



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGEMENT**

**CASE NO. 191/2015**

In the matter between:-

**HERBERT MTHUNZI DLAMINI**

**APPLICANT**

AND

**CHAIRMAN OF THE CIVIL SERVICE  
COMMISSION**

**1<sup>ST</sup> RESPONDENT**

**MINISTRY OF AGRICULTURE**

**2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation** : *Herbert Mthunzi Dlamini v Chairman of the Civil Service Commission and Others SZIC 63 (18 November 2015)*

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

**Heard** : **17 November 2015**

**Delivered** : **18 November 2015**

**Summary:** *Labour law – Industrial Relations – Applicant seeks order reviewing, correcting and setting aside the decision of the Civil Service Commission to conduct a disciplinary hearing against himself when it had made decision that he appears before a Committee of Officers. Held - It would not be in the interests of justice that the Applicant appears before the same Commission that previously*

dismissed him. **Held** – the Civil Service Commission should appoint a new Committee altogether which shall not hear any preliminary point relating to the undue delay of the institution of the misconduct charges the Applicant is facing.

1. This matter is not new to this Court. It has been previously heard by Nkonyane J, who in his judgement of 13 March 2015, under case number 525/2014, reviewed and set aside the decision to dismiss the Applicant. The history of the matter is that the Applicant had a very poor record of work attendance and that on occasions where he did show up at work he would do so on a questionable state of sobriety. His Supervisor eventually reported the issue of the Applicant's absenteeism to the authorities. An internal investigation was commissioned and thereafter the Applicant was charged. He appeared before the Civil Service Commission for a hearing and was ultimately dismissed from the Civil Service. Being dissatisfied with the decision to dismiss him, he successfully filed a review application to this Court challenging same.
2. In reviewing and setting aside the decision of the Civil Service Commission to terminate the services of the Applicant, the Court also issued an order that; *'The matter is remitted to the Commission to start the disciplinary hearing de novo within ten working days failing*

*which the employer shall be deemed to have waived its right to conduct the disciplinary hearing against the Applicant.’* The employer, it would seem, was not interested in waiving its right to discipline the Applicant, hence it appointed a Committee of Officers to conduct the disciplinary hearing. This was in terms of regulation 37(3) and 44(1) of the Civil Service Board Regulations.

3. At the hearing of the matter before Nkonyane J, Attorney Mr. X. Mthethwa argued that the dismissal was unlawful and unfair in that the charges were not instituted as soon as possible after the alleged acts of misconduct. But the Court, per Nkonyane J, in dismissing this line of argument by the Applicant’s Counsel stated thus;

***“What is to be considered as “soon as possible” will depend on the facts of each particular case. In the present case it has not been shown that there was undue delay which caused serious prejudice to the Applicant such that he was unable to properly conduct his defence. For example, there was no evidence, nor was it argued that the witnesses that the Applicant would have liked to call have since passed away or***

*relocated to other countries and was therefore prejudiced in his defence. This submission on behalf of the Applicant is therefore dismissed.*” (Court’s emphasis).

4. In effect, when the Court dismissed this line of argument it was saying there had been no undue delay in instituting the disciplinary enquiry against the Applicant. Hence the ultimate decision that the matter be remitted back to the Civil Service Commission to start the hearing *de novo*. That being the case, it therefore means that since the Court had already made a determination that there was no undue delay which caused prejudice to the Applicant, then that issue could no longer be revisited by the Applicant at his disciplinary hearing.
  
4. What then happened in this matter is that when the matter was called before the Committee appointed by the Civil Service Commission, the Applicant’s present Attorney, Mr. Mthethwa revisited the same issue by raising a preliminary objection about the delay in the institution of the disciplinary proceedings, something he was not legally competent to raise before that forum because a determination had already been made on this aspect by this Court. If anything, it was disingenuous of

Attorney Mthethwa to again canvass and revisit this issue before the Committee appointed by the Civil Service Commission. If for whatever reason the Applicant was not satisfied with the determination of the Court on this issue, the proper route to follow was to file a review application with the High Court or appeal to the Industrial Court of Appeal.

