IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

Appeal Case No. 10/17

Held at Mbabane

In the matter between:

WALIGO ALLEN **Appellant**

VS

NATIONAL EMERGENCY RESPONSE COUNCIL ON HIV AND AIDS **Respondent**

Neutral citation: *Waligo Allen Vs National Emergency Response Council on HIV and Aids [10/17] [2017] SZIC 02 30th October, 2017*

Coram: **M.R. FAKUDZE AJA**

J.S. MAGAGULA AJA

C. MAPHANGA AJA

Heard: 2nd October, 2017

Delivered: 31st October, 2017

Summary: *Interpretation of a written contract – contract of employment between Appellant and Respondent – no provision for disciplinary process in the contract – court a quo hold that Respondent has a right to convene a disciplinary hearing notwithstanding that same not provided for in the contract of employment.*

Held that it is trite law that the employer has the right to discipline an employee and the court cannot interfere with that right.

Held further that in as much as there is nothing in the contract that states that in the event the Appellant were to commit a misconduct she will be disciplined it is an implied term of the contract.

Held that the right to be heard before any disciplinary proceedings are instituted accords with the common law principle that a party must be heard – the audi alteram partem.

Held – Appeal therefore dismissed with costs and the judgment of the court a quo is confirmed.

JUDGMENT

JUSTICE M.R. FAKUDZE

[1] This is an Appeal from a Ruling by the Industrial Court dated 24th July, 2017.

BACKGROUND

[2] The brief background to this Appeal is that the Applicant is an employee of the 1st Respondent who occupies the position of manager. The 1st Respondent is the National Emergency Response Council on HIV and AIDS, often referred to as NERCHA. The 2nd Respondent is Attorney Sikhumbuzo Simelane who is chairman of a disciplinary hearing in which the Applicant is an accused – employee.

[3] On the 11th April 2017, the Applicant was charged with seven (7) counts of misconduct relating to allegations of dishonesty and insubordination committed at work. A disciplinary hearing process was instituted by the 1st Respondent. Currently, the Appellant is on suspension.

[4] When the disciplinary process commenced the Applicant raised a certain preliminary objection that the Employment Contract has no provision on how issues of discipline are to be dealt with. Consequently, the composition of the disciplinary panel was also unlawful as the same has no basis in terms of the contract.

[5] The Chairman handed down his ruling on the preliminary point on the 4th May, 2017. He dismissed the objection. Dissatisfied with that Ruling, the Appellant instituted legal proceedings on urgency basis at the Industrial Court challenging that Ruling. The following issues were raised by way of Notice of Motion reading 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. *That a Rule Nisi do hereof issue calling upon the 1st Respondent to appear and show cause at a date and time to be specified by this Honourable Court why an Order in the following terms should not be made final:-*

2.1. Reviewing, correcting and setting aside the Ruling of the 2nd Respondent dated 4th May, 2017;

2.2. Directing the 2nd Respondent to conduct the Disciplinary hearing in accordance with the terms enshrined in the Applicant's Employment Contract.

3. *That the Interim Order operates with immediate and interim effect pending finalisation of this matter.*

4. *Costs of suit by the party opposing the relief.*

5. *Such further and/or alternative relief.*

[6] The 1st Respondent filed a Notice of Intention to Oppose the Application and went further to file the Answering Affidavit. The Applicant accordingly filed her Replying Affidavit. After hearing the parties' representatives the court *a quo* dismissed the Appellant's Application on the bases that an employer has a right to institute disciplinary proceedings in order to determine the innocence or guilt of the employee. By the very same token, the employee also has a right to demand a fair disciplinary hearing in order to prove his innocence. The right to convene a disciplinary hearing is not based on the contract of employment but on common law. The Constitution of Swaziland also guarantees a fair hearing to any person whose civil rights and obligations are in issue.

[7] Based on the finding of the court *a quo,* the Appellant noted an Appeal on the 28th July, 2017. The following grounds of Appeal were raised:-

(a) *That the court a quo erred by holding that the right to convene a disciplinary – hearing is not based on the contract of employment but on common law.*

(b) That the court a quo erred by not holding that Clause 15.1 did not allow for the unilateral variation of the contract unless reduced into writing and signed by both parties.

