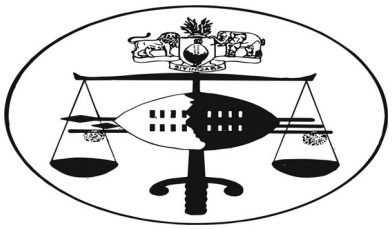

IN THE INDUSTRIAL COURT OF SWAZILAND

CASE NO. 348/2011

In the matter between:-

SWAZILAND UNION OF FINANCIAL INSTITUTIONS 1ST APPLICANT

AND ALLIED WORKERS (SUFIAW)

RONNY DLAMINI 2ND APPLICANT

And

NEDBANK SWAZILAND LIMITED 1ST

RESPONDENT

BONGANI MNTSHALI N.O. 2ND RESPONDENT

Neutral citation: Swaziland Union Of Financial Institutions And Allied Workers (Sufiaw) & Another v Nedbank Swaziland Ltd & Another (348/2011) [2012] SZIC 28 (15 August 2012)

CORAM: D. MAZIBUKO J

(Sitting with A. Nkambule & M. Mtetwa
(Nominated Members of the Court)

Heard: 15th December 2011

Delivered: **15th August 2012**

Summary : *Labour law – application to terminate uncompleted disciplinary proceedings - as a general rule disciplinary proceedings should run their course until completed, Court intervention is allowed only where compelling and exceptional circumstances exist, where injustice may result or injustice may not by other means be attained.*

Disciplinary proceedings governed by a code, the code limiting potential chairman of the disciplinary hearing to designated managers – employer unilaterally appoints chairman outside the group of designated managers in breach of the code – Court sets aside the appointment and orders strict compliance with the code.

Interdict – fresh matter brought before Court for decision yet not raised before chairman of disciplinary hearing, chairman has jurisdiction over matter – Court orders matter to proceed at disciplinary hearing.

1. The 1st Applicant is Swaziland Union of Financial Institutions and Allied Workers Union, a trade union established and registered in accordance with the Industrial Relations Act No.1/2000 (as amended). The 1st Applicant is a recognized employee representative of unionised employees of the 1st Respondent (Nedbank) which includes the 2nd Applicant - Mr Ronny Dlamini.

2. The 2nd Applicant is Mr Ronny Dlamini an employee of Nedbank (1st Respondent) (also referred to herein either as Mr Dlamini or employee). Where convenient the 1st and 2nd Applicants will simply be referred to as the Applicants.

3. The 1st Respondent is Nedbank Swaziland Limited, a financial institution incorporated and registered in Swaziland trading as such at Nedbank Centre, Swazi Plaza, Mbabane (referred to herein either as Nedbank or employer).

4. The 2nd Respondent is Mr Bongani Mntshali referred to herein either as Mr Mntshali or chairman) a non-practicing attorney based in Swaziland. Mr Mntshali has not opposed this application. He has exercised his right to remain neutral in this matter.

5. On the 28th February 2008 Mr Dlamini was employed by Nedbank as a teller. Since then Mr Dlamini has been working for Nedbank in the same capacity to the present day.

6. About the 9th November 2011 Nedbank charged Mr Dlamini with dishonesty allegedly committed in the course of work. A disciplinary hearing was convened for the 14th November 2011. At the hearing Mr Dlamini was represented by a union official.

7. When the hearing began, Nedbank informed the Applicants that it had appointed Mr Mntshali to preside over the disciplinary hearing.

The Applicants objected to the appointment of Mr Mtshali to chair the hearing. Nedbank insisted on implementing its decision. As a result Mr Mntshali proceeded to chair the hearing and had to decide on the validity or otherwise of his own appointment by Nedbank to chair the hearing.

8. The union advanced an argument that Mr Mntshali is not an employee of Nedbank. He is therefore disqualified from chairing the disciplinary hearing of a unionised employee of Nedbank in particular Mr Dlamini. It is only certain senior managers of Nedbank who are qualified to chair that hearing. This disqualification is contained in the Disciplinary Code and Procedure Agreement. The code was in force between Nedbank and the union at the material time.

9. Mr Mntshali heard arguments from both sides on the objection. He ruled in favour of Nedbank. In effect Mr Mntshali ruled inter alia, that the decision by Nedbank to appoint himself (Mr Mntshali) to chair the disciplinary hearing of Mr Dlamini was correctly taken. In his ruling, Mr Mntshali further directed that the disciplinary hearing should continue at a later date. The union was dissatisfied with that ruling and they approached this Court for relief.

