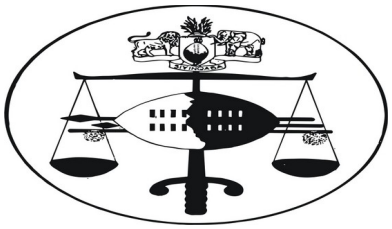

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 366/11

In the matter between:

MADODA NDWANDWE **Applicant**

And

SWAZILAND WATER SERVICES CORPORATION **1st Respondent**

SUSAN MKUMANE **2nd Respondent**

Neutral citation: *Madoda Ndwandwe v Swaziland Water Services & Another (366/11 [2012]* SZIC 11 MAY 2012**)**

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

Heard: **10 MAY 2012**

Delivered: **22 MAY 2012**

Summary:

Applicant coming to Court by way of urgency seeking an order to interdict re-hearing of disciplinary charges—The Court will not lightly interfere with the employer's prerogative to hold a disciplinary hearing against its employee. Application accordingly dismissed as the Applicant had failed to show that there existed exceptional and compelling circumstances entitling the Court to intervene.

JUDGMENT 22.05.12

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[1] This is an urgent application brought by the Applicant against the Respondents.

[2] The Applicant is an employee of the 1st Respondent. The 1st Respondent is a statutory corporation having its principal place of business at Ezulwini, Hhohho Region. The 2nd Respondent is also an employee of the 1st Respondent and is the Chairperson of the second disciplinary hearing that the Applicant is facing at the workplace.

[3] The facts of the application are not in dispute. What is in dispute is whether the Chairperson of the Appeal acted lawfully when making an order for the disciplinary hearing to start afresh before a different chairperson (2nd Respondent) at level 3.

[5] The undisputed facts of the application revealed that the Applicant was found guilty by a level 2 Chairperson who recommended summary dismissal of the Applicant. This recommendation was adopted by the 1st Respondent and the Applicant was accordingly summarily dismissed by letter dated 20th September 2011, Annexure "MN1" of the Applicant's Founding Affidavit. The Applicant noted an appeal to level 3. One of the grounds of appeal was that the Chairperson of the disciplinary hearing exceeded his scope of authority when he made the recommendation for summary dismissal as the highest possible sanction at level 2 was a final written warning.

[6] The Applicant was successful on appeal. The sanction of summary dismissal was set aside by the appeal Chairperson, who was the Managing Director, Mr. P.N. Bhembe. The appeal Chairperson also ordered a re-hearing of the charges against the Applicant because he reasoned that the nature of the charges that the Applicant was facing were supposed to be heard by a level 3 Chairperson in terms of the 1st Respondent's Recognition Agreement. It is this part of the decision of the Appeal Chairperson that prompted the present application on an urgent basis for the court's intervention.

[7] The Applicant is seeking an order in the following terms;

"1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the rules of the above Honourable Court and directing that the matter be heard as one of urgency.

2. That a rule nisi hereby issue calling upon the Respondents to appear and show cause on a date to be determined by the Honourable Court why an order in the following terms should not be made.

2.1 That the 1st and 2nd Respondents be and are hereby interdicted from proceeding with the 2nd Disciplinary hearing of the Applicant.

3. That the 1st Respondent pays the costs of this application.

4. Granting Applicant such further and or alternative relief."

[8] The Applicant's application is opposed by the Respondents on whose behalf an Answering Affidavit was filed deposed thereto by the 1st Respondent's Strategic Services Director, Mr. Leonard Nxumalo. A confirmatory Affidavit was also filed by the 2nd Respondent. The Applicant duly filed his Replying Affidavit.

[9] The application first appeared before the court on 01st December 2011. On this day, a consent order in terms of prayer 2.1 was granted. The Respondents were ordered to file their Answering Affidavits by 05th December 2011. The Applicant was to file his Replying Affidavit by 07th December 2011. The matter was ordered to proceed on a date to be arranged with the Registrar.

[10] In the Answering Affidavit the 1st Respondent raised three points *in limine*, namely; that the matter was not urgent as the re-hearing has already commenced and was nearing completion and therefore the present urgent application has been overtaken by events. Second; that this court has no right to interfere with an internal disciplinary hearing conducted by an employer against its own employee and thirdly; that the Applicant failed to demonstrate his right to an interdict.