(c) That the court a quo committed an error of law to hold and to interpret that clauses 1.1, 3.5, 13.2 and 13.5 of the Employment Contract were providing for the Respondent's power to convene a Disciplinary Hearing.

(d) That the court a quo erred by holding that the Respondent's power to convene a disciplinary hearing was conferred by law in total disregard of the existing contractual relationship between the Appellant and the 1st Respondent. To that extent, the court erred to hold that a Disciplinary hearing was a naturalia of the employment contract.

The parties' contention on appeal

Applicant's case

[8] When the matter came before this court on the 2nd October, 2017, the Respondent raised an issue that he thought the court needed to address on a preliminary basis. This pertained to the fact that the Applicant had allegedly tendered her resignation. The Appeal was therefore academic since there was no longer any employer - employee relationship. The Appellant disputed this and the court asked the Respondent to exhibit the resignation letter. Since the copy of the resignation letter was not signed, the Justices of Appeal could not admit same. They therefore ruled that the Appeal should continue.

[9] In their amended Heads of Argument, the Appellant's principal concerns are that the court *a quo's* refusal or failure to hold the right to convene a Disciplinary Hearing is derived from a contract of employment between the parties and by extension, the composition of the Disciplinary Hearing and the process itself is not in line with the contract of employment as that is not provided for in the contract.

[10] It is the Applicant's contention that the court *a quo* committed an error of law to hold that the Respondent has a right to convene a Disciplinary Hearing despite the fact that same is not provided for in the Contract of Employment. It is a legal requirement for a fair disciplinary hearing and it forms the basis of a fair labour practice that the Disciplinary Procedure should be clear and known to both employer and employee. In *casu*, the contract is silent.

[11] The Appellant contends that the Disciplinary enquiry that the Applicant is subjected to is unlawful as it is not provided for in the Contract of Employment. The Contract of Employment provides the terms and conditions of employment of the Applicant. It is trite that an employer may not unilaterally vary those terms and conditions. Clause 5.2 of the Contract of Employment only provides that "any failure to observe the above shall constitute a material breach of this Agreement." The Applicant argues that there should have been a further clause to provide for how instances of

breach are to be dealt with and what sanction would attach to each violation of the material obligations of the Appellant.

[12] On the issue that the issue of Disciplinary Hearing is implied in the contract, the Appellant argues that this is not only illegal, but is in violation of clause 15.1 of the Employment Contract which provides as follows:-

> *"15.1 No agreement varying, adding to, deleting from or cancelling this agreement and no waiver of any right under this agreement shall be effective unless reduced to writing and signed by the parties."*

It follows therefore, so argues the Appellant, that implying Disciplinary Proceedings in the contract, would therefore amount to a grave violation of the contract, hence same should be set aside.

The Respondent's case

[13] The Respondent's case is that the contract of employment does not state what will happen in the event the Appellant were to commit a misconduct whilst employed by the First Respondent. The omission has given birth to the Application that was heard in the court *a quo*.

[14] The Respondent's contention is that it is trite law that the employer has the right and even a duty to discipline an employee and the court cannot interfere with that right unless there are exceptional circumstances. The onus rests with the Applicant to prove that there are exceptional

circumstances. The Respondent supports its case by referring to the **Swaziland Electricity Board V Mashwama Bongani – Industrial Court of Appeal No. 21/2000** where it was stated at page 6 that:-

> *"In the present case the appellant clearly has a right and even a duty where it suspects that an employee is guilty of serious misconduct to hold a disciplinary hearing."*

The Respondent therefore urges this court not to interfere with the employer's

rights to discipline its employee.

[15] It is the Respondent's further contention that in as much as there is nothing in the contract that states that in the event Appellant were to commit a misconduct she will be disciplined, it is an implied term of the contract. Therefore the right to discipline the Appellant constitutes terms implied by law that form part of the Appellant's contract of employment. An implied term in a written contract is just as much as a term of the contract, so argues the Respondent.

