplinary charges and the discussions preceeding the charges the court cannot make a finding of fact. The chairperson of the disciplinary enquiry before whom the matter is pending will be able to make findings of fact after hearing the necessary evidence. The Applicant has failed to make a case for the relief sought. The court is not persuaded that exceptional circumstances exist to justify granting the Applicant the interdict sought. The Applicant's prayer for interdict therefore fails.

56. The Applicant's prayer can be approached from another angle. The relief which the Applicant is seeking is in the form of a final interdict. In order to obtain a final interdict the Applicant must established three (3) requirements, namely;

(a) a clear right,

(b) an injury actually committed or reasonably apprehended,

(c) the absence of a similar or adequate protection by any other ordinary remedy.

HERB STEIN AND VAN WINSEN: The Civil Practice of The High Court of South Africa, Vol 2 Juta co, 5th edition 2009 at page 1456.

The onus is on the Applicant to prove on a balance of the probabilities that the requirements necessary for a final interdict are established. ***HERBSTEIN AND VAN WINSEN (supra page 1457).***

57. The court has already made a finding that the chairperson of the disciplinary enquiry has jurisdiction to hear the main prayer before court and make an appropriate decision. That the means therefore that there is an alternative remedy available to the Applicant namely the decision of the chairperson. The

chairperson has jurisdiction to set aside or dismiss any one or all of the ten (10) disciplinary charges provided the Applicant has made out a case to justify the prayer sought. The disciplinary enquiry therefore provides the Applicant with a facility that is reasonably accessible, has adequate relief yet alternative to a court interdict. The Applicant has therefore failed to satisfy the requirements of an interdict.

That failure is fatal to the Applicant's case. The Applicant's main and alternative prayers are accordingly dismissed.

58. The employment contract subsists between the parties. An order for costs against one party may adversely affect the employment relationship. The court in the exercise of its discretion has refrained from granting a costs order in this matter.

For the reasons stated above the court orders as follows;

(a) The Applicant's main and alternative prayers are dismissed.

(b)Each party pays his/her costs

The members agree

D MAZIBUKO

JUDGE

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 150/10

In the matter between:

VUSI SIKELELA DLAMINI **APPLICANT**

And

EAGLE NEST (PTY) LTD **RESPONDENT**

CORAM:

D. MAZIBUKO: **JUDGE**

A. M. NKAMBULE: **MEMBER**

M.T.E. MTETWA: **MEMBER**

MR. C.BHEMBE: **FOR APPLICANT**

MR. K. MOTSA: **FOR RESPONDENT**

JUDGEMENT -29th NOVEMBER 2010

Unreasonable delay in filing application to court after CMAC certificate issued, what constitutes unreasonable delay - when is Applicant entitled to apply for condonation for late filing.