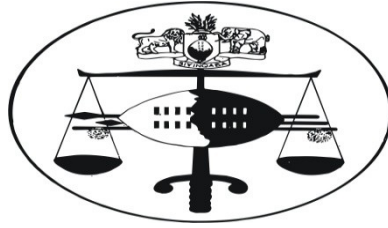


IN THE  
OF



INDUSTRIAL COURT  
SWAZILAND

CASE NO.116/12

In the matter between:-

**JOSHUA MANANA**

Applicant

**And**

**THE NEW HOPE CENTRE**

Respondent

Neutral citation: Joshua Manana and The New Hope Centre (116/2012)  
[2014] SZIC 38 (16 September 2014)

CORAM: D. MAZIBUKO

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

Heard: 9<sup>th</sup> July, 2014

Delivered: 17<sup>th</sup> September 2014

*Summary: Labour Law; Employee dismissed by employer on findings and recommendation of the Chairperson at a disciplinary hearing. Employee files an appeal. Appeal argued in the year 2011. Appeal Chairperson fails to deliver his decision. Employee aggrieved by chairperson's failure to complete the appeal.*

*Held: That Chairperson's failure to deliver his decision is prejudicial to both parties.*

*Held further: That the employer should commence appeal hearing afresh before new Chairperson and finalise his work within given time limits.*

## JUDGMENT 17<sup>TH</sup> SEPTEMBER 14

1. The Applicant is Joshua Manana. Prior to the 27<sup>th</sup> October 2010 the Applicant was employed by the Respondent. The date the employment contract was concluded does not appear on the pleadings.
2. The Respondent is The New Hope Centre a firm operating as such in Manzini (Swaziland) with power to sue and be sued.
3. On the 19<sup>th</sup> October 2010 the Applicant was suspended from work by the Respondent by letter dated the same day. The letter is attached to the Applicant's affidavit marked MOU 1. The suspension was with pay and was pending finalisation of a disciplinary hearing. The disciplinary hearing was scheduled for 26<sup>th</sup> October 2010. The Applicant was charged with assault.

4. The disciplinary hearing proceeded as scheduled. The Applicant was found guilty as charged. The chairperson of the disciplinary hearing recommended a dismissal. The Respondent proceeded to dismiss the Applicant from work, by letter, and with immediate effect. The letter of dismissal is dated 27<sup>th</sup> October 2010 and attached to the Applicant's founding affidavit marked MOU 2.
  
5. The Applicant alleged that he appealed the decision of the chairman. In particular the Applicant stated that he challenged both the verdict and the sanction. The Applicant added that he handed over the appeal document to the Respondent. There is no indication in the founding and answering affidavits as to when exactly did the Applicant file his appeal. The Applicant failed to attach a copy of the appeal document to his founding affidavit. It is noted that the Respondent (in its Reply) has denied receipt of the alleged notice of appeal.
  
6. According to the Applicant he expected the Respondent to arrange an appeal hearing, but the Respondent allegedly failed to do so. The Applicant thereupon reported a dispute with the Conciliation, Mediation and Arbitration Commission,

established under Section 62(1) as read with 64(1)(b) and (c) of The Industrial Relations Act No.1/2000 as amended, (hereinafter referred to as CMAC).

7. The Applicant reported a claim for unfair dismissal at CMAC. On the 15<sup>th</sup> December 2010 the parties concluded an agreement before the CMAC Commissioner on the following terms,-

7.1 that the matter should not be finalised at CMAC but should be dealt with at the workplace, and

7.2 that the Respondent will furnish the Applicant with the minutes of the disciplinary hearing, and

7.3 that upon receipt of the minutes, the Applicant will file his appeal against the findings and recommendations of the chairman.

A copy of the memorandum of agreement entered into at CMAC is attached to the Applicant's founding affidavit marked MOU 3.

8. The Applicant eventually filed his appeal documents and the hearing was held in February 2011. The parties awaited a decision from the appeal- chairperson. According to the Applicant a reasonable time period elapsed and still the chairperson failed to deliver his decision.

