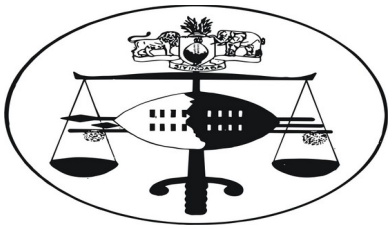

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**R U L I N G**

Case NO. 251/12

In the matter between:

**NDUMISO O. HLONGWANE** **Applicant**

And

**SNAT CO-OPERATIVE SOCIETY** **1st Respondent**

**SIKHUMBUZO SIMELANE N.O.** **2nd Respondent**

**Neutral citation:** *Ndumiso O. Hlongwane v SNAT Co-operative Society &Another (251 [2012]* SZIC 26 (AUGUST 1 2012**)**

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

**Date of argument:** **25 JULY 2012**

**Judgment delivered:** **01 AUGUST 2012**

***Summary:***
***The Applicant brought an urgent application for the review and setting aside of the disciplinary chairperson's ruling refusing to recuse himself—Applicant arguing that the Chairperson applied the wrong test hence he arrived at the wrong decision.***

***Held—that the Chairperson applied the correct test, namely, reasonable apprehension of bias. Application accordingly dismissed.***

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**RULING ON POINTS OF LAW RAISED**
**01.08.12**

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

[2] The Applicant is applying for an order restraining and interdicting the Respondents from proceeding with a disciplinary hearing set to commence on 24th July 2012, pending an application before the court for; (1) review and setting aside of the 2nd Respondent's ruling dated 05th July 2012; (2) removing the 2nd Respondent as chairperson of the disciplinary hearing; and (3) directing the 1st Respondent to appoint a chairperson in accordance with

its procurement processes. The Applicant is also applying for costs of suit and for any further and or alternative relief.

[3] The 1st Respondent filed a notice to oppose and a preliminary affidavit on 24th July 2012 when the matter first appeared in court. The 2nd Respondent was served with the application on that day. The matter was postponed until 25th July 2012 for argument and also in order to allow 2nd Respondent to file his affidavit.

[4] In its preliminary affidavit the 1st Respondent raised three points *in limine*. The court is presently called upon to make a ruling on the points *in limine* raised by the 1st Respondent.

[5] The first point *in limine* raised concerns the question of urgency. The 1st Respondent argued that the application was not urgent and that if there was any urgency it was self created. It was further argued on behalf of the 1st Respondent that:

> 5.1 The Applicant is asking the court to review the ruling of the 2nd Respondent which was delivered on 05th July 2012 but comes to court running on 20th July 2012 and claims that the matter is urgent.

5.2 The Applicant is asking the court to review the ruling of the 2nd Respondent dismissing the Applicant's application for recusal of the 2nd Respondent on the basis of apprehension of bias, when on two previous occasions when the Applicant appeared before the 2nd Respondent, he failed to make the application for the 2nd Respondent to recuse himself.

5.3 Even after the 2nd Respondent's ruling on 05th July 2012, the applicant did not act immediately, but only began to take action on 17th July 2012 when he directed correspondence to the 1st Respondent's attorneys.

5.4 The delay in bringing the application to court has not been satisfactorily explained.

[6] On behalf of the Applicant it was disputed that the urgency was self created. It was argued that when the Applicant first appeared before the 2nd Respondent on 14th June 2012, the application for the recusal of the 2nd Respondent was not moved because on that day the hearing did not proceed but the parties merely dealt with the logistics of how to go about with the disciplinary hearing. Further, it was argued that the Applicant had requested for further particulars and such had not yet been furnished on that day.

[7] The Applicant's attorney, Mr. Simelane, argued before the court that the 2nd Respondent only made known his terms of reference as chairperson on 05th July 2012, hence the application for recusal was made on that day after they had got to know his mandate. He said on the previous occasions when they appeared before the 2nd Respondent, there was no basis for them yet to apply for the recusal of the 2nd Respondent.

[8] In his Founding Affidavit, the Applicant dealing with urgency stated inter alia, that:

8.1 The matter was urgent on account of the fact that the hearing had been scheduled to proceed on 24th and 25th July 2012.

8.2 The urgency was in the harm that he would suffer in having to appear before the 2nd Respondent, who will clearly have no final say on the sanction to be meted out in the event the Applicant is found guilty.

8.3 Although the 2nd Respondent's ruling was made on Thursday 05th July 2012, the Applicant's attorney was only able to go through it on Monday 09th July 2012.

