



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

CASE NO. 483/12

CASE NO. 484/12

In the matter between

BUSISIWE MAMBA

1ST APPLICANT

BAGCINILE NGWENYA

2ND APPLICANT

And

MANKAYANE TOWN BOARD

1ST RESPONDENT

SIKHUMBUZO SIMELANE N.O

2ND RESPONDENT

Neutral citation: Busisiwe Mamba/Bagcinile Ngwenya V
Mankayane Town Board/Sikhumbuzo Simelane
N.O (483/484/2012) [2013] SZIC30(17th
September 2013)

CORAM: D. MAZIBUKO

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

Heard : 1st August 2013

Delivered : 17th September 2013

Summary: *Labour Law: Court intervention in uncompleted disciplinary hearing; permitted only in stringent conditions, where compelling and exceptional circumstances exist, alternatively to prevent grave injustice or where justice could not by other means be attained.*

Disciplinary hearing; parties invited to file written submissions. Chairman announces date scheduled for ruling. Parties given a total of 18 calendar days to file. Applicants deliberately refrained from filing in order to gain a tactical advantage over the Respondent. Chairman proceeds to deliver his ruling in the absence of Applicants' written submission.

1. The Applicant in case No. 483/2012 is Busisiwe Mamba who is employed by the 1st Respondent as an accounts officer. At the request of all the parties concerned, case No. 483/2012 was consolidated with case No 484/2012 . It appeared convenient to the parties to have these matters argued simultaneously. The Court approved the request for consolidation. The Applicant in case No. 483/2012 (Busiswe Mamba) will be referred to as 1st Applicant. The Applicant in case No. 484/2012, Bagcinile Ngwenya will be referred to as 2nd Applicant. The 2nd Applicant is also employed by the 1st Respondent as an accounts officer.
2. The 1st Respondent is Mankayane Town Board, a statutory body with power to sue and be sued, established in terms of the Urban

Government Act No.8 of 1969. The 2nd Respondent is Sikhumbuzo Simelane, a practicing attorney who is cited in this matter as chairman of a disciplinary hearing which is mentioned below. Though the 2nd Respondent is cited as a party herein, he has decided not to oppose this application in order to maintain his neutrality on the matter. The 2nd Respondent is the chairman of two (2) separate disciplinary hearings in which each of the Applicants is individually involved. For the sake of convenience the 2nd Respondent will be referred to herein as the chairman.

3. Both the 1st and the 2nd Applicants have approached the Court by urgent application . The Applicants have asked for relief as follows;

“(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) Reviewing, correcting and setting aside 2nd Respondent’s Ruling.

(3) Costs of suit in the event of opposition.

(4) Such further and or alternative relief.”

4. About the 20th August 2012, each of the Applicants was called individually to a disciplinary hearing which had been initiated by the

1st Respondent. The 2nd Respondent presided over each of the disciplinary hearings (hence referred to as chairman).

4.1 The 1st Applicant was called upon to answer the following charges;

COUNT 1

“ You are hereby charged with misappropriating the Town Board’s Funds in that between the period of 11th September 2009 and 22nd November 2011 you used the Company’s toilet users’ fees and market fees in the total amount of E34,900.00, without authority of the Board, to purchase airtime from the airtime vendors around Mankayane for your personal use”

COUNT 2

“You are charged with Gross Dishonesty in that, you allocated yourself a car allowance in the amount of E3 000.00 without the authority of the Board”

COUNT 3

“ You are charged with fraud alternatively theft of money in that on March 2012 payroll you debited your salary with medical aid contributions in the total amount of E1 912.00”

COUNT 4

“You are charged with with abuse of the Town Boards’ telephone, in that on the 27th June 2012, whilst on leave, you were found by the then Acting Town Clerk, Mr Sithole, in the office of the Personal Assistant, at about 1825 hours, making an unauthorized , personal and private telephone call to the Republic of South Africa”

COUNT 5

“ You are charged with Gross Insubordination in that you failed to heed the Town Board’s instruction that you should place an order for one package of clothing items for yourself from Phola World for the SIGA GAMES and placed an order for two packages of clothing for yourself without the Board’s permission.”

(Record pages 22-24)

4.2 The 2nd Applicant was called upon to answer the following charges;

COUNT 1.

“ You are hereby charged with misappropriating the Town Boards’ Funds in that ;

(a) You used the company’s toilet fees collections in the total amount of E2,570.00, without authority of the Board, to purchase

airtime from the airtime vendors in Mankayane for your personal use.

(b) On the 7th August 2011, you used the company's toilet fees collections in the total amount of E840.00, without the authority of the Board, to purchase furniture from Best Electric Furniture Stores for your personal use."

(Record under case No. 484/2012 page 20)

5. The disciplinary hearings proceeded. Evidence was led and each side closed its case. The chairman issued separate rulings for the disciplinary hearings wherein each of the Applicants was found guilty of some of the offences they were facing. Subsequent to that ruling, each of the Applicants launched an urgent application for the Court to review, correct and set aside the chairman's ruling. The Applicants also prayed for an order for costs. The grounds on which the Applicants based their review application are similar and can be summarized as follows;

5.1 The 1st Respondent has already hired an accounts officer to replace the Applicants. That meant that the 1st Respondent has already taken a decision to dismiss the Applicants.

