IN THE INDUSTRIAL COURT OF ESWATINI

JUDGMENT

Case No 251/19 (c)

In the matter between:

VUSI MKHALIPHI Applicant

And

CHAPELAT (SWAZILAND) (PTY) LTD t/a MONDELEZ INTERNATIONAL 1st Respondent

SICELO BANGEKHO DLAMINI N.O. 2nd Respondent

Neutral citation: Vusi Mkhaliphi v Chapelat (Swaziand) (Pty) t/a Mondelez and Another [2020] [251/19 (c)) (28 August 2020)

Coram: **NGCAMPHALALA AJ**
(Sitting with N. Dlamini and D.P.M. Mmango Nominated Members of the Court

Date Heard: 21 July 2020

Date Delivered: 28 August 2020

Summary: The Applicant instituted the present application on an urgent basis seeking an order interdicting and straining the First and/or Second Respondent from continuing with the Applicants Disciplinary Hearing and issuing any sanction pending final determination of the Application. They are also seeking an order declaring the written ruling/ directive given by the second Respondent to the First Respondent to file his mitigating circumstances before the employer and issue a verdict in the matter to constitute an unfair labour practice. Furthermore, they seek an order that the Second Respondent be ordered and directed to convene the disciplinary hearing and continue to hear mitigating and aggravating factors and issue a recommendation, instead of passing the duty to the First Respondent. Alternatively, that the finding of the 30 June 2020 be set aside and matter start de novo before a new Chairman.

Held - There is no evidence that the Second Respondent is no longer seized with the matter, or that he has abdicated his powers to hear mitigation, and given it to the first Respondent. Furthermore, there is no evidence that the letter by the first Respondent requesting for written submission deters the Applicant from making oral submissions in mitigation before the Second Respondent. Accordingly, the matter is referred back to the Second Respondent to continue with the hearing, and receive both written and oral mitigating submissions by the Applicant.

JUDGMENT

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[1] The Applicant is an employee of the 1st Respondent currently on suspension pending finalization of his Disciplinary hearing.

[2] The 1st Respondent is Chapelat (Swaziland) (Pty) Ltd trading as Mondelez International, a company duly registered and incorporated in terms of the laws of Eswatini carrying on business at Matsapha.

[3] The 2nd Respondent is Sicelo Dlamini, an adult male Liswati of Manzini and is the Chairman of the Disciplinary hearing.

BRIEF BACKGROUND

This matter has a history before the above Honourable Court ever since the Applicant was subjected by the first Respondent to disciplinary proceedings on various charges of misconduct. This Application being one of the several Applications before Court.

[4] It is alleged by the Applicant in this Application that the 2nd Respondent has abdicated his duty to the hear mitigating or aggravating circumstances to the first Respondent and thus issuing the first Respondent with the power to recommend a sanction, a duty that falls within the ambits of the Second Respondent. Furthermore the 1st Respondent wants to issue a sanction without hearing oral mitigating and/ or aggravating circumstances before

issuing a verdict. In support of these allegations the Applicant annexed a letter received from the First Respondent marked annexure **VM2.**

[5] The Applicant has now approached the Court under a certificate of urgency. They are seeking an order in the following terms:

"*5.1 That an order be and is hereby issued dispensing with the normal and usual procedure limits relating to forms of service and time limits and hearing this matter on an urgent basis in terms of* ***Rule 15*** *of the Industrial Court Rules.*

5.2 Condonation of any non compliance with the Rules of Court.

5.3 That a rule nisi do issue operating with interim and immediate effect calling upon First and Second Respondents to show cause, on a date fixed by this Court , to show cause why the following order must be confirmed and made final.

5.4 Interdicting and restraining the First and/or Second Respondent from continuing with the Applicant's disciplinary hearing and from issuing any sanction therein pending final determination of this application.

5.6 An order declaring the written ruling and/or directive given by the Second Respondent to the First Respondent and to the Applicant stating that the First Respondent is to "request the Accused (Applicant) to file his mitigating circumstances before the employer issues a verdict in the matter" as constituting an unfair labour practice and be set aside in so far as it constitutes an unfair labour practice.

