IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 117/11**

In the matter between:

MFANUKHONA SIBANDZE **APPLICANT**

AND

SIPHO NYONI N.O **1ST RESPONDENT**

CASQUIP STARCH (PTY) LTD **2ND RESPONDENT**

CORAM:

THULANI A. DLAMINI	**:**	**ACTING JUDGE**
SIMON MVUBU	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**L. MZIZI**
FOR RESPONDENT	**:**	**D. JELE**

JUDGEMENT – 05 MAY 2011

[1] The Applicant herein brought an urgent application seeking the following relief;

"1. Dispensing with the normal and usual requirements relating to manner of service, form and time limits in applications and enrolling this matter as one of urgency.

2. Condoning the Applicant's non-compliance with the rules of Court.

3. That pending finalization of this matter the disciplinary enquiry presided over by 1st Respondent be and is hereby stayed.

4. That a rule nisi do hereby issue operating with interim and immediate effect calling upon the Respondents to show cause on a date to be determined by the Honourable court why prayers 4.1 and 4.2 should not be made a final Order of Court.

4.1 That the disciplinary proceedings against Applicant presided over by the 1st Respondent be and is hereby stayed pending finalization of this application.

4.2 That the 1st respondent's findings (undated) (annexure c) be and is hereby reviewed and set aside.

5. Costs of suit.

6. Further and/ or alternative relief."

[2] The 2nd Respondent opposed the application, raising points of law *in limine* and further pleading to the merits.

[3] The brief history of the matter can be summarized as follows;

The Applicant was suspended without pay by the 2nd Respondent following certain misconduct, for which he has been charged and appeared before a disciplinary tribunal chaired by the 1st Respondent. At the commencement of the hearing the Applicant pleaded not guilty to the charges preferred against him and was represented by his present attorney. The hearing was finalised on the 15th March 2011 and thereafter the 1st Respondent returned a verdict of guilty against the Applicant, which verdict the Applicant now seeks to review, set aside and/or correct before this court.

[4] The basis upon which the Applicant seeks to review the 1st Respondents' decision is that he (1st Respondent) failed to apply his mind to the relevant issues in accordance with the tenants of natural justice, and then goes on to list the reasons why he feels the chairperson failed to apply his mind.

[5] As pointed out earlier, the 2nd Respondent opposed the application, on the following preliminary points of law:-

(a) that the matter is not urgent and that the alleged urgency is self created.
(b) that there was no basis for interference with the internal disciplinary process by this court.

[6] When the matter first appeared in this Court Mr. Jele for the Respondent indicated that he was ready to argue the matter, albeit on the short notice given by the Applicant. Mr. Mzizi however indicated that he would want to take further instructions for purposes preparing and filing his client's replying papers and heads of argument. The Court was accordingly inclined to grant an interim order in terms of prayers1, 2, and 3 of the

Notice of Motion. The matter was then rescheduled to the 20th April 2011 for arguments.

[7] For purposes of convenience, it was agreed that on the date set down for arguments on the issues raised, both the points of law raised and merits of the matter would be argued simultaneously.

A. URGENCY

[8] Mr. Mzizi on behalf of the Applicant, argued that since the Court had already issued an interim order staying the disciplinary inquiry in terms of prayer 3 of the notice of motion it means the matter has been so enrolled as one of urgency. As such, he argued, there was no need for him to belabour the court on this point. He nonetheless referred the Court to the applicant's founding affidavit on this issue.

[9] On the other hand Mr. Jele argued that the Respondent had been brought to court on a very short notice of less than four (4) hours obstensibly because the matter is urgent. He brought it to the Court's attention that in fact the Applicant had been aware of the 1st Respondent's decision for over 12 days. Jele's argument herein was to the effect that it was very unreasonable for the Applicant to bring the Respondents to court for the relief now sought, more so because he had been aware of the existence of the issue complained of for such a longtime.

[10] Mr. Jele further argued that the urgency alleged by the Applicant was speculative in that he contemplates that he will be dismissed following the decision of the chairperson to finding him guilty of the charges he was facing. He submitted that the 2nd Respondent had appointed an independent chairperson who was still to make a recommendation to it (company) on the appropriate punishment to be meted out. This would be after the formalities of mitigation and aggravation. As such it did not follow

that the Applicant would be dismissed just because he had been found guilty.