8.4 The Applicant tried to contact the 1st Respondent's Chairman in order to make arrangements for the appointment of another chairperson but was unable to get hold of him.

[9] The 1st Respondent was unable to file an Answering Affidavit. The court will therefore rely on the averments found in the Applicant's Founding Affidavit. From the Founding Affidavit it is clear that the 2nd Respondent's ruling was made on Thursday 05th July 2012. The Applicant's attorney got to go through the ruling on Monday 09th July 2012. The Applicant's attorney told the court that he could not act immediately because he was indisposed. It is common cause that the Applicant's attorney is not a sole practitioner. There was no explanation in court or in the papers why someone else could not handle the matter.

[10] The Applicant told the court that he tried to get in touch with the 1st Respondent's chairman to persuade him to make arrangements for the appointment of another chairperson, but was unable to locate him. It was not clear to the court why did the Applicant want to persuade the 1st Respondent's chairman to appoint another chairperson to chair the disciplinary hearing when the incumbent chairperson (the 2nd Respondent) had already made a ruling that he was not going to recuse himself from the matter. The 2nd Respondent had made his decision and the only way to

have someone else appointed to chair the disciplinary hearing was to have that decision first set aside. The Applicant is the General Manager of the 1st Respondent. He is therefore an above average citizen of the country who was expected to know what steps to take next if he was unhappy or did not agree with the 2nd Respondent's decision refusing to recuse himself. The Applicant also had the advantage of having legal representation in this matter.

[11] It was argued before the court that the court should not punish the Applicant for first trying extracurial means of solving the problem. This is a well known principle of labour law in this court. The present application is however distinguishable from those cases where this court has condoned the delay in instituting legal proceedings because the Applicant has had to try extracurial attempts to solve the dispute between the parties.

[12] In the present application, the decision to dismiss the recusal application was not made by the employer. It was made by an independent party, the chairperson of the disciplinary hearing. The chairperson of the disciplinary hearing is an independent person appointed by the employer. It was not clear to the court what purpose did the Applicant want to achieve by trying to persuade the 1st Respondent regarding a decision that was made by the 2nd Respondent in his capacity as the chairperson of the disciplinary

hearing. The conduct of the Applicant was clearly unnecessary and does not help the Applicant in any way in explaining the delay in instituting the present application on an urgent basis on 20th July 2012.

[13] The only conclusion that the court can arrive at, taking into account all the facts before it, is that the Applicant's conduct was calculated to be obstructive and to prevent the hearing from proceeding on 24th July 2012 when he instituted the present application on an urgent basis.

[14] The Applicant's explanation, taking into account all the facts and circumstances of this case, is clearly unacceptable and the court comes to the conclusion that the Applicant has failed to give satisfactory explanation for the delay. The court will therefore come to the conclusion that the Applicant has failed to establish urgency. The urgency in this case was clearly self created by the Applicant. This point of law is accordingly upheld.

[15] The second point of law raised was that there are no exceptional circumstances that have been advanced to for the court to intervene. This point of law was raised in reaction to prayer 3 of Part 2 of the Applicant's application. In prayer 3 the Applicant is seeking an order directing the 1st

Respondent to appoint a chairperson in accordance with its procurement processes.

[16] On behalf of the 1st Respondent it was argued that this issue was not properly before the court as it was not raised before the 2nd Respondent. It was argued that if the court were to entertain this issue it would be usurping the powers of the disciplinary hearing chairperson.

[17] This point was conceded by the Applicant. This point of law is accordingly upheld.

[18] The third point of law raised was that there was no reasonable apprehension of bias necessitating the 2nd Respondent to recuse himself. It was argued on behalf of the 1st Respondent that the test for disqualifying bias is objective, namely, would a reasonable man perceive any bias. The case of **Graham Rudolph v. Mananga College & Leonad Nxumalo N.O. case No.94/2007 (IC)** was referred to as authority for the test of bias, and that the 2nd Respondent did apply that test in his ruling and that therefore the ruling cannot be faulted and should not be reviewed by this court.

[19] On behalf of the Applicant it was argued that;

19.1 The 2nd Respondent committed an error of law by applying the wrong test to determine whether he should recuse himself or not. The 2nd Respondent wanted legal basis to be established over and above the "proof of facts" which would give rise to a reasonable perception of bias.