The disciplinary hearing which the 1st Respondent has instituted against the Applicants is therefore a sham and a

mere formality- designed to justify a decision that has already been taken.

5.2 Since each of the Applicants has been found guilty, inter alia of dishonesty, the chairman is likely to recommend dismissal. Once the dismissal is recommended the 1st Respondent is likely to dismiss the Applicants. The Applicants are therefore apprehensive that their dismissal is imminent and they seek the Court's intervention to avert it.

5.3 At this stage the Applicants feel that they are in a stronger position to resist the imminent dismissal, than to wait until the actual dismissal has taken place and then apply to Court for reinstatement. For that reason the Applicants plead for the Court's intervention at this stage to set aside what they perceive as unfair labour practice and a gross irregularity, which has allegedly taken place at their respective disciplinary hearings.

5.4 The Applicants have no faith in the power and effectiveness of the appeal chairman. The Applicants are apprehensive that the appeal chairman might fail to protect them against dismissal.

In the event that the 1st Respondent issues a dismissal sanction the appeal chairman will have neither power to suspend the effect of the dismissal nor courage to reverse it completely.

5.5 In the eyes of the Applicants the appeal chairman is ineffective. The Applicants are concerned about their careers as accounts officers. In the Applicants' view - no prospective employer would be prepared to hire an accounts officer who has been dismissed for dishonesty. The Applicants argued therefore that it is imperative that the Court should intervene in order to review and set aside the chairman's decision which found each of them guilty of dishonesty.

5.6 The Applicants argued further that the chairman has not complied with procedural fairness in the manner he conducted the disciplinary hearings. According to the Applicants, the chairman's ruling supports their (Applicants') contention of unfair labour practice, for the following reasons;-

5.6.1 the decision is irrational and is not supported by the facts;

5.6.2 the decision fails to take into consideration relevant principles;

5.6.3 the decision is tainted by the admission of hearsay evidence of Mr Maxwell Sithole;

5.6.4 the decision is further tainted by the admission of privileged information;

5.6.5 the 1st Respondent failed to call a certain relevant witness who was the chairperson of the 1st Respondent's Finance Committee, that witness was also necessary to corroborate the evidence of Mr Maxwell Sithole.

5.7 The Applicants argued further that the chairman has denied them an opportunity to file closing written submissions. The Applicants concluded that they were therefore denied a chance to be heard since their closing submissions were not before the chairman at the time the latter prepared his ruling. As a result the *audi alteram partem* rule was breached.

5.8 Furthermore, the chairman failed to consider the written submissions which had been filed on behalf of both the Applicants on the 29th November 2012. The ruling which the chairman handed down does not deal with the issues which were raised in those written submissions.

6. The 1st Respondent has challenged the application by raising legal points and further pleaded over on the merits. The 1st Respondent argued that the disciplinary hearings which have been instituted against the Applicants have not been finalised. The Applicants have so far been found guilty of offences relating to dishonesty. The parties have not as yet made submissions on mitigating factors and aggravating circumstances.

The chairman has not made his recommendation yet on the sanction to be meted out on the Applicants. As a result the 1st Respondent has not yet issued its decision on the matter.

7. Since the disciplinary action against the Applicants is ongoing as aforementioned that means it is incomplete and not ready yet for

review. The normal procedure is that the Court reviews a completed trial or disciplinary hearing . The review application is therefore prematurely before court and should be dismissed.

8. The 1st Respondent went further to challenge the factual allegations made by the Applicants as raised in paragraphs 5.1-5.8 above. The 1st Respondent responded as follows to these allegations:

8.1 The 1st Respondent has denied that the disciplinary hearings which the Applicants have been subjected to are a sham and a mere formality. The 1st Respondent has further denied that they have already taken a decision to dismiss the Applicants.

8.2 The 1st Respondent has admitted that an accounts officer has been hired to do the work which the Applicants were employed to do. However, the 1st Respondent added that the accounts officer has been appointed on a temporary basis pending finalisation of the Applicants' disciplinary process. If the Applicants are successful at the end of the disciplinary process, they will return to work and be allowed to resume their duties.

8.3 The 1st Respondent has annexed to her answering affidavit a contract of employment between herself and the new accounts officer. The contract is marked annexure R1. According to annexure R1, the employment contract with the new accounts officer commenced 2nd April 2013 and will terminate 31st March 2014.