10 The relief sought is in the form of a final interdict and a review. It may be paraphrased as follows;

10.1 that the disciplinary charge which Nedbank has preferred against Mr Dlamini should be declared invalid;

10.2 that the ruling which was made by Mr Mntshali dismissing the Applicants' objection should be reviewed and set aside, and

10.3 that Nedbank should pay the cost of suit.

11. The application is opposed. Nedbank is challenging the matter both on the facts and points of law. In the opinion of the Court, the facts and the points of law can conveniently be dealt with together as they are inter-related.

12. Nedbank argued inter alia, that the requirements of an interdict have not been complied with. The Applicants have failed to establish an injury that has commenced or is reasonably apprehended. In particular, the Applicants have not shown any actual injury suffered by Mr Dlamini or an injury reasonably apprehended should Mr Mntshali continue to preside over the hearing.

13. Nedbank argued further that, the Applicants have failed to demonstrate the absence of a similar or adequate protection offered by any other ordinary remedy. Should the disciplinary hearing proceed before Mr Mntshali and a finding is made against Mr Dlamini, he (Mr Dlamini) has an adequate alternative remedy available. Mr Dlamini can approach CMAC for a speedy resolution of the matter. CMAC has the authority to resolve the dispute through conciliation. Should conciliation fail the parties can, by consent, refer the matter to arbitration. As an alternative to arbitration the Applicants can refer the matter to the Industrial Court for adjudication, following a failure by CMAC to resolve the dispute. By CMAC is meant the Conciliation Mediation and Arbitration Commission established in terms of Section 62 (1) as read with 64 (1) of The Industrial Relations Act (supra).

14. The second point raised by Nedbank was that the Applicant has neither alleged nor demonstrated bias or incompetence on the part of Mr Mntshali. There is therefore no need to have Mr Mntshali removed as chairman of the disciplinary hearing.

15. Nedbank has denied that the appointment of Mr Mntshali was contrary to the provisions of the Disciplinary Code and Procedure Agreement.

According to Nedbank, the code is merely a guide which the parties can depart from should the need arise. The code is not a set of immutable rules which should be rigidly adhered to irrespective of the circumstances. Where convenient departure from the code is permissible in the interest of fairness. Nedbank argued further that their departure from the code is justifiable in the circumstances.

16. Nedbank submitted further that they have suffered loss in their business estimated at E3,000,000.00 (Three Million Emalangeni) as a result of fraud. Certain customers and employees of Nedbank are suspected to be behind the fraud. As a result, Nedbank has notified her employees generally that disciplinary action will be taken against those implicated in the fraud. In light of the aforegoing, Nedbank anticipated a difficulty in identifying a manager among its employees who is qualified, neutral in the matter and is willing to chair this particular disciplinary hearing.

17. Nedbank has stated in the answering affidavit that they have consulted two (2) of their managers, in succession, with a mandate to preside over the disciplinary hearing. Each of those managers declined that assignment allegedly on the basis that they may not be neutral in the matter. It is for that reason that Nedbank decided to assign Mr Mntshali the duty to preside over the hearing.

Since Mr Mntshali is not employed by Nedbank his neutrality in the matter is beyond question. Furthermore, since Mr Mntshali is a qualified attorney (though not practicing) his competence in serving as chairman is above reproach.

18. According to the Applicants, Nedbank failed to bring to their attention the allegation that two (2) of Nedbank's managers had been approached to chair the hearing and they both declined to serve. The Applicants averred that Nedbank has eight (8) managers who qualified to serve as presiding officers. Even if two (2) of those managers had declined to serve (which allegation is not confirmed) there are six (6) others who could still be approached.

19. The Applicants argued that Nedbank failed to consult them when they took the decision to depart from the code in the appointment of a chairman for the hearing. They stated further that the reason and manner Mr Mntshali was appointed chairman was unjustifiable in light of the provisions of the code. In the Applicant's view, the absence of consultation was irregular. This irregularity vitiates the fairness of the entire disciplinary process.