[11] The court was referred to the unreported High Court case of ***Protronics Networking Corporation (Pty) Ltd V Emcom Africa (Pty) Ltd and Another in re: Emcom Africa (Pty) Ltd V Protonics Networking Corporation (Pty) Ltd*** **case No. 854/2000 and to *Gallagher V Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W).** In the Protronics case, Masuku J stated that it is 'extremely unreasonable and amounts to the Respondent not being granted a fair hearing' where the opposing party is brought to court on very short notice. Masuku J further stated at page 3 of the Protronics that;

> ***"Any litigant who comes to Court must be fully appraised of the case that he has to meet and must also be afforded sufficient time to engage the services of an attorney to represent him if he so wishes. The abridgement of the time limits set out in the Rules of Court does not in any way negate the Respondent's right to be heard upon proper and sufficient notice having been given to him… Even in those cases where the Respondent is represented by an attorney, sufficient time must be given to the attorney concerned to properly consider the application, take instructions and prepare to do his primary duty of assisting the Court to reach the correct decision, hopefully in his client's favour."***

[12] As alluded to by Mzizi, this court did in fact grant an interim order when the matter was heard on its first day. But the court did not finally decide or rule on the issue of urgency, and as such it did not fall away by the granting of the interim order. The submission by Jele is that in the haste at which the Applicant has approached this court for relief, he has failed to take into account the Respondents' right to be heard on proper and

sufficient notice, when the decision complained of was delivered almost two weeks before he approached court. The Court has noted that in his founding affidavit the Applicant advances reasons for his delay in approaching it. We therefore have to consider whether the application is sufficiently urgent to warrant abridgement of the usual time limits prescribed by the rules or practice for the institution of applications on notice of motion in this court. A question which lingers in this regard is whether the urgency is self created by the Applicant and whether he delayed unreasonably in approaching court for relief.

[13] In the case of ***Nhlanhla Hlatshwayo V Swaziland Government & Another I.C. Case no. 389/2006,*** the court recognized the need to take into account, when assessing whether a litigant is guilty of delay, the natural reluctance of an employee to rush into litigation against his employer without careful consideration of his legal position. In the case of cash-stripped litigants, like the present Applicant who is on suspension without pay, there is also the need to raise sufficient funds to properly instruct counsel. In the present case, we do note and agree with Mr. Jele's criticism of the Applicant that, having dragged his feet in approaching this court for relief, when he eventually decided to litigate he engaged a 'high gear' and expected the Respondent to adjust to his speed.

[14] However, the court is satisfied that in the circumstances of this case, the delay of twelve days (12) does not disqualify the Applicant from approaching the court by way of urgency. It is this court's view that any procedural prejudice occasioned to the 2nd Respondent by the short service was remedied by the postponement granted on the 14th April 2011. The point *in limine* regarding urgency is accordingly dismissed.

B. INTERFERANCE BY COURT ON INCOMPLETE DISCIPLINARY HEARING

[15] Arguing for the Applicant on this point Mzizi stated that this court had the requisite jurisdiction to review decisions of disciplinary hearings and referred the court to the case of **Sazikazi Mabuza V Standard Bank IC case No. 311/2007**. In that case, Dunseith JP stated that the intervention of the court, though in the nature of a review, is based upon the courts' power to restrain illegalities and promote fairness and equity in labour relations. Mzizi pointed out that the disciplinary hearing against the Applicant is still on-going and that the chairperson had found him guilty. The reason he wants this court to intervene at this stage is because it is apparent that he (Applicant) will be dismissed. He referred the court to page 30 of the minutes of the disciplinary hearing where the CEO of the 2nd Respondent stated as follows responding to a question from the same attorney Mzizi;

> ***Mr. Mzizi: Mr. Cassey, as head of the company, what would be the companies position if an employee is found guilty (sic).***
>
> ***Mr. Cassey: If the employee is found guilty, we would suspend him without pay in terms of our D.C procedure and subject to the chairman he would be dismissed"***

[16] Mzizi's line of argument to the aforegoing exchange was that since the Applicant had been found guilty by the chairperson and following the response of the CEO above, it follows that he will be dismissed no matter what.