- 8.4 The 1st Respondent has dismissed as speculation and conjecture - the Applicants' allegation that at the close of the disciplinary hearing, the chairman will recommend to the 1st Respondent a dismissal of the Applicants. According to the 1st Respondent, the chairman has a discretion to issue a recommendation which he deems appropriate based on the facts before him and the law. Neither of the parties is capable of predicting that recommendation.
- 8.5 The 1st Respondent further pointed out that the chairman's recommendation does not amount to an order which the 1st Respondent is bound to follow blindly. Instead, the 1st Respondent has a discretion to issue a lighter sentence than that recommended by the chairman, if it is appropriate in the circumstances. It is not appropriate for the Court to intervene at this stage since the chairman has not failed to exercise his discretion judiciously.
- 8.6 At the end of the disciplinary hearing, after the verdict on the remaining charges as well as the sanctions has been delivered, the Applicants are entitled to lodge an internal appeal to challenge the verdict and / or the sanction.
- 8.7 The 1st Respondent has further denied that the Applicants were denied a chance to file their written closing submissions. The 1st Respondent added that both parties had an equal amount of

time to file the said closing submissions from the time the record was served on their attorneys to the 3rd December 2012. The 1st Respondent filed their closing submissions. The Applicants could also have filed theirs had they wanted to.

9. A litigant who approaches the Court by way of a review to challenge a decision of the chairman taken at a disciplinary hearing must pay meticulous attention to the distinction between an appeal and a review. An appeal and a review are two separate forms of relief which should not be confused since they are distinguishable and each serves a particular purpose. In the matter of **THEMBA PHINEAS DLAMINI VS TEACHING SERVICE COMMISSION AND THE ATTORNEY GENERAL SZIC CASE NO.324/2012** (unreported), the Court made the following observation at page 21 (paragraph 25) on the distinction between an appeal and a review:

“An appeal and a review are legal processes that differ in a material respect. A review challenges the proceedings and not the merits of the decision. Therefore, a party who is dissatisfied with the decision of the tribunal or court a quo, ought to approach the Court by way of appeal.”

10. In the matter of **JOHN KUNENE VS THE TEACHING SERVICES COMMISSION, THE ATTORNEY GENERAL AND THE UNDER SECRETARY (EDUCATION) SZIC CASE NO 317/2007** (unreported), at page 5 (paragraph 16), the Court made another instructive observation between an appeal and a review as follows;

“ ... it is always the proceedings of a tribunal that are subject to review, not the merits of its decision.”

ELLIS VS MORGAN ; ELLIS VS DESAI 1909 T.S. 576.

11. The Court has noted that some of the grounds which were raised by the Applicants to support their review application are matters that challenge the merits or outcome of the chairman’s decision and not the proceedings. These matters therefore should be dealt with by way of appeal and not review. Some of the examples of appealable matters that are contained in the Applicants’ affidavits include the following:

11.1 The decision of the chairman is completely irrational in that it is not supported by the evidence. Instead, the 1st Respondent’s evidence is replete with inconsistencies, repetitions and errors.

11.2 The chairman did not direct his mind to the matters before him. Instead, he took into consideration irrelevant matters and ignored relevant ones.

11.3 The chairman arrived at an unreasonable conclusion in his ruling. In particular, the chairman failed to state the exact amount of money allegedly misappropriated by the Applicants yet an interpretation of the evidence could have revealed the correct figures.

- 11.4 The chairman failed to analyse the evidence in a manner expected of him by the Applicants. The chairman relied on estimates and assumptions instead of facts.
- 11.5 The chairman relied on evidence which was not corroborated, yet a rational decision maker would have insisted on corroboration.
12. This Court is not sitting as an appeal tribunal to hear an argument which challenges the decision of the chairman. The duty of the Court is to hear argument on the irregularities which allegedly took place in the proceedings. The merits of the chairman's decision may be dealt with in an internal appeal.
13. The Applicants stated that on the 19th October 2012, after the leading of evidence had been concluded, the parties agreed among themselves to file written submissions as opposed to presenting an oral argument before the chairman. This arrangement was adopted in both cases. The parties had to await the delivery of the transcript of the evidence in order to prepare their closing submissions.
- The Applicants were represented by their attorney Mr M P Simelane both at the disciplinary hearing and in Court. According to the Applicants, the transcript in both cases was delivered to their attorney in mid November 2012. Mr M P Simelane confirmed this allegation in Court but failed to state the exact date he received delivery of the transcript.

14. The Applicants added that there was no date fixed for filing of the written submission neither at the close of the leading of evidence nor after delivery of the transcript. This issue is common cause between the parties. However, on the 20th November 2012 the chairman wrote the parties a letter which is annexed to the Applicants's affidavits and is marked annexure B. Annexure B reads as follows:

“20th November 2012

MAGAGULA HLOPHE ATORNEY'S

Swazi Plaza

Mbabane

Attention: Mr Mthethwa

Dear Sirs

***RE: MANKAYANE TOWN BOARD/BUSISIWE MAMBA &
BAGCINILE NGWENYA***

- 1. We refer to these matters.*
- 2. How far have you gone with preparing your closing submissions in these two cases?*
- 3. By copy of this letter, Mr M. Simelane is also informed.*