9. The delay caused the Applicant to write the Respondent a letter in which he expressed his frustration arising from the failure by the chairperson to deliver a decision on the appeal matter. The letter is dated 25<sup>th</sup> March 2011 and is marked annexure MOU 4. In his letter (annexure MOU 4) the Applicant threatened to report another dispute at CMAC.
  
10. On the 6<sup>th</sup> April 2011, the Respondent replied the Applicant's letter (annexure MOU4) by also writing a letter marked annexure MOU 5. The Respondent confirmed that the appeal was heard and that the chairperson has failed to deliver his decision. The Respondent confirmed further that the delay on the part of the chairperson was unreasonable. The Respondent proposed to convene a fresh disciplinary hearing before a new chairperson.
  
11. Pursuant to its proposal aforementioned the Respondent proceeded to call the Applicant (by letter), to a fresh disciplinary hearing for the 14<sup>th</sup> April 2011. The Applicant's rights including legal representation were explained in that letter. The Applicant was charged with the same offence as in the earlier hearing. The Respondent's letter is dated 6<sup>th</sup> April 2011 and is annexed to the founding affidavit, marked MOU 6.

12. The Applicant proceeded to report a second dispute at CMAC. In particular, the Applicant complained about unfair dismissal.

The parties met before the Commissioner at CMAC on the 25<sup>th</sup> May 2011. The parties agreed to settle that dispute in the following manner:

*“That the matter be withdrawn and be referred back to the parties”.*

A memorandum of agreement was signed on the 25<sup>th</sup> May 2011 by the Applicant, the Respondent and the Commissioner. The agreement is attached to the founding affidavit and is marked MOU 7.

13. On the 20<sup>th</sup> April 2011 the Applicant wrote the Respondent another letter in which he raised concerns about the proposed re-hearing of the disciplinary matter. The Applicant’s letter is marked annexure MOU 8. A reading of annexure MOU 8 indicates that it was written in response to annexure MOU 6. The Applicant raised the following questions in annexure MOU 8;

12.1 whether he was still an employee of the Respondent or not, this question was raised in light of the Respondent’s letter of dismissal (annexure MOU 2),

12.2 and if the disciplinary hearing commences *de novo* as proposed by the Respondent, does that mean that the Respondent has withdrawn the dismissal decision which the Respondent communicated to the Applicant by letter dated 27<sup>th</sup> October 2010 (annexure MOU 2),

12.3 the Applicant further complained about the expenses he had incurred and those he would further incur arising from the delay in finalizing the disciplinary exercise, and he wanted to know whether or not he would be compensated for that expense.

13. The Respondent wrote a reply to annexure MOU 8, which is dated 28<sup>th</sup> April 2011 and is marked annexure MOU 9. The Respondent stated her proposal as follows,

13.1 that she withdrew her letter of dismissal (annexure MOU 2),and

13.2 that the Applicant be reinstated as an employee but remain suspended- without pay, pending finalisation of the disciplinary hearing, and

13.3 further that the Respondent should not be held liable for the expenses referred to by the Applicant.

14. The proposal made by the Respondent in annexure MOU 9 was unacceptable to the Applicant. The Applicant was particularly opposed to the suggestion that he be reinstated without pay, pending finalisation of the disciplinary hearing. The Applicant demanded that he be reinstated with pay. The parties failed to reach an agreement. The Applicant not only rejected the Respondent's proposal, he further refused to subject himself to the proposed- fresh disciplinary hearing. On two (2) instances the Respondent had attempted to institute fresh disciplinary hearing against the Applicant, but failed. Each of the parties maintained its stance and they reached a deadlock. Thereafter the Applicant reported a third dispute at CMAC.

15. The issues in dispute before the Commissioner at CMAC were as follows,

15.1 *“the suspension of the Applicant be set aside,”* and

15.2 *“ the Applicant be paid his wages dating back from October 2010 until finalisation of the dispute”.*



The Commissioner failed to settle the matter through conciliation. The Commissioner proceeded to issue a Certificate of Unresolved Dispute which is dated 8<sup>th</sup> September 2011 and is annexed to the founding affidavit marked MOU 10.