19.2 The 2nd Respondent did not deal with the double requirement of reasonable test.

19.3 The 2nd Respondent once acted as the initiator/prosecutor for the 1st Respondent. He performed to the satisfaction of the 1st Respondent by securing a conviction.

19.4 It is not unreasonable to suspect that the 1st Respondent has hired the 2nd Respondent to deliver the same results which he delivered in his previous capacity as the initiator/prosecutor.

19.5 Whilst he was acting as the initiator for the 1st Respondent, the 2nd Respondent naturally had a close working relationship with the 1st Respondent. It is this connection with the 1st Respondent which renders him unfit to preside. This institutional bias is not the permissible type. This creates a reasonable perception of bias.

19.6 The 1st Respondent violated its own policies regarding the procurement of the 2nd Respondent's services.

19.7 The 2nd Respondent was not forthright when asked about the role that he played in a previous disciplinary enquiry instituted by the 1st Respondent against its employee. He first said he was a prosecutor and when asked later on 05th July 2012 he said he was the chairman. This showed that he had something to hide and that he might confuse his role in my hearing.

19.8 The 2nd Respondent has compromised himself by accepting the terms of reference which require him to make his findings and "if necessary" to make a recommendation to management regarding the sanction.

[20] The court will deal with these arguments as follows:-

20.1 **Applying the wrong test:**

It was argued that the 2nd Respondent's ruling should be reviewed and set aside because he applied the wrong test; hence he arrived at the wrong conclusion. This argument will be dismissed by the court because it was clearly incorrect. The 2nd Respondent applied the correct legal standard, namely reasonable perception of bias.

20.2 In paragraph 6 of the ruling the 2nd Respondent stated that:

*"The legal position applicable in circumstances in which chairpersons of disciplinary hearings must remove themselves or must be removed by the courts as chairpersons has been clearly*

*established and confirmed in many judgements of the Industrial Court of Swaziland including the case of*

***Mananga College v. Rudolph Graham & Another*** *unreported Industrial Court case of Swaziland and the principles set out therein are as follows:-*

20.3 There is no doubt to the court, from the reading of the 2nd Respondent's ruling that he applied the correct test. The 2nd Respondent went on to cite **John Grogan; Workplace Law, 10th edition p. 243** and the cases of **Forster v. Chairman, Commission for Administration 1991 (4) SA 403 ©** and **Semenya & Others v. CCMA & Others (2006) 16 ILJ 1627 (LAC).**

20.4 The Applicant's attorney argued that the correct standard to be applied in such cases is the double requirement test. The court was referred to the High Court case of **Swaziland Industrial Development Company Limited v. Friedlander & Others [2006] SZHC 146 where the court held that;**

*"The apprehension or fear of bias must be held by a reasonable or right minded person and must itself be reasonable. This is what is generally referred to as the double requirement of reasonable test."*

20.5 The 2nd Respondent did apply this test in his ruling. In paragraph 6.1 he held as follows:-

***…"Actual bias is not a necessary prerequisite . It is sufficient for an Applicant to show that a reasonable man in his position and on the basis of the facts of the matter would reasonably suspect or perceive that a chairperson will be biased."***

20.6 The argument by the Applicant's attorney that the 2nd Respondent applied the wrong test is therefore without merit and is dismissed.

[21] **Fear that the 2nd Respondent might confuse his current role as chairperson with that of an initiator/prosecutor:**

21.1 This argument is also without merit. It was only a fishing expedition by the Applicant. The 2nd Respondent is a qualified and experienced legal practitioner. He was one time appointed to be an initiator by the 1st Respondent in 2010, almost two years ago. That disciplinary hearing did not involve the Applicant. There was no evidence that it involved charges similar to the ones presently being faced by the Applicant. If the court were to accept this argument as a ground for recusal, it would mean that no attorney would ever be appointed as a judge or no prosecutor would ever be appointed as a judge.

[22] **The 2nd Respondent compromised himself by accepting the terms of reference as he has no power to make a decision:**

22.1 This argument was clearly too far fetched and unrelated to the facts at hand. The attack on the 2nd Respondent was based on paragraph 3.1 of his ruling where he stated that;

***"… I was called by Mr. Ndwandwe and he informed me that I was being appointed to chair the hearing of the Managing Director and my terms of reference were to hear the evidence of both parties in relation to the alleged offences, make my findings and if necessary, make a recommendation to management regarding a sanction then thereafter, management would decide whether to accept or reject the recommendation."***

22.2 It was argued on behalf of the Applicant that the sentence "management would decide" showed that the 2nd Respondent lacked the necessary independence of a chairperson. This argument clearly had no substance. This is the usual brief that is given to any other chairperson of a disciplinary hearing. The decision to dismiss or not to dismiss is the prerogative of the employer. It is not the role of the chairman. The chairman's role is to conduct a fact finding process, and, on the basis of the facts, makes his own findings or decision and thereafter recommend a sanction if he has made a finding of guilt. The chairperson then

presents the record of the proceedings and the findings to the employer to make its own decision.