Yours faithfully

Madau & Simelane Attorneys

*cc: MP Simelane Attorneys -Mbabane
Fax: 24041177”*

15. Annexure B is very clear as to what the chairman required the parties to do. The chairman was calling upon the parties in both cases, to file their closing submissions. Obviously, this letter is a sequel to an undertaking which both parties had made to the chairman on the 19th October 2012, to present written submissions. In other words annexure B was a notice from the chairman to the parties in both cases, notifying them that filing of written submissions was due.
16. It is common cause that the parties in both cases received annexure B on the 20th November 2012. Despite receipt of annexure B, neither of the Applicants filed its written submissions. The delay in filing led the chairman to write annexure C, which reads as follows;

November 29, 2012

MAGAGULA & HLOPHE ATTORNEYS

1st Floor, Development House

Mbabane

Attention: Mr Mthethwa

***RE: MANKAYANE TOWN BOARD FINDINGS/BUSI MAMBA
AND BAGCINILE NGWENYA***

1. *We refer to these two matters .*
2. *All parties are invited at Mankayane Town Board officers on Tuesday the 4th December 2012 at 9.30 a.m. for delivery of the chairman's findings in these cases.*
3. *All parties must come prepared for submission and mitigation and aggravating factors on the day.*

4. *By copy of this letter, Mr M.P. Simelane for the respondents is accordingly notified.*

Yours faithfully

Madau & Simelane Attorneys

*cc: M.P. Simelane Attorneys
Mbabane
Fax: 2404 1177”*

17. It is common cause that both parties received annexure C on the 29th November 2012. In annexure C, the chairman made himself clear that he intended to deliver his ruling on the matters before him on the 4th December 2012. That statement does not mean that the chairman had already decided on the matter. It does however mean that the chairman had planned to move to the next stage in the disciplinary process on the 4th December 2012. In other words the chairman was notifying the parties in annexure C, that the opportunity for filing written submissions will not last indefinitely.
18. The parties were therefore alerted in annexure C to do their work, namely to file their written submission, as the disciplinary process was about to proceed to the next stage on the 4th December 2012. The parties were therefore clearly and adequately warned through their respective attorneys to the effect that filing should take place before the 4th December 2012, if the parties wish to have their written submissions considered in the ruling.

The parties must have realised upon receiving annexure C that the exercise of filing the requisite submissions had since become an urgent matter. Both Applicants failed to file despite receipt of annexure C.

19. Annexure C further reminded the parties to come prepared to address the chairman on mitigating and aggravating factors - should the need arise. Obviously, what was paramount in the mind of the chairman was to give the parties sufficient notice to prepare for argument- in the event that it becomes necessary to make a presentation on mitigation and aggravating issues. The forewarning which the chairman issued was to avoid a request for a postponement from either of the parties on the 4th December 2012. The chairman was focused on serving time and to bring the disciplinary process to a speedy completion.

20. The Applicants gave several reasons for their failure to file their written submissions and these are listed herein below:

20.1 According to the Applicants the reason they failed to file their written submission was because the chairman failed to give the parties a deadline for filing. In the absence of a deadline the Applicants concluded that they were justified in neglecting to file.

20.2 The Applicants are correct in saying that on the last day of the hearing of the evidence (i.e 19th October 2012), the chairman

did not give the parties a deadline for filing their written submissions.

20.2.1 It is however also correct to say that as at the 19th October 2012 the parties became aware of their duty to file written submission. What they did not know then, was the cut-off- date. The parties were delayed by the temporary absence of the transcript from immediately attending to their work of drafting and filing submissions.

20.2.2 The transcript was delivered mid November 2012. As from that day, the parties should have began in earnest preparing their submissions. The delivery of the transcript gave the parties a kickstart to prepare, complete and file the written submissions. The parties were therefore fully aware of the responsibility to file.

20.2.3 The parties were reminded of their duty to file their written submission on the 20th November 2012, when they were served with annexure B.

20.2.4 A final notice was served on the parties on the 29th November 2012 in terms of annexure C. Annexure C was a 3rd notice to the parties and it conveyed a deadline for filing. Any of the parties

who sincerely desired to file written submissions should have realized the urgency contained in annexure C, particularly the date of the ruling i.e the 4th December 2012. The date of the ruling meant that the 3rd December 2012 was the last day of filing. Logic and common sense dictate that if delivery of a ruling in a disciplinary hearing is scheduled for the 4th December 2012, then written submissions should reach the chairman before the 4th December 2012, unless an alternative arrangement has been made with the chairman,

20.2.5 It is the Court's finding that the parties were given sufficient time to file and were further given adequate notice regarding the cut-off-date. The chairman was not obligated to follow a particular format when communicating to the parties the need to urgently file written submissions. There is therefore nothing wrong if the chairman did not follow a format which was preferred by the Applicants. The duty of the chairman was to communicate to the parties in a clear and unequivocal language his requirements and plans toward completing the disciplinary hearing. The chairman discharged that duty.