[11] From the Court record, it does not appear that the 1st Respondent raised the points of law on the first day when the application appeared in Court on 01st December 2011. It also does not appear from the record that the 1st Respondent on that day indicated to the Court that it was reserving its right to raise the points of law on a later date. The Court having opened its doors to the Applicant, and there being no evidence on the Court's record that when the matter first appeared before the Court the 1st Respondent raised the question of urgency or told the Court that it was reserving its right to raise that question later, the 1st Respondent cannot now, five months later since the matter appeared before the Court, raise the question of urgency. This point of law has now been overtaken by events and is accordingly dismissed.

[12] The other points raised are inextricably intertwined with the merits of the case. The court will therefore deal with them in its reasons for the judgement in this application

[13] **Court's Jurisdiction**

The Applicant argued that the court must interfere and stop the present proceedings because the 1st Respondent's act of ordering a re-hearing was illegal because;

13.1 The decision to lay charges against an employee is vested only on the employee's supervisor or any other authorised person.

13.2 The re-hearing was ordered to re-start at level 3 and not at level 2 where it was initially held.

13.3 The re-hearing will result in double jeopardy as the first disciplinary hearing was properly carried out and there was no need for a second hearing of the same charges.

[14] What is clear from the evidence before the court however is that the Appeal Chairperson did not make any decision to lay charges against the Applicant. The Appeal Chairperson merely ordered a re-hearing before a level 3 Chairperson because he reasoned that the disciplinary proceedings were not supposed to be heard by a level 2 Chairperson in terms of the Recognition Agreement between the parties.

[15] The Applicant did not dispute the Appeal Chairperson's response that the disciplinary hearing was supposed to be heard by a level 3 Chairperson in terms of the Recognition Agreement.

[16] If therefore the Appeal Chairperson had noticed an irregularity in the manner that the disciplinary hearing was held, the Appeal

> Chairperson did not act illegally in ordering a re-hearing before the proper level in terms of the Recognition Agreement between the parties. The Chairperson of a disciplinary appeal hearing has broad powers to ensure that the disciplinary outcome is lawful and fair. If it is established on appeal that the original hearing was procedurally irregular, the appeal chairperson may cure the irregularity by re-hearing the matter himself or may remit the matter to the initial enquiry for re-hearing.
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> See:- **Nasionale Prkeraad v. Terblance (1999) 20 I.L.J. 1520 LAC**
>
> **Thoko Dlamini v. Sipho Madzinane N.O. and Mormond Electrical Contractors case No. 377/08 (IC).**

[17] In the present application the Appeal Chairperson could not remit the matter for re-hearing by the initial Chairperson at level 2 because it was improper in terms of the Recognition Agreement for the matter to be heard at that level.

[18] As already pointed out by the Court, the evidence that it was improper for the initial hearing to be heard at level 2 was not disputed by the Applicant. The Court therefore has no right to interfere with the decision of the Appeal Chairperson as it has not been shown to be illegal.

[19] What was clear to the court however was that the Appeal Chairperson misdirected himself when he said that he was empowered by Article 6.4.2 of the Recognition Agreement to make the order for re-hearing. Article

6.4.2 of the Recognition Agreement deals with matters at level 4. The initial disciplinary hearing was held at level 2. The Applicant's appeal was heard at level 3 and not at level 4. There is however a similar provision in level 3 under Article 6.3.3 namely, that "**The chairman shall have sole judicial responsibility."**

[20] It follows therefore that although the Appeal Chairperson misdirected himself when he said he was empowered by Article 6.4.2 to order the re-hearing, that mistake is not fatal as the Appeal Chairperson at level 3 has similar powers of sole judicial responsibility over the proceedings before him.

[21] The gist of the Applicant's complaint is that it appears to him that the 1st Respondent ordered the re-hearing because it wants him to get a harsh sanction. From the evidence before the court there is no basis for this conclusion by the Applicant. Further, from the evidence before the court, the Applicant has no complaint about the 2nd Respondent's manner of handling the re-hearing. There are therefore no compelling reasons for the Court to intervene and interdict the present disciplinary hearing.

[22] Since the evidence that the initial hearing was irregularly placed before a level 2 Chairperson has not been contradicted by the Applicant, we do not see how the Court may interfere with the Appeal Chairperson's order that a re-hearing be held at the appropriate level in accordance with the Recognition Agreement.

[23] It follows therefore that the Applicant's application should be dismissed.

[24] The court will therefore make the following order;

a) The application is dismissed.

b) There is no order as to costs.

The members agree.

NKONYANE J

For Applicant :- Miss X Shabangu
(Sibusiso B. Shongwe & Associates)

For Respondents :- Miss S. Matsebula
(MP Simelane Attorneys)