20. There are two (2) issues before Court. The first is an attack by the Applicants on the disciplinary charge which Nedbank has preferred against Mr Dlamini- namely dishonesty. The Applicants have prayed for that charge to be declared invalid. The argument advanced by the Applicant is that Mr Dlamini as an employee of Nedbank received a gift of money or tip from a customer of Nedbank of One Hundred Emalangeni (E100.00). The Applicants do not see the connection between a gift or tip of One Hundred Emalngeni (E100.00) and allegation of fraud, let alone fraud which resulted in a loss to Nedbank of Three Million Emalangeni (E3,000.000.00).

21. At this stage the Court does not have the power to analyse the evidence which the Applicants intend to adduce at the hearing and further pronounce on the validity or otherwise of the disciplinary charge which Mr Dlamini is facing. The Court is not conducting a disciplinary hearing of Mr Dlamini. The Court has no power to review the decision of Nedbank to charge its employees with a disciplinary offence.

22. It is the prerogative of the employer to prefer a disciplinary charge against its employee where there exists reasonable suspicion that the employee has committed a work-related offence. This principle is now settled in our law and has received support in many decided cases and other authorities.

22.1 In the case of **ABEL SIBANDZE V STANLIB SWAZILAND (PTY) LTD AND LIBERTY LIFE SWAZILAND (PTY) LTD, ICA CASE NO. 5/2012** (unreported) Justice Ota states as follows at page 50 paragraph 72;

> *"We must not lose sight of the fact … that it is the exclusive prerogative of the employer to discipline an employee where there is breach of standards and conduct."*

22.2 This principle was reiterated by SAPIRE JP in the case of **SWAZILAND ELECTRICITY BOARD V MASHWAMA MICHAEL BONGANI AND 2 OTHERS, ICA CASE NO. 21/2000** (unreported) at page 6 as follows;

> *"In the present case the appellant [employer] clearly has a right and even a duty, where it suspects that an employee is guilty of serious misconduct, to hold a disciplinary enquiry."*
>
> (underlining added)

22.3 The learned author John Grogan in support of this principle states the following;

"*The power to prescribe standards of conduct for the workplace and to initiate disciplinary steps against transgressors is one of the most jealously guarded territories of managers everywhere, forming as it does an integral part of the broader right to manage, …*"

(underlining added)

JOHN GROGAN; WORKPLACE LAW 10th edition, 2009, Juta and Co., ISBN 13: 978-0-7021-8185-6 at page 129.

23. The Industrial Court is not at this stage seized with jurisdiction to determine the validity or otherwise of the disciplinary charge which the employee (Mr Dlamini) is facing. This is a matter which should be argued before and decided by the chairman. The chairman may require further evidence to support the contention advanced by either party. The Court should not usurp the rights and responsibilities of the chairman.

24. It is noted that the chairman of the disciplinary hearing has not failed to hear and decide on the Applicants' contention and submission regarding the disciplinary charge. The matter has not been presented as yet before the chairman.

The written ruling of the chairman (Mr Mntshali) on the disciplinary proceedings dated 18th November 2011 has been filed before Court by the Applicants marked (SUFIAW 4) . A reading of the ruling and transcript clearly indicates that the application to declare invalid, the disciplinary charge, was not made before the chairman.

25. The chairman cannot be reviewed on a matter which he has neither heard nor decided. The Court finds that the prayer to declare invalid the disciplinary charge is prematurely filed before Court. The chairman should be given a chance to exercise his discretion on the matter. A possibility exists that the chairman, in the exercise of his discretion, may rule in favour of the Applicants. This prayer is accordingly misdirected and should fail.

26. The matter has been brought before Court by way of a final interdict. It is apposite at this stage to reproduce the requirements of a final interdict;

26.1.1 a clear right,

26.1.2 an injury actually committed or reasonably apprehended, and

26.1.3 the absence of similar or adequate protection by any other ordinary remedy.

HERBSTEIN AND VAN WINSEN: The Civil Practice of the High Courts of South Africa, 5th edition 2009, vol 2, Juta and Co, ISBN 978 0 7021 7933 4 at page 1456.

27. The prayer to declare invalid, the disciplinary charge, does not pass the test for an interdict. The Applicants are entitled to appear before a duly appointed chairman and move the same application which is presently before Court. The chairman in the exercise of his discretion may grant or refuse the prayer sought. The Applicants therefore have an alternative remedy. The availability to the Applicants of an alternative remedy, is fatal to the application for an interdict. For this reason as well, the prayer to declare invalid the disciplinary charge cannot succeed.

