IN THE INDUSTRIAL COURT OF SWAZILAND

REASONS FOR JUDGEMENT

CASE NO. 30/2014

In the matter between:-

DUMISA ZWANE **APPLICANT**

AND

EZULWINI MUNICIPALITY **1ST RESPONDENT**
COUNCILLOR BONGIWE MBINGO **2ND RESPONDENT**
COUNCILLOR SIBUSISO MABUZA **3RD RESPONDENT**
ZONKE MAGAGULA NO **4TH RESPONDENT**

Neutral citation : *Dumisa Zwane v Ezulwini Municipality and Others SZIC 33 (14 August 2014)*

CORAM : **DLAMINI J,**
*(Sitting with **P. Thwala & P. Mamba** Nominated Members of the Court)*

Heard : **11 AUGUST 2014**

Delivered : **14 AUGUST 2014**

Summary: ***Labour law – Industrial Relations –*** *Applicant seeks order interdicting and restraining Respondents from breaching Order of this Court of March 2014, and setting aside charges preferred against him.* ***Held –*** *Respondents are not in breach of Court order of March 2014.* ***Held –*** *Applicant has not made out case for this Court to interfere with the employer's prerogative. Application dismissed with no order as to costs.*

1. The dispute between the Applicant and his employer, the Ezulwini Municipality has been to this Court before. It first came before this Court 12 February 2014, where we granted an interim order in terms of which the employer, Ezulwini Municipality 1st and Attorney Titus Mlangeni N.O. were interdicted from proceeding with the disciplinary hearing of the Applicant pending the finalization of the matter then. On the 04th March 2014, this Court heard submissions and arguments and thereafter delivered an *ex tempore* judgement on the same day in terms of which amongst other prayers principally decided that the Clerk of the Municipality, Vusumutiwendvodza Matsebula, was to play no role, whatsoever, in the present disciplinary hearing of the Applicant, Dumisa Zwane, except as a witness. The Court points out that in the March 2014, urgent application, the Applicant had also sought to have the charges preferred against him set aside and / or interdicting the disciplinary enquiry itself. That prayers for the setting aside of the charges or interdicting the disciplinary enquiry were dismissed by this Court, so that the charges still stand.

2. The Applicant was unhappy with the decision of the Court, hence he approached the High Court on review to have the decision of this Court set aside. To an extent, the Applicant's review application was successful in the High Court. But the High Court, per Maphalala MCB J, like this Court, never interfered with the charges as preferred by the employer. Maphalala MCB J stated at paragraph 24 of his judgement that '*…It is trite law that disciplinary powers over employees is the prerogative of the employer, and, this includes appointing the chairperson and*

acting on the recommendations made.' At paragraph 25 of his judgement the Judge quotes the decision of Dunseith JP, as he then was, in *Graham Rudolph v Mananga College & Another IC Case No.94/2007,* where the learned Judge President then stated at paragraph 46 of his judgement that *'…The Court has often expressed its reluctance to interfere with the prerogative of an employer to discipline its employees or to anticipate the outcome of an incomplete disciplinary process.'*

3. This matter is now back before this Court. The Applicant has again come in such haste for urgent relief. He seeks an order that the present Respondents be interdicted from proceeding with the disciplinary hearing against him and / or setting aside the charges he is facing. He states that after the review application at the High Court, the employer appointed the 1st and 2nd Respondents as members of a Committee tasked with the responsibility of handling the disciplinary hearing against him. This Committee in turn appointed the 4th Respondent to chair the disciplinary hearing against him. He has qualms with the whole manner this has unfolded. He states that despite the order of this Court issued on 01st March 2014, directing that the 1st Respondent's Town Clerk / CEO should play no role whatsoever in the disciplinary hearing against the Applicant, except as a witness, the Committee has decided to go ahead on the same charges the Applicant was initially slapped with. Hence now this urgent application before this Court.

4. After hearing submissions and arguments on the matter this Court issued an *ex tempore* judgement in which it dismissed the application of the Applicant. These now are the reasons for the judgement of the Court above. The gist of the Applicant's case is that the Committee appointed by the employer should not have relied on the initial charges preferred on him but should carry out their own investigations and decide whether to still charge him or not. He argues that the conduct of the Committee of relying on the initial charges is tantamount to a deliberate disregard of the order of this Court interdicting the CEO from playing any role whatsoever in the disciplinary against him except as a witness.