16. On the 26<sup>th</sup> April 2012 the Applicant instituted an application before Court for relief as follows;

- “1. Declaring the suspension of Applicant, without pay, as unlawful, illegal, wrongful and ultra vires.*
- 2. Directing the Respondent to pay the Applicant his salary as from the Month of November, 2010 up to and including [the date the disciplinary hearing is finalised].*
- 3. Ordering the Respondent to conclude the pending disciplinary hearing within One [1] month of the Courts’ judgment.*
- 4. Setting aside the suspension without pay and declare same as null and void.*
- 5. Granting and or Ordering Respondent to pay costs of this application.*
- 6. Granting Applicant Further and/or Alternative relief.”*

(Record page 66-67)

The application is opposed. The Respondent filed an answering affidavit.

17. The first disciplinary hearing that took place on the 26<sup>th</sup> October 2010 is not subject of dispute. Upon finalisation of that disciplinary hearing the Respondent took a decision to dismiss the Applicant and further implemented that decision. There is a dispute as to whether the Applicant filed an appeal against the dismissal or not. The Applicant alleges that he appealed the dismissal, but he failed to produce evidence of the appeal notice or any other relevant document. The Respondent denied that an appeal had been filed.
18. The Court accordingly finds that the Applicant has failed to prove that he appealed the dismissal. In the absence of an appeal, it was logical to conclude that the Applicant accepted the dismissal.
19. However on the 8<sup>th</sup> December 2010 the Applicant reported a claim at CMAC for unfair dismissal against the Respondent. About the 15<sup>th</sup> December 2010 that dispute was settled. The parties entered into a written tripartite agreement which was signed by the Applicant, the Respondent and the Commissioner. There are three (3) points that were agreed upon at CMAC namely;

- 19.1 that the claim for unfair dismissal should not be finalised before the Commissioner, instead the parties chose to resolve their dispute themselves,
- 19.2 that the Respondent agreed to furnish the Applicant with the minutes of the disciplinary hearing of the 26<sup>th</sup> October 2010, and
- 19.3 that the Applicant will, upon receipt of the minutes, file an appeal against the finding and recommendation of the chairperson of the disciplinary hearing.
20. The effect of the agreement (annexure MOU3) gave the Applicant another chance to file an appeal against the dismissal. The evidence indicates that an appeal was heard sometime in February 2011. The appeal chairman did not however issue a decision. Both parties were seriously inconvenienced and prejudiced by the failure by the chairperson to deliver his decision.
21. The chairperson's failure to deliver his decision on the appeal hearing created an abnormal situation concerning the relationship that existed between the parties. The Applicant had been dismissed, he was therefore an ex-employee of the Respondent.

However since the Applicant had filed an appeal, there was that possibility that he could succeed on appeal and be reinstated.

The delay by the chairperson in delivering a decision on the appeal occasioned grave injustice to both parties. When an employee or ex-employee acquires a right to appeal a particular decision and he actually files the necessary documents and appears at the hearing to challenge that decision, he is entitled to a decision on appeal. In this case the Applicant was denied, by the chairman, a right to a decision on appeal.

22. In the matter of: THEMBA PHINEAS DLAMINI VS TEACHING SERVICES COMMISSION AND ANOTHER SZIC 324/2012 (unreported) at pages 20-21, this Court had an opportunity to comment on the importance to an employee or ex employee, of a right to appeal an adverse decision. The Court stated as follows:

*“An internal appeal gives the Applicant a second chance to prove his innocence and/or expose irregularities that exist in the disciplinary hearing. If the internal appeal is successful, the adverse decision will be reversed and that will bring the matter to an end. However if the conviction is upheld on appeal, the Applicant still has another chance to make submission in mitigation of the sanction. If the mitigation is*

*successful, the Applicant will get a lesser sanction than a dismissal.*

*A denial of an appeal is therefore a denial of justice for the Applicant.”*

(Underlining added)

23. The failure by the chairperson to deliver a decision on the Applicant’s appeal clearly resulted in a miscarriage of justice. Both parties are entitled to be informed on the outcome of the appeal within a reasonable time. An appeal decision defines the rights and obligations of the parties. In this case both parties were prejudiced by the chairperson’s dereliction of duty.
  
