



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGMENT**

Case NO. 34/12

In the matter between:

**SWAZILAND TRANSPORT & ALLIED  
WORKERS UNION**

**1<sup>st</sup> Applicant**

**CAROL THOKO MSIBI**

**Second Applicant**

And

**CASQUIP STARCH (PTY) LTD**

**First Respondent**

**SIPHEPHISO DLAMINI N.O.**

**Second Respondent**

**Neutral citation:** *Swaziland Transport & Allied Workers Union & Another (34/12 [2012] SZIC 1 (FEBRUARY 2012))*

**Coram:** NKONYANE J,  
*(Sitting with G. Ndzinisa & S. Mvubu  
Nominated Members of the Court)*

**Heard:** **21 FEBRUARY 2012**

**Delivered:** **29 FEBRUARY 2012**

**Summary:**

*Trade union operations at the workplace---a trade union must first seek recognition in terms of the Industrial Relations Act before it can freely and lawfully operate at the workplace. Senior employees--- senior employees in the management cadre who do not fall under unionizable employees can join a staff association to deal with their grievances at the workplace, they are not without a remedy. It is not the duty of the Industrial Court to interfere with internal disciplinary hearings. It is only where there exists special circumstances that the Court may be requested to intervene in the interest of justice.*

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**JUDGMENT**

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1. This is an application brought by the Applicants under a certificate of urgency.
2. The 1<sup>st</sup> Applicant is a trade union established and recognized as such in terms of the Industrial Relations Act No. 1 of 2000.
3. The 2<sup>nd</sup> Applicant is an adult Swazi female of Siteki, Lubombo Region and an employee of the 1<sup>st</sup> Respondent.
4. The 1<sup>st</sup> Respondent is a limited liability company duly incorporated in terms of the company laws of Swaziland.
5. The 2<sup>nd</sup> Respondent is a Swazi male adult cited herein in his capacity as the Chairperson of the disciplinary hearing conducted by the 1<sup>st</sup> Respondent against its employee, the 2<sup>nd</sup> Applicant.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants instituted the present application under a certificate of urgency and are seeking the following orders;

“1. Dispensing with the usual forms and procedures relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. Ordering that a rule nisi be issued calling upon the Respondents to appear and show cause, if any on the date to be determined by this honourable court why an order in the following terms should not be made final.

2.1 Interdicting and restraining Mr. Siphephiso Dlamini, to stop proceeding with the hearing of Carol Msibi and Casquip (Pty) Ltd forthwith.

2.2 Declaring the alleged verbal recommendation of a dismissal be and set aside forthwith.

2.3 Interdicting and restraining Casquip (Pty) Ltd from accepting the recommendation forthwith.

2.4 Reviewing and/or set aside the verbal ruling of Mr. Siphephiso Dlamini with regards to the representation of the 2<sup>nd</sup> Applicant by the 1<sup>st</sup> Applicant forthwith and that a hearing should

not have been proceeded without her participation.

2.5 Directing that the service of the 1<sup>st</sup> Respondent be sufficient to the 2<sup>nd</sup> Respondent.

2.6 Declaring charges by a colleague or a subordinate null and void.

2.7 Interpret section 36(a) to suit the sanction of failing to carry out instruction of a Supervisor.

3. That cost at a punitive scale be awarded against the 1<sup>st</sup> and the 2<sup>nd</sup> Respondent.

4. That prayer 2.1,2.2,2.3,2.4,2.5,2.6,2.7 operate in the interim.”

7. The application first came before the court on 09.02.2012. From the papers filed of record there was no indication that the 2<sup>nd</sup> Respondent was served with the application. From the Bar, Mr. Thwala informed the court that the 2<sup>nd</sup> Respondent had been served. No return of service was however filed in court.

8. On that same day Mr. Jele informed the court that the internal disciplinary hearing complained about by the Applicants will not continue until the matter is finalized in court. The matter was accordingly postponed until 13.02.2012 to allow the Respondents to file

their Answering Affidavits and for the Applicants to file their Replying Affidavits, if any.

9. The matter did not proceed on argument on 13.02.2012. It was postponed until 20.02.12 and the parties' representatives were instructed by the court to file heads of argument prior to the date set for argument on 20.02.2012. On this day Mr. Thwala had not yet filed his heads of argument and the matter was postponed until the following day on 21.02.2012.
10. On 21.02.2012 Mr. Jele informed the court that he was no longer pursuing the points of law raised in the Answering Affidavit
11. The applicants did not file any Replying Affidavits. Mr. Thwala told the court he has read the Answering Affidavit and that they will not be filing Replying Affidavits.
12. The facts of the matter are not in dispute. They revealed that the 2<sup>nd</sup> Applicant was employed by the 1<sup>st</sup> Respondent Company as a Senior Supervisor reporting to the Farm Logistics Manager, a certain Job Sikhondze. The employment contract of the 2<sup>nd</sup> Applicant was annexed to the Founding Affidavit and marked "BK3". She is also holding the position of chairperson of the Branch Executive of the 1<sup>st</sup> Respondent.
13. On 24.11.2011 the 2<sup>nd</sup> Applicant was served with a notice to attend a disciplinary hearing on 28.11.2011. She was facing the charge of failing to carry out an instruction of a Supervisor. As a member of the

1<sup>st</sup> Applicant union, the 2<sup>nd</sup> Applicant wanted to be represented by a union official.