5.7 That the Second Respondent be ordered and directed to convene the disciplinary hearing and to continue hearing mitigating and aggravating factors and to issue a recommendation instead of passing that duty to complainant employer

ALTERNATIVELY

5.8 That the second Respondent's finding, as embodied in the written findings dated the 30th June 2020, be set aside and the First Respondent be directed to start the disciplinary hearing of the Applicant de novo before a new Chairman.

5.9 That the First Respondents letter to the Applicant calling upon the Applicant to submit written mitigating factors be set aside as it

constitutes a procedural irregularity in the hearing and thus an unfair labour practice.

5.10. Costs of application.

5.11 Further and/or alternative relief."

[6] The Applicants' application is opposed by the 1st Respondent on whose behalf an answering affidavit was duly filed and deposed thereto by Mandla Shongwe, who stated therein that he is the Industrial Relations Manager at the 1st Respondent's establishment. The Applicant thereafter filed their replying affidavit.

[7] The 2nd Respondent who is the Chairman of the Disciplinary hearing, has not filed papers before Court.

[8] The matter came for arguments on the 17 July 2020, the court directed that the matter be argued simultaneously in respect of the points *in limine* raised by the 1st Respondent and the merits of the application.

POINTS IN LIMINE

[9] Through the answering affidavit of one Mandla Shongwe the 1st Respondent raised the following points ***in limine***.

9.1 **Abuse of Court Process**

9.2 **There are no exceptional circumstances warranting this court to intervene in uncompleted disciplinary hearing**

9.3 **Requirements of the ground of an interim order have not been met.**

9.4 **Urgency**

ABUSE OF COURT PROCESS

[10] The 1st Respondent raised the point that the applicant in bringing the present application in circumstances wherein the employer is exercising its right to discipline its employee, following internal procedures, is clearly an abuse of the machinery of the court. He further submitted that the prayers sought by the Applicant are not meritorious, but are vexatious, frivolous and improper, aimed at frustrating the completion of the disciplinary process which has run for almost a year since August 2019. 1st Respondent stated that this was the fourth application brought before this court without merit,

and that this matter cries out for a strike out by this court for abusing its process.

Abuse of Court process was defined in Black's Law dictionary (6th Ed) as

"a malicious abuse of the legal process occurs when the party employs it for some unlawful object, not the purpose which it is intended by law to effect, in other words a perversion of it."

[11] Litigants and their respective counsel should take the necessary steps to safe guard the integrity of the judiciary and to obviate actions likely to abuse its process.

In the case of; **Benkay Nigeria limited vs Cadbury Nigeria limited No. 29 of 2006,** their respective Lordships held:

"In the ***Seraki vs Kotoye (1992) 9 NWLR****, this court on abuse of court process held…..the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issue".*

The Court observed that;

"……to constitute abuse of court process, the multiplicity of suits must be instituted by one person against his opponents on the same set of facts"

[12] The 1st Respondents Counsel has contended that the application is an abuse of the Court process and ought to be dismissed. The Court is agreement with this position, the Applicants disciplinary hearing commenced in August 2019, several applications have been made by the Applicant in an attempt to stop the hearing on the same set of facts. Either wanting the chairperson to be removed, on in the present case making allegations which could have easily been dealt with if the Applicant had communicated with his employer through the human resources office. No evidence was led by Applicant to show that means were made by him to communicate on the issue before court which could have been easily resolved without rushing to Court. This in effect means the point of law on the abuse of Court succeeds.

THERE ARE NO EXCEPTIONAL CIRCUMSTANCES WARRANTING THIS COURT TO INTERVENE IN UNCOMPLETED DISCIPLINARY HEARING.

[13] The Respondent further in its heads of argument raised the point that it is settled law in this jurisdiction that the Industrial Court has no jurisdiction to intervene in an uncompleted disciplinary hearing unless it has run its course. The 1st Respondent premised his arguments on the case of **Gugu Fakudze vs Revenue and Others** where the court as follows:

"It is a trite position of the law that the court cannot come to the assistance of an employee before a disciplinary enquiry has been finalized. The reason being that the court does not want to interfere with the prerogative of an employer to discipline its employees or even to anticipate the outcome of an incomplete disciplinary process.