28. The Court has noted further that the Applicants have failed to advance reasons in support of their prayer to declare invalid, the disciplinary charge. That means that even if the Court had jurisdiction in this prayer (which it has not) the Applicants would still fail due to absence of reasons.

29. It is common cause that Nedbank and the union signed a Disciplinary Code and Procedure Agreement which is binding on all the parties before Court.

A copy of the code is attached to the Applicants' founding Affidavit marked *SUFIAW 6.* The Applicants have introduced the code in their founding affidavit as follows;

> *"9. 1 The present dispute concerns the interpretation of the Article 2.4.1.2 of the disciplinary code and procedure [agreement] signed between the Applicant and the Respondent.*
>
> *9.2 …..*
>
> *9.3 The Disciplinary Code and Procedure [Agreement] forms part of the employment condition between the Second Applicant [employee] and the First Respondent[employer]. Accordingly conditions of service cannot unilaterally be changed."*
>
> *(underlining added)*
>
> (Record pages 13-14)

30. Nedbank's response to the allegation made by the Applicants in the preceding quotation is as follows;

> *"The contents herein admitted, …".*

That means that Nedbank has admitted all the allegations which are made by the Applicants as contained in the quotation which appears in paragraph 29 above, namely;

30.1 that there is a signed disciplinary code which is binding between Nedbank, the union and their assigns;

30..2 that the contents of the disciplinary code are peremptory and they form part of the conditions of service between Nedbank as employer and its employee (Mr Dlamini), and

30.3 that the said conditions of service cannot be unliterary changed by either party.

31. The relevant clause in the code which is subject matter of the dispute reads as follows;

"*2.4.1.2 The proceedings of the formal disciplinary hearings <u>shall be presided over by a Bank Representative of a Senior Management level</u> from another Branch/Department:"*

(underlining added)
(Record page 38)

The Court understands this quotation to mean that the presiding officer at the disciplinary hearing must;

31.1 be an employee of Nedbank,

31.2 occupy a senior management position, and

31.3 work in a branch/department which is different from the one where the accused – employee is working.

32. According to the evidence of Nedbank, Mr Mntshali is a non–practicing attorney who is currently a director of an organization known as the Federation of Swaziland Employers. That means that Mr Mntshali is not an employee of Nedbank. Mr Mntshali therefore fails to meet the requirements of a presiding officer in this matter. This defect exists despite Mr Mntshali's advanced legal training, competence, impartiality and vast experience in chairing disciplinary hearings in this country. Mr Mntshali is accordingly disqualified by the code from presiding over the disciplinary hearing of Mr Dlamini. This defect cannot be cured by an argument that emphasizes Mr Mntshali's competence, experience, legal training and neutrality in the matter.

33. According to Nedbank, the appointment of Mr Mntshali was necessary to achieve fairness and neutrality in the disciplinary hearing of Mr Dlamini.

Nedbank averred further that it consulted two of its managers who qualified in terms of the code to chair the hearing, but they were both unavailable to serve. It became necessary to find a neutral chairman who is not an employee of Nedbank to chair the hearing.

34. There is no evidence before Court regarding the identity of the alleged two managers. There is evidence however that Nedbank has a complement of eight (8) senior managers who qualified in terms of the code, to chair the disciplinary hearing. That means that the remaining six (6) senior managers have not been given an opportunity to chair that hearing and further that they have not declined to do so. Nedbank has not explained the reason for failing to contact the remaining six (6) managers. A possibility exists that one (1) of those managers could and still can make himself available to serve as chairman.

35. It is therefore clear to the Court that compliance with the code is not impracticable as Nedbank has alleged. It is Nedbank who purposely avoided compliance. Instead of complying with the code Nedbank imposed Mr Mntshali on the Applicants as chairman of the disciplinary hearing despite his obvious disqualification. Nedbank's motive for conducting itself in this manner is not clear to the Court.

The Court is unable to agree with Nedbank's contention that imposing Mr Mntshali as chairman at the hearing was in the best interest of Mr Dlamini. The Court is not persuaded that Nedbank was justified by the circumstances to deviate from the code.