5. The Committee upheld the preliminary point as raised on behalf of the Applicant with the result that it set aside the hearing. It would seem that the Committee was not aware that this issue had been unsuccessfully canvassed before this Court. Had the Committee been aware that this same issue had been dealt with and dismissed by this Court, it would obviously not have even entertained it when it was raised as a preliminary objection before it. In effect, the decision of the Committee was contradicting the determination made by this Court on this issue. It had the effect of reviewing it, which legally it cannot do.
6. On receipt of the Committee's recommendation that the hearing be set aside the Civil Service Commission rejected the ruling and elected to

conduct the disciplinary proceedings against the Applicant itself, hence the present application now before this Court. Counsel for the Respondents, Attorney Mr. Vilakati correctly pointed out that in this matter the enabling authority is Regulations 37(3) and 44(1) of the Civil Service Board (General) Regulations. Attorney Vilakati submitted that properly construed, these Regulations confer on the Committee of Officers a power of inquiry only and not to decide. And that when the Committee of Officers acted beyond the inquiry powers they had and contradict this Court by finding that there had been undue delay, then the Civil Service Commission correctly acted within the ambit of its powers by revisiting the decision and deciding that it was not bound by this legally flawed decision.

7. In terms of the law in disciplinary enquiries, the ultimate decision is the exclusive preserve of the Employer. The person(s) appointed to preside over the hearing only make a recommendation based on the evidence presented before that enquiry. Even our own Government's General Orders provide similarly. In this regard the Court refers to General Order A.947(3) which provides that;

*‘On the conclusion of the inquiry (if the inquiry has been conducted by a Committee of Officers the findings shall be forwarded to the Commission) the Commission shall record its findings and decide what punishment, if any, shall be imposed on the officer.’ (Court’s emphasis).*

8. This means that whatever findings the Committee of Officers makes, it forwards same to the Commission which ultimately decides on the sanction to be imposed. In this matter therefore, it was beyond the scope of the Committee to make a decision that the hearing was set aside, thus contradicting the decision of this Court on the issue. It is therefore a finding of this Court that the Commission was perfectly entitled to reject the decision of the Committee of Officers as it did.
  
9. One issue though the Court cannot overlook is that the Applicant had previously appeared before the same Civil Service Commission which dismissed him on 15 April 2014. It would therefore not be in the interests of justice and proper that he again appears before the same Commission that previously dismissed him. When this Court, per Nkonyane J, remitted the matter back to the Commission for the

hearing to start *de novo*, the Commission correctly appointed the Committee of Officers, which unfortunately acted outside of their mandate by making a decision to set aside the hearing on an issue already settled by this Court.

10. The law is that justice must not only be done but must also be seen to be done. This Court therefore finds that it would not be in the interests of justice that the Applicant still appears before the same Commission that previously dismissed him. Instead what would be more prudent is that the Commission appoints a new Committee of Officers altogether to hear the disciplinary case of the Applicant *de novo* and thereafter make a recommendation to the Civil Service Commission to decide on what punishment is to be imposed to the Applicant in terms of General Order A.947(3). The new Committee to be so appointed cannot hear any preliminary issue relating to the undue delay in the institution of the charges the Applicant is facing, as this Court has already made a determination on same under case number 525/2014. This therefore means the application of the Applicant should succeed in so far as the Civil Service Commission cannot be allowed to again conduct his disciplinary hearing itself when it previously dismissed



him. The success of this application however is not based on the considerations the Applicant expounds in his pleadings and the arguments of his Counsel.

11. The Court accordingly makes the following order;

*A) The Civil Service Commission is to appoint a new Committee of Officers to hear the disciplinary case of the Applicant de novo and thereafter make a recommendation it (Commission).*

*B) The new Committee is to be appointed within 10 working days.*

*C) The new Committee to be appointed in terms of (A) above cannot hear any preliminary issue relating to undue delay in the institution of the misconduct charges the Applicant is facing, as this Court has already made a determination on this issue under case no. 525/2014.*

*D) The Court makes no order as to costs.*

The members agree.

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**T. A. DLAMINI**  
**JUDGE – INDUSTRIAL COURT**

**DELIVERED IN OPEN COURT ON THIS 19<sup>th</sup> DAY OF NOVEMBER 2015**

*For the Applicant: Attorney X. Mthethwa (Bhembe Attorneys)*

*For the Respondent: Attorney M. Vilakati (Attorney General's Chamber)*