This would be the case even if the employee is in a situation where his pre- dismissal rights have been infringed or where there has been unfair labour practice. In such a case the court would only be able to grant relief after the fact. Conversely, the court has jurisdiction to interdict any unfair conduct including the disciplinary action in order to avert irreparable harm being suffered by an employee. Put differently, where exceptional circumstances exist for the court to intervene, it will."

[14] The 1st Respondent further cited the case of **Dumisa Zwane vs Judge of the Industrial Court and Eights Others** where the Court stated in paragraph 39-40 of the judgment:

> **"[39]……the attitude of the courts thus, is not to intervene in the employee's internal disciplinary proceedings until they have run their course except where compelling and exceptional circumstances exists warranting such interference.**
>
> **[40] The chairperson of a disciplinary enquiry and in whose hands the final decision, has a quasi-judicial function. He is by law presumed to be independent and impartial umpire and to have competence to determine any question in relation to the disciplinary enquiry, including the legality of the charges, until the contrary is proved. Since the question of the legality of the charges lies with the chairperson after evidence has been led, the court will only intervene on the issue of the charges. In the face there are compelling factors disabling the chairperson from adjudicating such a mala fide, bias etc…"**

[15] The 1st Respondent stated in his submission that no exceptional circumstances warranted the Applicant to come before this Court. He categorically stated during his submission that the 2nd Respondent was still seized with matter and would be the one to whom the written submission in mitigation were to be determined. Further that they had not denied the Applicant the opportunity, to make oral submission, they had merely first written to request written submission thereafter the Applicant would have been invited to give oral submission in mitigation. He stated that the Human Resources office was only acting as an intermediate, between the Employee and Employer taking into account that the Applicant was still an employee, and the human resources offices plays an impartial role between the parties.

[16] At the outset of his opening remarks, and the in the Applicants heads of arguments, the Applicants attorney did not dwell much on this point *in limine* raised by the 1st Respondent, which leaves little for the court to go on. The Respondent cited the case of **Samuel Shabalala v Registrar of Insurance and Retirement Fund Industrial Case No. 04/2011** in this case the Applicants wanted the stay of an ongoing disciplinary hearing, the removal of the Chairperson from hearing the matter and that the matter

starts de novo before a new chairperson. It further sought to review and set aside the decision of the Respondent of finding the Applicant guilty of misconduct.

[17] It is evident from this case that the facts and relief sought in this case are different from the one before this Court. What the Court is required to determine in this case is whether the 2nd Respondent abdicated his duties to hear the Applicant in mitigation to the 1st Respondent. The Applicant further alleges that there was no recommendation made by the 2nd Respondent in annexure **VM1** titled recommendation in the matter 30th June 2020.

[18] The Court should point out that on the face of this recommendation the parties are detailed as the Applicant being the Accused and the 1st Respondent as Employer and the 2nd Respondent as the Chairperson. Furthermore the Applicant submitted that by letter dated 6th July 2020, annexure **VM2** the 2nd Respondent was barring the Applicant from making oral submission. The Applicant has a right to give oral evidence before 2nd Respondent and this opportunity was being denied by the 1st Respondent to Applicant, who it seems has now taken over the proceeding.

[19] It is evident from the reading of annexure **VM 1** that a recommendation was made by the chairman. On page 30 of this annexure the Chairman states:

“in my view the accused person is guilty of all these charges that are preferred against him taking into consideration the evidence that was led at the disciplinary hearing.”

[20] This in the interpretation by the Court is the recommendation that was made by the 2nd Respondent with regards to the charges. The letter dated the 6th July 2020 was a communication sent to him after the recommendation was made by the Chairman. The fact that the letter was written by the Human Resources Department does not mean that the 2nd Respondent was now relegating from his duties. It is the duty of the human Resources department to act as an intermediate between Employer and Employee.