[16] The Respondent finally contends that the contract of employment provides that the contract will be governed and interpreted in accordance with the laws of Swaziland. Paragraph 1.1 of the Agreement states that "This Agreement shall be governed and interpreted in accordance with the Laws of Swaziland." Paragraph 3.5 provides that "Nothing contained in this Agreement shall prevent, limit or otherwise interfere with the right of

NERCHA to lawfully terminate the services of the Employee at any time subject to the provisions of the Agreement and the laws of the Kingdom of Swaziland." Paragraph 13.2 provides that "This contract may be prematurely terminated by the Employer at any time for reasons that are in compliance with the laws of Swaziland, specifically in terms of the Employment Act and the Industrial Relations Act." Paragraph 13.5 states that "……. nothing shall affect the right of the Employer or the Employee to terminate this contract of Employment without notice or payment in l*ieu* thereof for any cause recognised in law as being sufficient."

[17] The 1st Respondent's argument is that paragraph 1.1 specifically provides that this agreement will be governed and interpreted in accordance with the Laws of Swaziland. Paragraph 3.5 gives the 1st Respondent as an employer, power to lawfully terminate the contract of employment. In the event that it becomes necessary for the 1st Respondent to terminate the contract of employment, such termination must comply both with the laws of the Kingdom of Swaziland and the terms of the said contract of employment. Paragraphs 13.2 and 13.5 confirm the power the 1st Respondent has as an employer, to terminate the contract of employment subject to compliance with the law of Swaziland especially the Employment Act and the Industrial Relations Act. The 1st Respondent has therefore two (2) sources of authority available to support a termination of the contract of employment, namely, the contract itself as well as the laws of Swaziland. Even though the contract does not state that the employer has a right to convene a disciplinary hearing prior to taking a decision to discipline the employee, the power of the employer is conferred by law. It need not be provided for or confirmed

in the contract of employment. It is not a legal requirement that, that power should be provided for or confirmed in the contract of employment.

The Applicable Law

[18] It is common cause that where parties have entered into a written contract, the terms thereof exclusively regulate the relationship between them**. Phillip Millin, on Mercantile Law of South Africa** at Pages 55 to 56 states that:-

> "*A clause in a written agreement provides that the agreement can be varied only in writing purports to deprive the parties of the power which they ordinarily possess to vary their agreement by word of mouth. The effect of such "a non variation clause" has given rise to much different opinion. The parties by inserting such a clause in their contract, effectively deprive themselves of the power to vary it otherwise than in writing, and any attempt to vary orally or by conduct is ineffectual."*

[19] A similar thought is captured in the High Court case **of Busaf (Pty) Limited V Vusi Emmanuel Khumalo t/a Zimeleni Transport, Civil Case No. 2839/2008,** where the Court observed that:

> "*If however, the parties decide to embody this agreement in written form, the execution of the document deprives all previous statements of their legal effect. The document became conclusive as to the terms of the transaction which it was intended to record. As the parties*

previous statements on the subject can have no legal consequences, they are irrelevant and evidence to prove them therefore inadmissible."

[20] In the Learned Authors' **Grogan's Rickets Basic Employment Law**, Second Edition, John Grogan states the following:-

> "*The power……. To initiate disciplinary steps against transgressors is one of the most jealously guarded territories of managers anywhere forming as it does an important part of the broader right to manage."*

[21] In the matter between **Graham Rudolph V Mananga College & Another Industrial Court Case No. 94/2007** at paragraph 46, His Lordship Peter Dunseith observed that:-

> *"46 The courts have 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. See* ***Bhekiwe Dlamini V Swaziland Water Services Corporation (ICA Case No. 13/2006); Thobile Bhembe V Swaziland Government and Others (IC Case No. 5/2001) Swaziland Electricity Board V Michael Bongani Mashwama & Others (ICA Case No. 21/2000)****. At the same time, the court will interfere to prevent an unfair labour practice which may cause the Applicant irreparable harm."*