20.2.6 The argument as advanced by the Applicants, that they were not aware of the cut-off-date for filing has no merit. The conclusion is inescapable that failure by the Applicants to file their written submissions was due to lack of diligence. The chairman took reasonable and necessary steps to notify and further remind the parties of their duty to file. The 1st Respondent took heed of the chairman's notice and complied. The Applicants paid no heed.

20.3 All the parties concerned were represented by their attorney's in both hearings that were before the chairman. Attorneys are equipped with both skill and training in handling legal matters including prosecuting and defending a litigant in a trial or disciplinary hearing.

20.4 When a litigant as well as his attorney is notified on the 29th December 2012 that the chairman of the disciplinary hearing has scheduled to deliver his ruling on the 4th December 2012, that litigant and his attorney should realize that the filing of outstanding papers, in this case – written submissions, is critical and urgent. Instant compliance would be expected in that case. The attorney would know that failure to comply instantly may result in consequences that are detrimental to his client's case. The Applicants knew the risk they were taking when they neglected their duty to file.

21. The second argument which was advanced by the Applicants to justify their failure to file written submissions was that there was no point in filing since the chairman had already decided on the matter. The Applicants based their argument on a phrase which is contained in annexure C, namely:

“All parties are invited at Mankayane Town Board officers on Tuesday the 4th December 2012 at 9:30 a.m. for delivery of the chairman’s findings in these cases”

22. The Applicants argued that since the chairman notified them on the 29th November 2012 (in terms of annexure C), that he had planned to deliver his ruling on the 4th December 2012, that meant that the chairman had already made his ruling. The 4th December 2012 was the date on which the ruling was scheduled to be delivered. The Applicants therefore saw no point in filing written submissions. As a result thereof, the Applicants did not file. The Applicants argued further that it was irregular for the chairman to proceed to issue a ruling in the absence of their (Applicants’) written submissions.
23. It is not clear to the Court on what basis did the Applicants arrive at the conclusion that the chairman had already decided on the matter as at the 29th November 2012. When the chairman notified the parties that he intended to deliver his ruling on a certain date in the future i.e 4th December 2012, that statement did not mean that the chairman had already decided on the matter. The chairman was merely announcing his plans on how he intended to execute his duties in the

near future in relation to the matter before him. The chairman was obviously working on the understanding that the parties in both cases would comply with the undertaking they had made, namely to file their written submissions. Had all the parties concerned filed their written submissions before the 4th December 2012, that compliance would have enabled the chairman to consider all the submissions filed when preparing the ruling.

24. The chairman saw the need to notify the parties regarding the plans he had made in his work schedule and also to prepare them for the next possible phase in the disciplinary process. In the event that the matter proceeded to that stage, the parties would be called upon to present arguments on mitigating factors and aggravating circumstances.
25. It is not irregular for the chairman to plan ahead in his schedule and inform the concerned parties accordingly. The Court does not find evidence that the chairman pre-judged the disciplinary hearing. The Applicants' attack on the chairman is accordingly baseless and is hereby dismissed. The Court finds that the Applicants have no legal justification in failing to file their written submissions.
26. The Applicants' argument reveals that their failure to file written submissions was deliberate. The Applicants refrained from filing purposely, since they believed that the chairman had pre-judged the outcome of the disciplinary hearing. That argument contradicts their earlier contention that the chairman denied them a chance to file. It also contradicts the Applicants' argument that they did not file

because the chairman failed to communicate to them the deadline for filing.

27. The Court has noted that the Applicants have not complained about insufficiency of time, as one of the reasons for failing to file their written submissions. Even though this issue has not been raised by the Applicants, it is an important matter which the Court has to consider in fairness to the Applicants. The question is : were the Applicants given sufficient time to file their written submissions?

27.1 The period between the delivery, on the Applicants, of the transcript (i.e mid November 2012) and the delivery of annexure B is estimated at five (5) days. This estimate is a result of the failure by the Applicants' counsel to commit himself to an exact date in which he received the transcript. The Court interprets the phrase; *mid November 2012* to mean the middle of November i.e the 15th November 2012.

27.2 The period between the delivery on the Applicants of annexure B (20th November 2012), and annexure C (29th November 2012), is nine (9) days.

27.3 The period between the delivery of annexure C, and the 3rd December 2012 (being the eve of the day scheduled for the ruling), is four (4) days. The ruling was scheduled for the 4th December 2012.

- 27.4 That means that the Applicants had about eighteen (18) days to prepare and file their written submissions. The Court takes the view that a period of eighteen (18) calendar days is sufficient time for the Applicants to prepare and submit their written submissions. The issue of time was not therefore the reason or a contributing factor in the Applicants' failure to file written submissions.
28. In the course of the argument, the Applicants' counsel informed the Court that the Applicants' written submissions had been prepared and ready for filing but that he held on to them with the hope that the 1st Respondent would be the first to file theirs. The Applicants' Counsel thought that this stance would gain the Applicants a tactical advantage over the 1st Respondent. Should the 1st Respondent be the first to file, the Applicants would study the submissions filed and tailor theirs to address the issues raised by the 1st Respondent. As a result the Applicants purposely delayed filing while awaiting the 1st Respondent to comply. The Applicants delayed up to the date of the ruling. The Applicants were not aware that the 1st Respondent eventually filed their submissions before the date of the ruling.
- 28.1 From the submissions made by the Applicants' Counsel the point was clearly made that failure on the Applicants' part to file written submissions was deliberate. The intention was to gain a tactical advantage over the 1st Respondent.