[21] The letter itself merely requests that he make written submission in mitigation. Nowhere in his papers does the Applicant allege that he wrote to the 1st Respondent requesting to also make oral submission and was denied this opportunity.

[22] The question whether or not there are compelling and exceptional circumstances is a question of fact to be determined from the facts and circumstances of each case. In the case of **Gugu Fakudze vs The Swaziland Revenue Authority and Others Industrial Court of Appeal Case No 8/2017,** the Court stated the following:

"In answering the question of whether the Appellant set out exceptional circumstances for the court to intervene, the *court a qou* ought to have considered whether a failure to intervene would result in injustice or whether the appellant could achieve justice by other means."

[23] The Court has considered this, and has arrived at a finding that no injustice would be suffered by the Applicant from the evidence given. The Applicant has not set out exceptional circumstances for the Court to intervene, especially because the employer has an inherent right to discipline its employees.

It is trite law that the Court will not come to the assistance of an employee before a disciplinary inquiry has been finalized. The reason being that the

Court does not want to interfere with the prerogative of an employer to discipline its employees or even anticipate the outcome of an incomplete disciplinary process.

This in effect means that the point of law on the intervention of this court in the incomplete disciplinary enquiry succeeds.

REQUIREMENTS OF THE GROUND OF AN INTERIM ORDER HAVE NOT BEEN MET

[24] The 1st Respondent has agued that the Applicant has failed to satisfy the requirements of an interdict. It being argued that the Applicant has failed to satisfy all the requirements of an interdict. The 1st Respondent cited several cases in support of this argument. Applicant has argued that it has satisfied the elements of the interdict, also referring the court to several authorities.

For the Applicant to succeed in obtaining an interdict of this nature the Applicant must establish the following requirements:

(i) The existence of a clear right;

(ii) Apprehension of irreparable harm;

(iii) The absence of alternative relief;

(iv) The balance of convenience.

[25] In the case of **Magagula and Others vs Acting Judge of the Industrial Court, High Court Case No. 112/14,** the Court held

"a Court must be satisfied that the balance of convenience favours the grant of an interim interdict. It must juxta pose the harm to be endured by an Applicant if interim relief is not granted with the harm the Respondent bear if the interdict is granted. Thus, a Court must assess all relevant factors carefully in order to decide where the balance of convenience rest".

[26] From the evidence adduced during arguments and referred to above it is evident that the Applicant has failed to meet the requirements and has failed to show that the balance of convenience favours that an order be granted in his favour. He has further failed to show the absence of alternative relief. Clearly therefore it cannot be said that good cause has been shown for the court to grant the interdict sought by the Applicant. The point *in limine* therefore succeeds.

URGENCY

[27] On the question of urgency as a point in limine, I consider that such legal point has been overtaken by events. This is because on the 13th July, 2020 when the matter was first enrolled before me, counsel on behalf of 1st Respondent applied to be granted indulgence to file papers. The Applicant did not oppose this application and the parties agreed to file heads and a date for argument of the matter. After all 1st Respondent main contention was that he was given short notice to file its papers. For this reason, I make no findings on urgency as the point is now moot and courts of law do not ordinarily deal with academic matters. I say ordinarily because l am alive to **Yacoob J** and **Mandlanga AJ's** judgment to the following:

"even though a matter may be moot between the parties in the sense defined in Ackermann J, that does not necessarily constitute an absolute bar to its justiciability. This court has a discretion whether or not to consider it."

Independent Electoral Commission vs Langeberg Municipality 2000 (3) SA 925.

CONCLUSION

[28] After considering all aspects of this case, taking into account all the circumstances of the case, the interests of justice, fairness and equity, the Court will make the following order based on the points of law upheld, that the present application cannot succeed and is hereby dismissed.

ORDER

(i) The application is dismissed.

(ii) The 2nd Respondent is directed to continue with the disciplinary hearing, allowing the Applicant to submit oral and written mitigating submission.

(iii) There is no order as to costs.

The Members Agree.

B. NGCAMPHALALA
ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

For Applicant: Mr. S. Simelane (S.M. Simelane & Company).

For Respondents: Mr. H. Magagula (Robinson Bertram)