[22] Likewise in the case of **Sazikazi Mabuza V Standard Bank of Swaziland Limited and Another Case No. 311/2007** the Court held at paragraph 34 that:-

> *"We do not think that any distinction can or should be drawn between statutory disciplinary enquiries in the Application of the Walhaus principles. The notion that the Industrial Court may intervene in uncompleted disciplinary proceeding "in rare cases where grave injustice might otherwise result or where justice might not by any other means be obtained," appeals to the sense of justice."*

Court's Analysis and Conclusion

[23] As stated earlier, the Appellant's case is that since the contract of employment does not provide for disciplinary proceedings, the court *a quo* committed an error of law when it concluded that the employer has a right to institute disciplinary proceedings. This accords with fair labour practice that the Disciplinary Procedure should be clear and known to both employer and employee.

[24] It is therefore the Appellant's contention that there should have been a clause in the contract that provides for how instances of breach are to be dealt with and what sanction would attach to each breach.

[25] On the issue that the Disciplinary hearing is implied in the contract, the Appellant argues that this is not only illegal, but is in violation of clause 15.1 of the Employment Contract which states that any variation, addition to, deletion from or cancellation in the Agreement shall not be effective unless reduced to writing and signed by the parties.

[26] The Respondent's case is that an employer has a right and duty to discipline an employee. This right may be interfered with by the court in exceptional circumstances. In the case at hand, the Appellant has not established these exceptional circumstances.

[27] The Respondent further contends that even if there is no clause dealing with Disciplinary Hearing in the contract, this issue is an implied term. Reference was made to various paragraphs in which it is stated that the laws of Swaziland will have to be followed in the interpretation and implementation of the contract.

[28] On the issue of the absence of a clause dealing with Disciplinary Hearing, the court's view is that the position propounded by the Respondent is correct. A thought that should always be at the back of our minds is how can an employer terminate a contract of employment without first instituting a disciplinary hearing? As stated in the **Graham Rudolph's case** (supra), courts are generally reluctant to interfere with the prerogative of an employer to discipline its employees unless exceptional circumstances exist.

In the case of **Dumisa Zwane V Judge of the Industrial Court and Others, High Court Case No. 404/2014**, His Lordship Maphalala M.C.B, J (as He then was) observed at paragraph 26 the value of procedural fairness as follows:-

> *"(26) It is well-settled that procedural fairness is the yardstick to determine whether the employer has conducted the hearing fairly and justly before imposing the penalty. The requirements of procedural fairness were developed by the courts from the rules of natural justice, and they have nothing to do with the merits of the case. Procedural fairness requires the employer to act in a semi- judicial manner before imposing a disciplinary penalty on the employee. This involves an investigation by the employer to determine whether grounds exist for dismissal and whether the employee was notified of the allegations against him. The employee should be entitled to a reasonable time to prepare a response including legal representation. In addition, the employee should be allowed the opportunity to state his case before an impartial presiding officer or tribunal."*

[29] It is also this court's considered view that the Disciplinary Hearing process is implied in the contract. The Respondent has ably demonstrated that the contract must be interpreted and implemented taking into account the laws of Swaziland. Paragraph 1.1 provides that the Agreement shall be governed and be interpreted in accordance with the Laws of Swaziland. Paragraphs