14. On 28.11.2011 the disciplinary hearing did not proceed for reasons that are not relevant to the present enquiry. The disciplinary hearing was postponed until 02.02.2012. On this date a different union official, Mr. Thwala, the present representative of the Applicants appeared at the disciplinary hearing representing the 2<sup>nd</sup> Applicant. The 1<sup>st</sup> Respondent raised an objection that it was improper for Mr. Thwala in his capacity as the union official to represent the 2<sup>nd</sup> Applicant because the 2<sup>nd</sup> Applicant was not a unionizable employee as she was part of management because of her position as Senior Supervisor.
15. The chairperson of the disciplinary hearing ruled in favour of the 1<sup>st</sup> Respondent, effectively removing Mr. Thwala in his capacity as the official of the 1<sup>st</sup> Applicant from representing the 2<sup>nd</sup> Applicant. The chairperson postponed the hearing to another day to allow the 2<sup>nd</sup> Applicant to get another representative. In his ruling the chairperson also allowed the 2<sup>nd</sup> Applicant to get a representative of her choice even outside the company structures if she could prove that no other person within the company structures was prepared to represent her.
16. The court is now being called upon to review the decision of the chairperson.

17. On a point of order and caution, it must be pointed out that from the papers before the court, the chairperson made a ruling on only one question, namely, that of union representation. The court will therefore address itself to the question of union representation. The other prayers raise issues that were not addressed by the chairperson of the disciplinary hearing; hence he did not make any ruling on them. If the court were to address those issues it will be usurping the powers of the chairperson of the disciplinary hearing. No exceptional circumstances have been alleged and proved to warrant the court to interfere in an internal disciplinary hearing by an employer against its employee.

**See:- Abel Sibandze v. Stanlib Swaziland (Pty) Ltd case No. 5/2010 (ICA);**

**Bhekiwe Hlophe v. Swaziland Water Corporation case No. 411/2006 (IC);**

**Ndoda Simelane v. National Maize Corporation (PTT) LTD Case No. 453/06 (IC)**

18. The ruling of the chairperson of the disciplinary hearing is annexed to the Answering Affidavit and is marked “JK 1” on paragraph 8 of the ruling it is stated that;

**“From evidence led it is common cause that Ms Msibi is a Senior Supervisor reporting directly to the Logistics Manager whose duties include setting of daily work schedules, disciplining other employees and or authorizing same. Below her she has a pool of Supervisors who are in**

**charge of a span of not less than 15 employees. This in terms of IR Act/2000 as amended qualifies her as staff and restricts her from union representation.”**

Part of paragraph 9 reads as follows:-

**“It was also established from the evidence led that currently there is no recognition agreement between the parties.....”**

In paragraph 10 the Chairperson stated that:

**“In the absence of the recognition agreement the union may therefore not claim any right to represent the employee. This has been well pointed out in the case between SMAWU & Others v. Leo Garment (IC case no. 387/08).”**

The Chairperson concluded in paragraph 11 as follows:-

**“Based on the above, I therefore find that the accused union’s legal capacity to represent the accused has not been established.....”**

19. Even before the court, it was common cause that there is presently no recognition agreement between the parties and that that process was still underway. Mr. Thwala informed the court that the parties may sign a recognition agreement at the end of this month.
20. The recognition and procedural agreement is the document in which the parties would agree as to the categories of the employees at the



workplace, that is, which employees are unionizable and which employees are not because they are part of management. The Chairperson also held in his ruling that should the 2<sup>nd</sup> Applicant fail to secure internal representation, she was free to seek external representation of her choice. This shows that the chairperson was not only fair, but also independent in discharging his duties.

21. The Industrial Court does not sit as a court of Appeal for decisions of employers taken during internal disciplinary hearings. If the accused employee is not happy about the decision or ruling of the chairperson, that employee must prove that there exist exceptional circumstances warranting the Industrial Court to interfere in the process of the internal disciplinary hearing. In the present application it has not been shown that the chairperson misdirected himself in any way. It has also not been shown that the chairperson failed to judiciously exercise his discretion. In the case of **Sazikazi Mabuza v. Standard Bank Swaziland Ltd & Another case No. 311/07 (IC)**, the court pointed out that;

**“The duty resting upon a chairman of a disciplinary enquiry is to exercise his discretion judiciously. This means that he is required to listen to the relevant evidence, weight it to determine what is probable and reach a conclusion based on the facts and the law. The court cannot interfere with his discretion where he has applied**

**his mind to these matters, even if the court disagrees with  
his conclusions on the facts or the law.....”**

22. As already pointed out in the preceding paragraph, it has not been shown in this application that the chairperson failed to properly apply his mind to the issues before him and thus committed a gross irregularity warranting his decision to be reviewable.

**See also: Lynette Groening v. Standard Bank Swaziland  
& Another, Case No. 184/2008 (IC).**

23. There was no evidence before the court that the chairperson made a recommendation for the dismissal of the 2<sup>nd</sup> Applicant as suggested by prayers 2.2 and 2.3 of the Notice of Motion. In prayer 2.6 the court is being asked to make a declaratory order that the charges against the 2<sup>nd</sup> Respondent are null and void. This issue must however first be raised with the chairperson so that he could make his ruling on it. The court would be interfering with the duties of the chairperson of the disciplinary hearing if it were to entertain this prayer at this stage. Again prayer 2.7 is a matter that also falls squarely within the powers of the chairperson. It is not the duty of this court to conduct a hearing or pre-hearing of the disciplinary charges. These are issues that should be determined by the chairperson.

**See; Abel Nsibandze v. Stanlib Swaziland (Pty) Ltd case no.  
440/2009 (IC).**

24. Taking into account all the foregoing observations, it follows that none of the prayers in the Applicants Notice of Motion can succeed. They are accordingly dismissed with costs.

**ORDER:**

25. The Applicants' application is dismissed with costs. They are jointly and severally liable, the one paying the other to be absolved.
26. The members agree.

NKONYANE J.