36. The Court has noted that the Applicants' allegation that Nedbank has six (6) other managers who qualified in terms of the code to chair the disciplinary hearing, was made for the first time in the replying affidavit. The Court has further noted that this allegation is relevant and is in response to allegations made by Nedbank in its answering affidavit. The justification that Nedbank gave in appointing Mr Mntshali reads as follows;

> *"…the 1st Respondent [Nedbank] would have had difficulty finding an impartial employee to chair the hearing. As a matter of fact, 1st Respondent [Nedbank] requested two Senior Managers to chair the hearing and both declined…"*

(Record page 58)

37. The impression created by Nedbank in the preceding quotation is that it did all it could to consult the qualified managers but they failed or declined to serve. That impression is clearly wrong and misleading.

The Applicants were entitled therefore to correct the wrong impression which Nedbank (1st Respondent) had created in their answering affidavit. That correction was in the form of evidence which indicated that as a matter of fact, there were eight (8) senior managers who qualified to chair the hearing and not two(2). Since Nedbank stated that they had contacted two (2) managers who allegedly declined, that means that Nedbank did not contact the remaining six (6).

38. Nedbank has not denied the allegation which the Applicants made in their replying affidavit. Had Nedbank felt the need to challenge this allegation they could and should have applied for leave to file a supplementary affidavit. There has been no application by Nedbank brought before Court for leave to supplement their answering affidavit. The Applicants' evidence on this particular issue remains unchallenged.

39. The Court has further noted that Nedbank did not consult the Applicants before it (Nedbank) made a unilateral deviation from the code. Nedbank lost sight of the fact that the code is an agreement with the employees which is incorporated into the terms and conditions of the employment contract.

40. A unilateral deviation from the code amounted to a breach of the employment contract. That breach of the employment contract denied the employee (Mr Dlamini) a right to a fair disciplinary hearing. The employee (Mr Dlamini) is therefore justified in coming to Court to apply for a review of the irregular decision taken by the chairman and to have its consequences set aside.

41. An employee who is summoned to attend a disciplinary hearing is entitled to insist on a properly constituted disciplinary panel. In a matter (as in the present case) where the disciplinary process is governed by an agreed disciplinary code, the employee is entitled to demand strict compliance with the provisions of the code. The employee is further entitled to question the authority of a chairman especially one who is prima facie disqualified from serving as a chairman. There would be no point in the union and the employers signing a disciplinary code if that code can be disregarded by any of the parties as and when it wishes to.

42. The union and the employer (Nedbank) signed the disciplinary code for a reason. Furthermore, the parties incorporated into their code clause 2.4.1.2 (which is subject matter of this case) for a reason. Inter alia, the disciplinary code introduced predictability, consistency and fairness in the disciplinary process.

The selection of the chairman for a disciplinary hearing in the case of a unionised employee, was no longer subject to the unfettered discretion of the employer, as the case would be in the absence of a code. Instead, that selection was limited to a clearly identifiable and predictable pool of senior managers, not exceeding eight (8) in number. That restriction ensured that an employee who is summoned to a disciplinary hearing is not taken by surprise when the chairman is introduced.

43. The negotiation and signing of the code allowed the employees, through their union, to partake in shortlisting a group of eight (8) senior managers who were there and then qualified as chairpersons of future disciplinary hearings. As a result of the code an employee of Nedbank is entitled to expect and demand that his disciplinary hearing be chaired by any one (1) of the eight (8) designated managers. By signing the code, the union registered its confidence in the competence, impartiality and fairness of the designated managers.

44 The deviation from the code which the employer (Nedbank) introduced was not a triviality. Its effect was to completely disregard a pool of six (6) qualified managers from chairing the hearing. Instead, the employer imposed an outsider who was clearly disqualified from serving as chairman, and who had not been approved by the union.

It is not open to the employer to unilaterally and arbitrarily depart from an agreed disciplinary code and then claim that, that departure is in its opinion fair to the employee as compared to the provisions of the code.

45. The Supreme Court of Appeal of the Republic of South Africa was faced with a similar situation in the case of **DENEL (PTY) LTD V VOSTER (2004) 25 ILJ 659 (SCA)**, also cited as (**2004) 13 SCA 7.9.1,** when it stated as follows in page 664;

> *"…through its disciplinary code, as incorporated in the conditions of employment, the appellant undertook to its employees that it would follow a specific route before it terminated their employment and it was not open to the appellant unilaterally to substitute something else."*

At page 65 the Court continued to state the following;

> "*The procedure provided for in the disciplinary code was clearly a fair one–it would hardly be open to the appellant [employer] to suggest that it was not-and the respondent [employee] was entitled to insist that the appellant abide by its contractual undertaking to apply it. It is no answer to say that the alternative procedure adopted by the appellant was just as good .*"