28.2 On the 19th October 2012, the Applicants made an undertaking which resulted in a duty on their part to file written submissions in order to support the case they had made before the chairman at the disciplinary hearing.

That duty existed irrespective of whether or not the 1st Respondent filed their written submissions. The Applicants therefore subjected themselves to an unnecessary risk of making compliance with their duty dependant on the 1st Respondent's compliance .

28.3 The Applicants could have achieved the same goal without taking an unnecessary risk. The Applicants could have proceeded to file their written submissions on time, and if it became necessary, the Applicants could have amended their submissions at a later stage but before the date of the ruling.

28.4 When the parties agreed on the 19th October 2012, to address the chairman by written submission they did not make a further agreement that the 1st Respondent should be the first to file, and thereafter the Applicants would also file after studying the 1st Respondent's submissions. If the Applicants were interested in that arrangement, they should have insisted on the 19th November 2012, (or soon thereafter) that it be made an agreement before the chairman, in which case it would be binding on the parties.

- 28.5 The Applicants took a miscalculated risk which unfortunately backfired. The Court finds that the reason advanced by the Applicants' Counsel for their failure to file written submissions has no merit, and it is accordingly dismissed. The Court does not find any irregularity on the part of the chairman in the manner he dealt with the parties regarding the filing of written submissions.
29. On the one hand the Applicants appear to be arguing that the chairman denied them a chance to file their closing submissions before he issued a ruling on the matter. On the other hand the Applicants appear to be arguing that they did file their closing submissions but the chairman did not take those submissions into considerations in his ruling. These two arguments are contradictory. The 1st Applicant stated as follows in his founding and replying affidavits;

29.1 *“The 2nd Respondent [chairman] failed to apply his mind to the decision he had rendered. As aforesaid, he did not have my closing submissions before him, ...”*

(underlining added)

(Record page 10 paragraph 17.3)

This quotation is repeated word for word in paragraph 16.3 of the 2nd Applicant's founding affidavit.

29.2 “On the 5th December 2012, the ruling was faxed to my attorney without affording him the opportunity to file my closing submissions. [I] Am advised that such step on the part of the 2nd Respondent [chairman] amounted to an irregularity i.e failure to afford me a proper and full hearing.”

(underlining added)

(Record page 11 paragraph 21)

This quotation was repeated in paragraph 21 of the 2nd Applicant’s founding affidavit save for the change in the date. According to the 2nd Applicant the ruling was faxed to his attorney on the 7th December 2012.

29.3 “As there were no timeline[s] set to file the submissions, my attorneys were still working on the same when the 2nd Respondent [chairman] hastily prepared the ruling before I could be heard.”

(underlining added)

(Record page 118 paragraph 37)

This quotation is also repeated word for word in paragraph 38 of the 2nd Applicant’s replying affidavit

29.4 *“I however state that the hearing was unfair and offends the principles of audi alteram partem rule in as much as I was never given a chance to be heard”*

(underlining added)

(Record page 114 paragraph 20)

This quotation was repeated word for word in paragraph 21 of the 2nd Applicant’s replying affidavit.

29.5 According to the evidence, as captured in the preceding quotations, each of the Applicants argued that the chairman failed to give her an opportunity to file her closing submissions. As a result the Applicants assert that they were denied the right to be heard before the ruling was made. The Applicants concluded that the ruling is irregular in that it was made in the absence of the Applicants’ written submissions.

30. There is no doubt that a closing submission is an important component in prosecuting or defending a case before the Court or chairperson in a disciplinary hearing. A well prepared submission can tilt the scales of justice in favour of one party over his adversary. A litigant therefore, has a crucial responsibility to ensure that his closing submission is well prepared and timeously filed with the relevant authority, so that it may be considered in the decision making process. A litigant who fails in this duty runs the risk of having his case decided without the support and persuasion that should be contained in the closing submission.

31. One of the responsibilities of the chairman in the disciplinary hearing, is to exercise effective control and management of the disciplinary process. The chairman has a duty to bring the disciplinary process to a speedy yet just and equitable completion. The chairman has the power and authority to resist any tactic, ploy, or trick from either party to the dispute whose intention or effect is to unduly delay or irregularly prevent a successful completion of disciplinary hearing.
32. After the chairman had given notices to the parties in terms of annexures B and C, to file their written submission, he was entitled to announce a date on which he intended to deliver his ruling. The parties had been given sufficient time to file their submissions. Therefore, the failure by the Applicants to file their written submissions cannot be attributed to the chairman.
33. A litigant cannot be allowed to unduly delay or prevent the completion of a trial or a disciplinary hearing by refusing to submit documents that are at his disposal and which he is obligated to release. The progress and completion of a trial or hearing cannot hinge at the mercy of a litigant. There comes a time in a trial or disciplinary hearing when the Court or chairman will refuse to entertain delaying tactics. That time arrived on the 3rd December 2012 for the chairman in this case.
34. In this case, the conduct of the chairman in preparing and delivering his ruling in the absence of the Applicants' written submissions

cannot be said to be unreasonable, irregular or an unfair labour practice. The chairman was justified in the manner he acted. Accordingly, the Applicants' prayer for a review of the chairman's ruling has no legal justification and should be dismissed.