22.3 The Applicant's attorney also had a problem with the phrase "and if necessary," If necessary here simply means that in case the chairperson has found the accused employee guilty, he would have to go ahead and make a recommendation on the appropriate sanction. It only becomes necessary to recommend the appropriate sanction only if the accused employee has been found guilty. Recommendation of the appropriate sanction is conditional on the verdict of guilty. The "if necessary" therefore means that in the event that the Applicant is found guilty, the 2nd Respondent would have to make a recommendation on the appropriate sanction.

[23] **The 2nd Respondent not being forthright about what role he played in a previous disciplinary hearing instituted by the 1st Respondent:**

23.1 It was argued on behalf of the Applicant that the conduct of the 2nd Respondent of mixing the roles that he played in a previous disciplinary hearing instituted by the 1st Respondent against one of its employees meant that he had something to hide. It was argued that his role as the prosecutor was to secure a conviction and that *in casu*, it was not unreasonable to suspect that the employer has hired him to deliver the same results which he delivered in his previous capacity.

23.2 The apprehension of bias must be reasonable. The apprehension or fear of bias must be held by a reasonable or right-minded person. A right-minded person is highly unlikely to apprehend bias in the 2nd Respondent being appointed chairperson of a disciplinary hearing just because the 2nd Respondent once played the role of initiator in a disciplinary hearing instituted by the same employer against the colleague of the Applicant almost two years ago. The 2nd Respondent is a professional legal practitioner, who, because of his legal training is capable of disabusing his mind of his previous role as the initiator for the employer which he performed almost two years ago. In this jurisdiction we have a judicial officer who was appointed from the Prosecution department. It would be absurd for litigants to apply for his or her recusal on the basis that he/she once played the role of seeking the conviction of accused persons. Actual bias would have to be proved.

[24] **Nature of the charges and the manner the suspension was handled by 1st Respondent:**

24.1 In his Founding Affidavit under paragraph 21.4 to 21.4.4, the Applicant stated that his suspicion was also being fueled by the nature of the charges and whole issue of his suspension. He stated that the charges have been changed at least three times when they relate to a single act of alleged misconduct, the procurement of a generator.

24.2 There was no evidence before the court that the 2nd Respondent had anything to do with the amendment of the charges or the suspension of the Applicant. This ground for review is therefore also dismissed.

[25] **The 2nd Respondent should not have allowed the initiator to oppose the application for recusal:**

25.1 This argument also does not have any merit. There was clearly nothing wrong, procedurally, in asking the initiator to respond to the application by the Applicant. The initiator represents the interests of the employer in the disciplinary hearing. The application for recusal was made in 'open court' and the other party to the litigation was entitled .to respond or make his views on the application being moved by the other party known.

[26] Taking into account all the evidence of the Applicant in the Founding Affidavit, the arguments by both Counsels before the court and the Affidavit and ruling of the 2nd Respondent, the court is unable to find any misdirection by the 2nd Respondent in his ruling.

[27] The 2nd Respondent in his ruling applied the correct test, namely, reasonable perception of bias. Reasonable perception of bias simply means

that the fear or apprehension of bias must be held by a reasonable or right – minded person (the reasonable man) and that the fear itself must be reasonable. This is what is commonly referred to as the double requirement of the reasonable test. It is not a different test from reasonable perception of bias. Whether you refer to the test as the double requirement of reasonable apprehension of bias test or reasonable perception of bias test, these all refer to the same concept or notion of the bias required to be proved where it is not actual.

[28] Taking into account all the foregoing observations and all the evidence and circumstances of this case, the court will make the following order:

**a) The application is dismissed.**

**b) There is no order as to costs.**

[29] The members agree.

**N. NKONYANE J**

**For Applicant : Mr. M.P. Simelane**
**(MPS Law Firm and Advisory Services)**

**For 1st Respondent : Mr. N. Mthethwa**
**(Magagula & Hlophe Attorneys)**