46. The Court respectfully agrees with the legal position as stated in the Denel case. The Denel case was quoted with approval in the subsequent case of **SAMWU (OBO M. ABRAHAMS AND 106 OTHERS) V CITY OF CAPE TOWN,** case no. **C611/07 (L.C**), reported as **[2008] 7 BLLR 700 (LC).** The Denel and Samwu cases have emphasized the principle that;

46.1 the disciplinary code as incorporated into the contract of employment is binding between employer and employee,

46.2 neither the employer nor employee (including their assigns) is at liberty to disregard the obligations imposed in the code since those obligations have a contractual effect,

46.3 where there is a breach of the code, the innocent party is entitled to enforce compliance by Court Order, if necessary.

On the authority of the Denel and Samwu cases the Court finds that the Applicants have made out a case for the relief sought.

47. Nedbank has argued that strict enforcement of the disciplinary code is impractical, but failed to give the Court reasons for drawing that conclusion. In order to make a sound argument,

Nedbank would have to demonstrate with evidence that all the senior managers who qualified to chair the disciplinary hearing of Mr Dlamini have declined to serve. It must further be demonstrated that the Applicants have been consulted on that impasse to no avail. In that situation the Court may intervene to assist the parties and allow a carefully guided departure from the code, taking into consideration justice, fairness and the spirit of the code. The evidence presented so far does not justify the Court's intervention in the strict application of the provisions of the code.

48. The disciplinary hearing of Mr Dlamini should commence *de novo* before another chairman who should be appointed in accordance with the code. In the event that it becomes necessary to deviate from the code, the chairman shall be appointed after sufficient consultation with the union.

The employer (Nedbank) and the union can agree on new terms amending their contract (disciplinary code) to suit their mutual interests.

49. The Respondent has further opposed the application before Court on the basis that it seeks to interfere with incomplete disciplinary proceedings. The general rule has been clearly stated as follows by the Industrial Court of Appeal of Swaziland;

"The attitude of the Courts therefore, is not to intervene in the employers [employer's] internal disciplinary proceedings until they have run their course, except where compelling and exceptional circumstances exist, entitling the Court to do so. This is from time immemorial the general attitude of Courts in all instances where the powers of a superior court is invoked to interfere in an ongoing proceedings of an inferior court. This attitude I must stress, is not peculiar to the Kingdom, but cuts across other jurisdictions, such as the Republic of South Africa and Lesotho."

per OTA AJA in ABEL SIBANDZE V STANLIB SWAZILAND (PTY) LTD AND LIBERTY LIFE SWAZILAND (PTY) LTD CASE NO. 5/2010 (unreported) at page 31 paragraph 41.

50. The above stated principle has been quoted with approval in various judgments of this Court and the South African Courts. The Industrial Court of Swaziland restated the principle as follows;

"The attitude of the courts has long been that it is inappropriate to intervene in an employer's internal disciplinary proceedings until they have run their course, except in exceptional circumstances.

This approach arises from a principle long established in our courts, that as a general rule a superior court will not entertain an appeal or application for review, when such appeal or review seeks to interfere with uncompleted proceedings in an inferior court.

Lawrence v Assistance Magistrate, Johannesburg 1908 TS 525;

Walhaus [Wahlhaus] v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A)"

(underlining added)

per Dunseith JP in the Industrial Court case of;

SAZIKAZI MABUZA V STANDARD BANK OF SWAZILAND LIMITED AND ERROL NDHLOVU N.O. Case No. 311/2007 (unreported) (IC) at page 11 paragraph 31.

51 In the Wahlhaus case (supra) the Court cautioned itself in the exercise of its power to intervene in uncompleted disciplinary hearings in the following manner;

"While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus *or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained …"*

(underlining added)

per Ogilvie Thompson J.A. at page 120 A-B.

52. His Lordship Dunseith JP observed that though the principle in the Wahlhaus case was expressed in the course of a criminal trial, it is equally applicable in civil cases as well as labour law matters. His Lordship further stated as follows;

"The principle in the Walhaus[Wahlhaus] case (supra) has been extended to apply equally in civil proceedings and in the labour law field…."

(underlining added)

SAZIKAZI MABUZA Case (supra) at page 12 paragraph 33.