24. The chairperson in a disciplinary hearing or a subsequent appeal thereto, is not an agent of the employer. The chairperson is a neutral person whose responsibility is to decide the matter before him without bias or pressure- in whatever form. The employer cannot be held liable for misconduct or dereliction of duty on the part of the chairperson, unless the employer has directly or indirectly caused or contributed to the impropriety complained of. In this case there is neither allegation nor indication that the employer caused or contributed to the chairperson’s dereliction of duty.

25. It was open to any of the parties to move an application before Court for an order to compel the chairperson to complete his work and submit his decision within stipulated time limit. The Applicant's representative conceded that, that route was open to the Applicant but quickly added that it was fraught with danger. The danger was that once the chairperson is compelled by Court Order to complete his work, there is a likelihood that the chairperson may purposely issue a decision that is adverse to the party that obtained the order. The Court was informed that any effort to compel the chairperson to do or complete his work may be counterproductive. The Court noted that the Applicant's fear may be genuine. The Court also noted that there was no likelihood of the parties working together to move a joint application against the chairman.
26. An attempt was made by the Respondent to introduce a *compromise*, in order to break the stalemate that exists between the parties. On the 6<sup>th</sup> April 2011 the Respondent proposed to the Applicant that the disciplinary hearing should commence *de novo* under a new chairperson. It was further proposed that the Applicant will remain an employee under suspension and without pay, pending finalisation of the disciplinary hearing.

27. That proposal was not acceptable to the Applicant. In particular, the Applicant rejected the suggestion that he be subjected to suspension without pay. Instead, the Applicant demanded that if disciplinary hearing commences *de novo*, and he is suspended pending finalisation of the disciplinary hearing, the following conditions must be met;

27.1 he must be suspended with pay, and

27.2 that he must be re-instated as an employee from the date of dismissal(27<sup>th</sup> October 2010), and

27.3 that he must be paid salary arrears and benefits from October 2010 to the date the *compromise* (agreement) is concluded.

The Applicant's demands clearly amounted to a counter- proposal. The parties failed to reach an agreement on the way forward and accordingly they remained trapped in the stalemate aforementioned.

28. A *compromise* was one of the possible avenues to bring an end to the impasse which the parties are faced with. A Court order for reinstatement or a conclusion of the appeal in the Applicant's favour were other possible avenues. Legal authorities have explained a *compromise* as follows:

28.1 *“Compromise is, in the wide sense, an agreement between persons for the settlement of a matter in dispute (whether or not arising from a previous contract), each party abating some of his previous demands. If parties to a contract dispute each other’s rights in terms of the contract and subsequently compromise, their rights are then regulated by the compromise and not by the original contract, which falls away (Cachalia vs Harberer & Co. 1905 TS 457). In such a case, as the parties enter into a new contract which replaces the old one, it is clear that compromise is a form of novation...”*

GIBSON JTR: SOUTH AFRICAN MERCANTILE AND COMPANY LAW, 7<sup>th</sup> edition,(Juta & Co.) 1997, ISBN 0 7021 4058 9 at page 113.

28.2 *“Compromise, a mutual arrangement made between two or more persons for the settlement, by means of concessions, of the differences or disputes existing between them.”*

BELL WHS: SOUTH AFRICAN LEGAL DICTIONARY, 2nd edition (Juta & Co.), 1925 ISBN (not available) at page 117.



29. From the aforesaid definitions, it is clear that once the parties conclude a *compromise* each party will necessarily abate some of his rights, which he enjoyed prior to the agreement and will further gain some benefit, which otherwise he was not entitled to. In this case, the Applicant was offered a *compromise* which contained *inter alia*; reinstatement which was subject to the condition that the Applicant remains under suspension and without pay, pending finalisation of a disciplinary hearing. The Applicant rejected that offer but demanded a reinstatement with pay plus arrear salary. The basis of the Applicant's demand was that reinstatement was among the terms that were contained in the Respondent's offer. The Applicant's demand clearly amounted to a rejection of the Respondent's offer.

30. When the offer of *compromise* was made, it was within the Applicant's power to either accept or reject it as a whole.

When the Applicant refused to be subjected to a suspension without pay, he thereby rejected the entire offer. It was not open to the Applicant to accept those terms in the offer that were favourable to him and implement them as if a *compromise* had been concluded while he rejected the unfavourable terms.