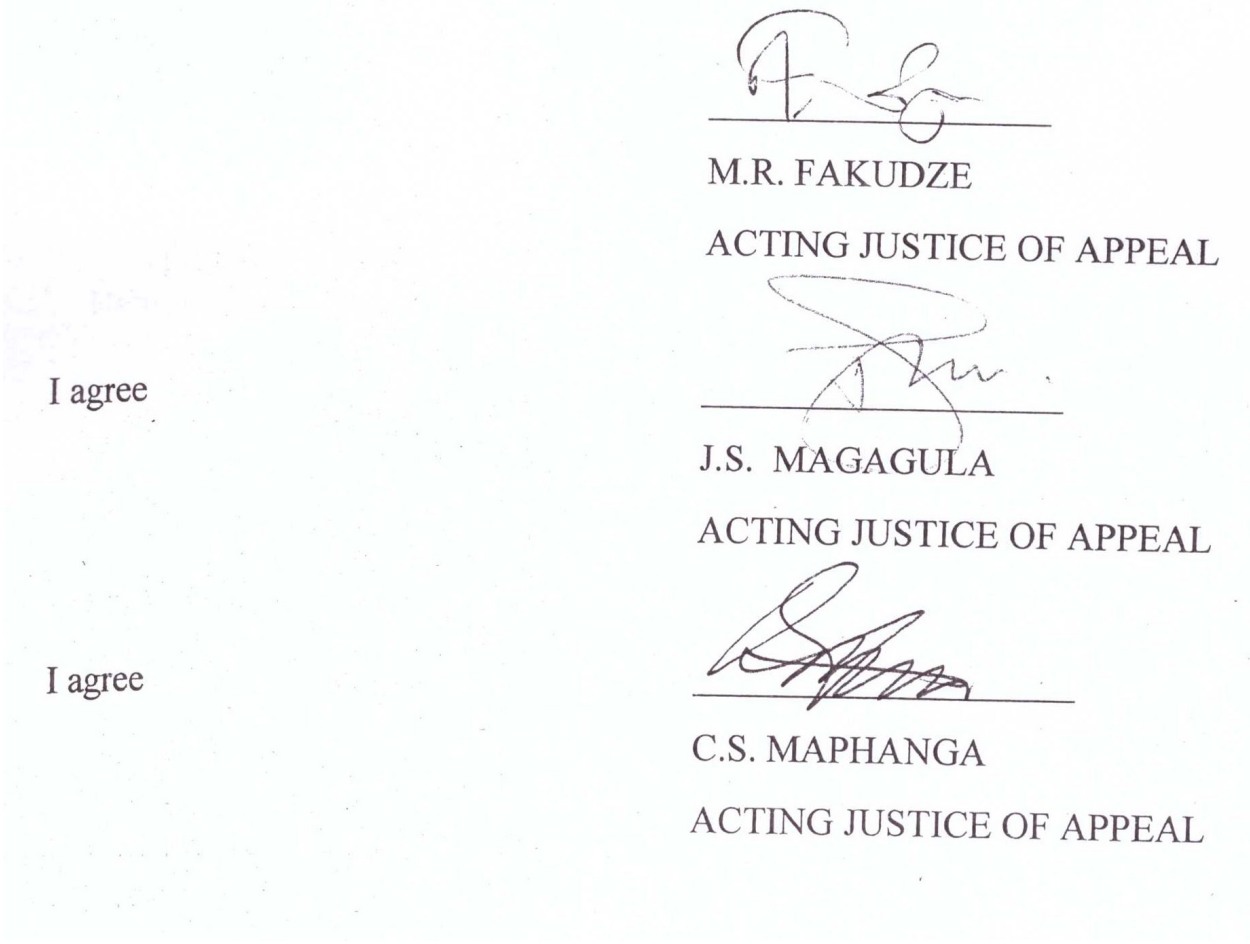
13.2 and 13.5 provide and confirm the power and authority the employer has to terminate the contract of employment subject to compliance with the law of Swaziland, especially the Employment Act and the Industrial Relations Act. The views expressed by the Respondent on this issue are upheld by this court. We therefore find in favour of the Respondent on this point as well.

[30] The last and final issue pertains to the fact that the Constitution Act, 2005 and the Industrial Relations Act, 2000, provide in clear terms that no adverse decision can be taken against a person without being heard. The right to be heard comes from the well-known Common Law principle of *audi alteram partem.*

[31] In light of all the foregoing, the following orders are made:

(a) The Appeal is dismissed and the judgment of the court *a quo is* confirmed.

(b) The 1st Respondent is awarded costs at an ordinary scale.



M.R. FAKUDZE

ACTING JUSTICE OF APPEAL

I agree

J.S. MAGAGULA

ACTING JUSTICE OF APPEAL

I agree

C.S. MAPHANGA

ACTING JUSTICE OF APPEAL

FOR APPELLANT: M. SIMELANE

FOR RESPONDENT: D. JELE