5. In relation to the Order of this Court of the 05th March 2014, the decision of the Court was that the CEO ***'…shall play no role whatsoever in the present disciplinary hearing against the employee, Mr. Dumisa Zwane, except as a witness.'*** (Court's emphasis). When the Court issued this order it was cautious not to fall into the temptation tentacles of interfering with the prerogative of the employer to discipline its employees. The Court points out that it never set aside the charges. As it is the charges still stand. That is why we said the CEO was to play no role in the present (or pending) disciplinary hearing except as a witness. Otherwise what would the CEO be a witness to except for the disciplinary hearing in respect of the charges the Applicant is currently facing?

6. Indeed the Applicant is entitled to a fair hearing, under the chairmanship of an independent person whose independence and impartiality is beyond suspicion.

(See the ***Graham Rudolph case***). But the Applicant does not say that the impartiality of the new Chairperson appointed by the Committee is suspect. He only has a problem with the charges which he says are tainted because of the involvement of the CEO in their institution. However he has not challenged the investigation against him in these proceedings nor in the earlier proceedings of March 2014. And we reiterate that this Court found no reason in March 2014, neither did the High Court under review, to interfere with the prerogative of the employer in disciplining its employee Dumisa Zwane. That is why the charges were never set aside. In fact, there is no allegation that the investigation against him was conducted in a procedurally unfair manner so as to warrant immediate interference by this Court.

7. An interesting fact the Court brings to the fore is that in the application of March 2014, amongst the orders the Applicant sought was an order to set aside the charges against himself and/or interdicting the 1st Respondent employer from proceeding with the disciplinary enquiry. That prayer was dismissed by this Court. As an alternative to this prayer, he sought for an order removing Attorney Titus Mlangeni from sitting as the Chairperson in his disciplinary hearing, and <u>that in his stead the 1st Respondent's Committee of Council appoints a new person to chair his hearing.</u> (Court's emphasis). From the underlined above, it is clear that the Applicant was saying as an alternative prayer he was seeking that the Committee should remove the Chairperson already appointed and that it (Committee) should instead appoint an independent Chairperson. And that is

exactly what has happened in this instance. As per his wish, a Committee has been appointed to handle his disciplinary enquiry. Over and above that, and again as per his wish, the Committee he so much wanted has appointed an independent Chairperson to chair his hearing. This is exactly what he wanted. It would seem the Applicant still wants his cake despite having already eaten it. The conduct of the Applicant is nothing more than a delaying tactic meant to frustrate the disciplinary process instituted against him.

8. It is a well known fact that there are various laws imposing all kinds of burdens and obligations upon employers in relation to their employees. And yet as a rule, this Court has always, consistently so, upheld the employers' inherent prerogative to regulate their workplace. Under the doctrine of management prerogative every employer has the inherent right to regulate, according to their own discretion and judgement, all aspects of employment relating to employees' work, including hiring, work assignments, working methods, time, place and manner of work, supervision, transfer of employees, lay-off of employees, discipline and dismissal of employees. The only limitations to the exercise of prerogative by employers are those imposed by labour laws and the principles of equity and substantial (natural) justice.

9. The Court quickly points out though that while the law imposes many obligations on the employer, nonetheless, it also protects the employer's right to expect from its employees not only good performance, adequate work, and diligence, but also

good conduct and loyalty. In fact labour laws do not excuse employees from complying with valid company policies and reasonable regulations for their governance and guidance.

10. Having said this, it is a finding of this Court therefore, that the employer in this matter has not in anyway breached the Order of this Court issued in March 2014. We find no merit in the present application by the Applicant in this matter. The Court has accordingly come to the conclusion that the Applicant has failed to make out a case for it to intervene at this stage. Accordingly the Court is inclined to dismiss the application with no order as to costs. And that is the order we make.

The members agree.

T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DATED THIS 14th DAY OF AUGUST 2014.

For the Applicant: *Attorney Z. Shabangu (Magagula & Hlophe Attorneys)*
For the Respondent: *Attorney S. Mdladla (S.V. Mdladla & Associated)*