31. The Respondent has not withdrawn the letter of dismissal (annexure MOU 2). That means the Applicant remains dismissed since the 27<sup>th</sup> October 2010. In other words the Applicant has not been reinstated. The Applicant's prayers are predicated on the wrong assumption that the Applicant is still an employee of the Respondent. The Applicant has prayed inter alia, for payment of both the current and arrear salary, calculated from November 2010 up to the date the disciplinary hearing is concluded. The Applicant does not render any service to the Respondent. He is therefore not entitled to payment of salary. There is further no legal justification for payment of arrear salary. Prayer 2 of the Notice of Motion accordingly fails.
32. The Applicant is no longer employed by the Respondent. The work or employment relationship between the parties was terminated on the 27<sup>th</sup> October 2010 by letter, annexure MOU 2. Since then, the Respondent has neither power nor authority to suspend the Applicant from work. It is an employer who has power and authority to suspend an employee from work. At the time the Respondent purported to suspend the Applicant from work, without pay and pending finalisation of fresh disciplinary hearing,

the Respondent was labouring under a wrong impression that the employment relationship had been restored between the parties. However, since the Respondent's offer to conclude a *compromise* has been rejected by the Applicant, the proposed reinstatement of the Applicant as an employee thereby failed. The Respondent could not therefore exercise authority over the Applicant. Likewise, the Applicant could not demand from the Respondent the benefits that are reserved for an employee -such as payment of salary. The Respondent's initiative of the 6<sup>th</sup> April 2011, to suspend the Applicant from work (with or without pay) was *ultra vires* the powers of the Respondent, it was therefore *null* and *void*. In light of the foregoing, prayers 1 and 4 of the Notice of Motion cannot be granted in the manner they are drafted.

33. The Applicant has further prayed the Court to order the Respondent to conclude the disciplinary hearing (of the Applicant) within one (1) month of the Court's judgment. This prayer is predicated on the Respondent's offer of *compromise*- which the Applicant rejected. The Respondent offered a fresh disciplinary hearing subject to reinstatement and suspension of the Applicant without pay. In the present circumstances the Respondent has no authority to institute a fresh disciplinary hearing against the Applicant.

The Applicant is no longer employed by the Respondent. There is no disciplinary hearing pending between the parties. There is however an appeal hearing that was argued and a decision is pending to date. For reason not known to the Court the appeal- chairperson has failed to deliver his decision. The chairperson is not a party to these proceedings, he has not therefore been given an opportunity to explain his delay. Prayer 3 in the Notice of Motion cannot therefore be granted.

34. The Applicant is entitled to insist that his appeal matter be finalised without further delay. The appeal decision is clearly overdue. Both parties have clearly and understandably lost confidence in the appeal-chairperson. Since the chairperson is not a party to these proceedings and the cause for his failure to conclude the appeal is not known to the Court, the Court is not in a position to give an order or directive to that chairperson in any manner, regarding progress in the appeal matter. It would be fair to both parties if the appeal hearing would commence *de novo* before another chairperson who should be put to strict time limits to complete his/her work. This order can fairly be accommodated under the prayer for alternative relief i.e prayer 6 in the Notice of Motion.

35. Wherefore the Court orders as follows:
- 35.1 Prayers 1,2,3,4 and 5 in the Notice of Motion are dismissed.
  - 35.2 The Respondent is ordered, within ten (10) calendar days of this judgment, to appoint a new chairperson to convene a fresh appeal hearing.
  - 35.3 The chairperson shall conclude his/her work within 30 (thirty) calendar days from the date of appointment.
  - 35.4 In the event that the Respondent or chairperson fails to comply with the time limits set out in this Order, an application shall be made before this Court on Notice of Motion and affidavit for an extension of time.
  - 35.5 Each party shall pay his/her costs.

The members agreed.

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D. MAZIBUKO.  
INDUSTRIAL COURT JUDGE

Applicant's Representative: Mr. S.Masuku  
Trade union Official

Respondent Attorney: Miss Q Dlamini  
NDZ Ngcamphalala Attorneys