[17] Countering Mzizi's argument Jele's citing the same ***Sazikazi*** case (supra) stated that 'it is not sufficient merely to find that the chairperson of the disciplinary hearing came to a wrong decision'. He went on to point out that according to the ***Sazikazi*** case, for a court to intervene, it (court) must be satisfied that this is one of those rare or exceptional cases where a grave injustice might result if the chairperson's decision is allowed. Jele further referred the court to the case of ***Walhaus V Additional Magistrate, Johannesburg*** **1959 (3) SA 113 at 119 H – 120E** where the court held:

> ***"By virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief by way of review, interdict or mandamus – against the decision of a Magistrates court given before conviction. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances…and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained…"***

The above principle has been extended to apply in this field of labour law. In this regard the decision of the South African Labour Appeal Court in the case of ***Booysen v The Minister of Safety and Security & other*** **[2011] 1 BLLR 83 (LAC)** is relevant. In this recent judgment, the LAC upheld the jurisdiction of the Labour court to interdict any unfair conduct, including disciplinary action. Nevertheless, Tlaletsi, JA, cautioned:

> ***"However, such an intervention should be exercised in exceptional circumstances...Among the factors to be considered would be whether failure to intervene would lead to***

grave injustice or whether justice might be attained by other means."

[18] From the aforegoing, and the endless list of authorities on the principle, it is without doubt that whether the court will intervene depends on the facts and circumstances of each case. So that it is not sufficient merely to find that the chairperson of the disciplinary inquiry came to a wrong decision. The court will intervene immediately upon being satisfied that a particular case is one of those rare or exceptional ones where a grave injustice might result if the chairperson's decision is allowed to stand.

[19] Over and above the afore-going, and for this court to intervene at this stage, it has to be satisfied that the chairperson of the inquiry did not exercise the discretion bestowed on him judiciously. It is without doubt that the duty resting on the chairperson of a disciplinary inquiry to exercise his discretion 'judiciously' means that he is at law required to listen to the relevant evidence, weigh it to determine what is probable and reach a conclusion based on the facts and the law. And where it can be proved that indeed the chairperson applied his mind to these matters, then the court can not interfere – even if it disagrees with his conclusions on the facts or the law.

[20] This court has considered the findings of the chairperson of the disciplinary inquiry and has noted that he has exercised his discretion judiciously. Whether or not this court agrees with his conclusion on the facts and the law is not relevant for this judgement, suffice to state that this court finds no *mala fides*, improper motive, arbitrariness or caprice against the 1st Respondent.

See:

- ***National Transport Commissioner & Another V Chetty's Motor Transport 1972 (3) SA (A) 726 at 735 F***

- ***Nationwide Car Rentals V Commissioner, Small Claims Court Germiston & Another 1998 (3) SA 568 (W)***

[21] We do not agree with the argument by Applicant's counsel that his client will be dismissed following the return of a verdict of guilty by the 2nd Respondent. Clearly that is speculation by the Applicant. We again emphasise that this court can not be called upon to speculate. Further to that, we do not believe that in this case justice might not be attained by other means. In the premises, we are of the view that the court can not entertain the present application and accordingly the 2nd Respondent's point of law in this regard succeeds.

[22] As pointed out in the preceding paragraph and the court having already made a finding that the chairperson exercised his discretion judiciously, we therefore find it unnecessary to deal with the correctness or otherwise of his decision. This, especially taking into account that the Applicant is yet to mitigate, after which the chairperson will make a recommendation on the appropriate sanction. And then the final decision on the sanction will be made by the employer. This clearly is not one of those cases where the court would deem it appropriate to intervene in the employer's internal disciplinary proceedings until it has run its course. The applicant has therefore not made out a basis for this court to intervene. We are not persuaded that the applicant has established prima facie rights which deserve immediate protection. We also believe this application was premature in any event. The Applicant can not be said to be without alternative remedies in attaining justice as and when the hearing has been completed.

[23] The court accordingly makes an order as follows:

(a) the application is dismissed;

(b) the interim order granted by this court is hereby discharged;

(c) the 1st and 2nd Respondent are hereby ordered to complete the disciplinary inquiry of the Applicant within 14 days hereof;

(d) There is no order as to costs.

The members agree.

THULANI A. DLAMINI

INDUSTRIAL COURT - ACTING JUDGE.