35. The Applicants referred the Court to the case of OBED HLONGWANE VS SNAT CO-OPERATIVE SOCIETY AND NKOSINATHI MANZINI N.O. SZIS CASE NO 462/2012 (unreported) . In this case the Applicant was called to a disciplinary hearing. Evidence was led. The matter was postponed to another date for a ruling. Meanwhile the parties were directed to file written submissions. A transcript of the evidence was subsequently delivered on the parties. The Applicant failed to meet the deadline for filing his written submissions. The Respondents managed to file their submissions. The chairman proceeded to make a ruling in the absence of the Applicant's submissions. The Applicant moved an application to Court to set aside the chairman's ruling. The Court granted the order and thus set aside the ruling. The Court held that on the peculiar circumstances of that case the chairman erred in making a ruling in the absence of the Applicant's written submissions. The following dictum was extracted from pages 7-8 (paragraph 15) of that judgment;

“ In the present case, the evidence revealed that the Chairman of the disciplinary hearing made a ruling without having heard a chance to consider the written submissions filed by the Applicant. The failure to consider the written submissions clearly constituted a violation of the

audi alteram partem principle. This procedural irregularity was so patent and seriously prejudicial to the Applicant. Each case must be judged in accordance with its own peculiar facts and circumstances. In the present case the violation of the right to be heard was so blatant such as to entitle the Court to intervene”

36. The honourable Court has stated the following points in its judgment:

36.1 Each case must be judged in accordance with its own peculiar facts and circumstances.

36.2 In the Hlongwane case the violation by the chairperson of the Applicant’s right to be heard was so blatant as to persuade the Court to intervene in an uncompleted disciplinary hearing.

37. In the Hlongwane case, the Applicant’s reasons for failing to file his written submissions do not appear *ex facie* the judgment. The Court was however satisfied that the Applicant’s failure to file was justified. The Court was further satisfied that the chairman was unjustified in proceeding to issue a ruling in the absence of the Applicant’s written submission.

38. The Hlongwane case is distinguishable from the matter before Court on several features;

38.1 In the matter before Court the failure by the Applicants to file their written submissions was deliberate. It was therefore a

wilful default. The Applicants' had planned the default with the hope to gain a tactical advantage over the 1st Respondent.

38.2 There is clear evidence that the parties had been given sufficient time to file. The Applicants failed to file notwithstanding the time being made available.

38.3 The chairman was therefore justified in proceeding to issue a ruling in the absence of the Applicants' written submissions.

38.4 The evidence of each of the Applicants is self contradictory. On the one hand the Applicants claimed to have filed their written submissions. They blamed the chairman for failing to consider those submissions in his ruling. On the other hand the Applicants claim that they did not file their written submissions. These two statements made in the same set of affidavits cannot be both correct. At least one statement is incorrect. The Court cannot tell which of the two statements is correct. However, each of these statements cannot assist the Applicants in their application before Court.

38.5 The Applicants failed to produce in Court copies of the written submissions which they claimed they had filed with the chairman. In its affidavit, the 1st Respondent challenged the Applicants to produce proof of the existence of the alleged written submissions. The Applicants failed to produce such

proof. That created doubt in the mind of the Court whether such written submissions exist.

38.6 This Court agrees with his Lordship Nkonyane J in the Hlongwane matter, that each case must be decided in accordance with its peculiar facts and circumstances.

38.7 In the Hlongwane case, the Court did not make a declaration that if either of the parties to a disciplinary hearing fails, for whatever reason, to deliver his written submissions when called upon to, the chairman cannot be justified in proceeding to deliver his ruling.

38.8 For the reasons aforementioned, this Court finds that the Hlongwane case is distinguishable from the present matter and therefore it cannot assist the Court.

39. As stated above the Applicants have raised three (3) other grounds on which they have based their claim for relief. The Applicants have argued that the chairman allowed the 1st Respondent to lead hearsay evidence during the hearing, of a witness named Mr Maxwell Sithole. That hearsay evidence is said to have prejudiced the Applicants' defence.

40. The Applicants have further complained that during the disciplinary hearing, the chairman allowed the 1st Respondent to lead evidence of

privileged information. It is said that, that evidence was prejudicial to the Applicants' defence.