53. His Lordship, Banks A.J. made a similar observation when he stated as follows;

> *"Although that case [Wahlhaus case] dealt with criminal proceedings before a magistrate's court, in my view it can be applied to review proceedings of a body such as a disciplinary committee."*

(underlining added)

BROCK V S.A. MEDICAL AND DENTAL COUNCIL 1961 (1) SA 319 at 324 D-E.

This Court is in respectful agreement with the principle stated above by their Lordships Dunseith JP in the Sazikazi Mabuza case and Banks A.J. in the Brock case . It is noted by Court that this particular review before Court has not been brought in the usual manner which is provided for in the rules. Rather it is among the rare cases that come before Court under compelling and exceptional circumstances. The cases quoted above confirm the jurisdiction of the Court in hearing a review of this nature. The jurisdiction of the Court is further established and / or confirmed by legislation. See also;

VAN WYK V MIDRAND TOWN COUNCIL AND OTHERS 1991(4) SA 185 AT 188 B-E

54. In addition to the case law, the Court has further jurisdiction to hear this matter by virtue of section 8 (3) and (4) of The Industrial Relations Act (supra) which reads as follows;

"(3) In the discharge of its functions under this Act, the Court shall have all the powers of the High Court, including the power to grant injunctive relief.

(4) In deciding a matter, the Court may make any other order it deems reasonable which will promote the purpose and the objects of this Act."

(underlining added)

55.. The objects of The Industrial Relations Act (supra) are listed as follows in section 4 of the same Act;

(1) The purpose and objective of this Act is to-

(a) promote harmonious industrial relations;

(b) promote fairness and equity in labour relations;

(c) to k)…."

(underlining added)

It is fairness and equity in a disciplinary hearing of an employee of Nedbank that the Court is concerned with in this matter. Harmony in Industrial relations can be achieved and promoted by fairness and consistency in the application of a disciplinary code agreed to between employer and employee.

56. The question before Court is, whether there are compelling and exceptional circumstances in this case which justifies the Court granting the relief prayed for.. The parties have signed a disciplinary code which governs the disciplinary procedure between employer and employee. The code enjoins the employer to appoint a chairman for the disciplinary hearing from within a designated group of eight (8) managers. The employer disregarded the code and arbitrarily appointed a chairman from outside the group.

This Court has already made a determination that the manner the chairman (Mr Mntshali) was appointed is irregular and unfair. That irregularity has denied the employee a fair disciplinary hearing.

57 That irregularity and unfairness cannot be cured by the experience and the legal training which the chairman is possessed with. The irregularity and unfairness complained of, is a perpetual taint that will contaminate the entire disciplinary hearing from beginning to end , if the hearing is not immediately discontinued .

58. The aforementioned irregular and unfair element in the disciplinary hearing, qualifies as the compelling and exceptional circumstance required by the legal authorities to set aside an uncompleted disciplinary hearing. Grave injustice will occur if the employee (Mr Dlamini) is subjected to a disciplinary hearing before an obviously disqualified chairman. Removal of the chairman and having the disciplinary hearing commence *de novo* in accordance with the code is the only option available to the employee in the circumstances. In the eyes of the Court justice in this case cannot by other means be obtained.

59. The Applicants have made a case for the relief sought, namely to review and set aside the decision of the chairman - Mr Mntshali (2nd Respondent) dated 18th November 2011. The Applicants are accordingly entitled to judgment.

60. The Applicants have succeeded in their application to review and set aside the decision of the chairman (Mr Mntshali). On the other hand Nedbank has also succeeded to resist an application to declare invalid the disciplinary charge. Both parties are to some extent successful in this application. It is in the interest of justice that each party pays its costs.

61. Wherefore the Court orders as follows;

(a) The application to declare invalid the disciplinary charge is dismissed.

(b) The ruling of the chairman (2nd Respondent) dated 18th November 2011, dismissing the objection of the Applicants is hereby reviewed and set aside.

(c) The disciplinary hearing of the 2nd Applicant (Mr Dlamini) will commence *de novo* before a chairman appointed in accordance with the disciplinary code.

In the event that none of the designated managers is available to serve as chairman, the parties shall agree either on an alternative chairman or an alternative method of appointing a chairman.

(d) Each party will pay its costs.

. The members agree.

_____

D. MAZIBUKO

INDUSTRIAL COURT – JUDGE

For Applicant : A. Lukhele

(Dunseith Attorneys)

For Respondent : M Sibandze

(Musa Sibandze Attorneys)