41. The general rule is that the Courts do not intervene in an uncompleted trial or disciplinary hearing. The Courts have allowed intervention in uncompleted matters under very stringent circumstances. In the matter of WAHLHAUS VS ADDITIONAL MAGISTRATE, JOHANNESBURG AND ANOTHER 1959 (3) SA 113 (AD), the Court intervened in an uncompleted trial and stated the following principle in support thereof:

“ While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether mandamus or otherwise, upon the unterminated cause 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.... . In general however it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.”

42. In the matter of ABEL SIBANDZE VS STANLIB SWAZILAND (PTY) LTD AND LIBERTY LIFE SWAZILAND, SZICA CASE NO 5/2010 (unreported) the following principle was stated at page 31 (paragraph 41) ;

“The attitude of the Courts therefore, is not to intervene in the employers [employer’s] disciplinary proceedings until they have run their course, except where compelling and exceptional circumstances exist entitling the court to do so.”

This principle was applied in many other cases including the following;
SAZIKAZI MABUZA VS STANDARD BANK OF SWAZILAND AND
ERROL NDHLOVU N.O. SZIC CASE NO. 311/2007 (unreported).

SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED
WORKERS (SUFIAW) AND RONNY DLAMINI VS NEDBANK
SWAZILAND LIMITED AND BONGANI MNTSHALI N.O. SZIC CASE
NO. 348/2011 (unreported).

43. This Court respectfully agrees with the principle expressed in the Wahlhaus and the Abel Sibandze cases. The complaints raised by the Applicants that the chairman allowed the 1st Respondent to lead hearsay as well as privileged evidence can be adequately and competently addressed in an internal appeal or in a review, once the disciplinary process is complete. In this case, justice can otherwise be obtained by following the correct procedure. There are no exceptional or compelling circumstances in this case which warrant the Court’s intervention. In other words the Applicants can obtain justice by referring the matter to an internal appeal. The application accordingly fails on this ground.

44. The Applicants have further argued that they have no faith in the appeal chairman that he will uphold their grounds of appeal, in the event that the Applicants file an appeal.

44.1 The 1st Applicant states as follows in paragraph 13 of her founding affidavit;

“It cannot be said also that a review application may not be brought on account of the fact that the enquiry is still on-going. [I] Am advised that what matters is that there is now a decision/ruling made on this matter. To sit on my laurels in the vain hope that the appeal chairman would uphold my grounds of complaint is risky. There is that possibility, s/he may not and I may suffer irreparable harm.”

(Record page 9)

This evidence is repeated word for word in paragraph 12 of the 2nd Applicant’s founding affidavit.

44.2 The 1st Applicant continued to state in paragraph 23 of her replying affidavit the following;

“The decision to uphold allegations of unfair labour practices lies with the chairman on appeal –and he is not bound to uphold the same, whereas at this stage, before an appeal may even be lodged the unfair practice may be reversed.”

(Record page 115)

This evidence is also repeated word for word in paragraph 24 of the 2nd Applicants' replying affidavit.

- 44.3 The reason given by the Applicants for having filed a review application with the Court and bypassed an internal appeal is that they have no assurance that the appeal chairman will uphold their grounds of appeal. This is not a reason for the Court to intervene in an uncompleted disciplinary hearing. The Applicants' reason for the review application does not fall under the exceptions which are stated in the cases cited above.
45. The Applicants have not referred their matter to an internal appeal yet. The appeal chairman has not been appointed or introduced yet. He certainly has not started his work. It is not clear therefore on what grounds do the Applicants base their attack on the chairman's ability to discharge his quasi-judicial function, in the event that the appeal is placed before him. The duty of the appeal chairman is to decide the appeal that has been placed before him in a manner that is fair, just and equitable. There is nothing to suggest that the appeal chairman will fail to discharge his duty. The Applicants' argument is therefore speculative and devoid of facts, it is accordingly dismissed.
46. The general rule is that the party who succeeds should be awarded costs. Had the Applicants paid attention to their affidavits they would

have realised the obvious contradictions which they have made under oath. They should have taken the necessary steps to avoid bringing contradictory evidence before Court. The Applicants' lack of diligence in prosecuting this application deserves the Court's censure by way of an order for costs.

47. The Court has noted that the 1st Respondent also deserves the Court's censure for delaying in filing its answering affidavit in both matters before Court. The 1st Respondent was ordered to file by the 20th December 2012. Instead, the 1st Respondent filed on the 27th May 2013. Mr N. Mthethwa, who is Counsel for the 1st Respondent, stated that his client delayed in giving him instructions which led to the delay in filing. That is not a justifiable reason for such a delay. As a mark of its disapproval of the 1st Respondent's conduct the Court will withhold an order for costs which otherwise would have been made in their favour. However, the order for costs issued against the 1st Respondent on 13th February 2013 stands.

48. With the foregoing, the Court orders as follows;

48.1 Both application before Court are dismissed.

48.2 Each party is to pay its costs.

Members agree

D. MAZIBUKO

INDUSTRIAL COURT- JUDGE

Applicants' Attorney: M.P. Simelane
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