**IN THE INDUSTRIAL COURT OF ESWATINI**

**HELD AT MBABANE** **CASE NO. 110/2020**

In the matter between:

**BHEKI SABELO TSABEDZE** Applicant

And

**CHAPELATE SWAZILAND (PTY) LTD T/A**

**MONDELEZ INTERNATIONAL** 1st Respondent

**THE GOVERNEMT OF THE KINGDOM**

**OF ESWATINI** 2nd Respondent

**THE ATTORNEY GENERAL** 3rd Respondent

**Neutral citation:** Bheki Sabelo Tsabedze and Chapelate Swaziland (Pty) Ltd t/a Mondelez International, The Government of the Kingdom of Eswatini and The Attorney General [110/2020] [2020] SZIC 54 (04 May 2020)

**Coram:** **B.W. MAGAGULA - ACTING JUDGE**
(Sitting with L.E.B. Dlamini and D.P.M Mmango
Nominated Members of the Court)

**Heard :** 28 April 2020

**Delivered :** 04 May 2020

**SUMMARY:** This is an Urgent Application to interdict the 1st Respondent from proceeding with a Disciplinary Hearing against the Applicant and that the charges prefered against him be set aside, on the basis that they have been instituted in bad faith and on the account of the COVID-19 pandemic. 1st and 2nd Respondents raised Preliminary Points in Limine.

Held: The Applicant has failed to set out a case in its papers establishing rare and exceptional circumstances warranting the intervention of the Court to interdict incomplete disciplinary proceedings, pending before the independent Chairperson.

**Points in Limine upheld.**

**No order as to costs.**

**RULING**

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[1] **INTRODUCTION**

This is an Application brought by the Applicant seeking an order in the following terms;

1. *Dispensing with the usual forms and procedures as relating to time limits and service of Court documents that the matter be heard as one urgency.*

2. *That a rule nisi do hereby issue calling upon the Respondents to show cause why an order in the following terms should not be made final;*

   *2.1 That the 1st Respondent be and are hereby interdicted from proceeding with the disciplinary hearing against the applicant and setting aside the charges against the applicant on the basis that it has been instituted on in bad faith.*

*Alternatively;*

*2.2 That disciplinary hearing against the applicant is hereby*

*suspended until such time that the Corona Virus pandemic has subsided;*

*2.3 Interdicting and restraining the 1st Respondent from proceeding with the disciplinary hearing against the Applicant in the absence of the Employee's legal representative of choice where such Attorney is unable to attend the hearing due to the Corona Virus pandemic (COVID-19).*

*2.4 Directing the 2nd Respondent to forthwith withdraw all permissions, exemptions and/or dispensations granted to the 1st Respondent to carry on its business during lockdown period;*

*2.5 Directing the Applicant should be allowed to withdraw from workplace under the prevailing circumstances of the novel Coronavirus in so far as same poses a threat to his health or life;*

*2.6 Directing the 1st Respondent to clarify and/or rephrase charge 1 on the charge sheet on account of its being vague and difficult to understand;*

*2.7 Declaring the particular clause said to be in the Applicant's contract of employment, requiring him to work overtime and on holidays without being paid for same to be valid and of no force or effect;*

*3. That prayers 2.1, 2.2,2.3,2.4,2.5, 2.6 and 2.7 to should operate with immediate and interim effect pending the finalisation of this application.*

*4. Granting Applicant further and/or alternative relief as the Court may deem fit.*

[2] When the matter first appeared before us on the 28th April 2020, Applicant's counsel conceded that there had been short service on the Respondents. As such, he did not insist on prayer 3 of the Notice of Motion, which was an order that prayers 1 to 2.7 should operate with immediate and interim effect.

[3] When the matter adjourned, the respective attorneys were to engage each other on whether the disciplinary proceedings would be stayed pending the final determination of the matter by Court. The matter was then postponed to 7th May 2020 at 9.30am for arguments. On the same day the 1st Respondent filed from the bar, a Notice to Oppose simultaneously with a Notice to Raise Points of Law. Before the Court could deal with the matter on the 7th May 2020, the Applicant brought forward the whole matter, by filing a Notice of Set down dated 29th April 2020, enrolling the matter for the 30th April 2020. The Applicant was seeking the Court to grant a *rule nisi* in terms of the prayers sought in the Notice of Motion, pending the final determination of the matter.

[4] Owing to the fact that the 1st Respondent had in the interim, filed a substantive answering affidavit wherein Preliminary Points of Law were raised, it was necessary for the Court to consider the contents of the answering affidavit when determining the Application for a *rule nisi*.

[5] We will now consider the Points in Limine; to ascertain if indeed they pass the test, of upsetting the Application for a *rule nisi* sought by the Applicant.

[6] **ABSENCE OF JURISDICTIONAL FACTS TO WARRANT THAT THE COURT INTERVENE AND INTERFERE IN AN INCOMPLETE DISCIPLINARY HEARING**

6.1 It was contended on behalf of the 1st Respondent, that the Applicant is currently facing a Disciplinary Hearing at his place of employment. The enquiry has commenced and certain preliminary objections have been raised in that forum. The Chairman of the Disciplinary Hearing is an attorney of this Court. The Applicant is also represented by an attorney and the employer is also assisted by a legal representative in the prosecution of the matter before the Chairman. It was further submitted on behalf of the 1st Respondent, that the Chairman of the hearing has already ruled on the preliminary objections. A witness has already given evidence and is awaiting cross examination. The matter therefore, as was contended on behalf of the 1st Respondent, is pending before the Chairman of the disciplinary hearing. The contention is that, the Applicant has failed to set out cogent grounds to warrant this Court to intervene and interfere in the incomplete Disciplinary Hearing.

6.2 The argument is that, there are no exceptional circumstances that have been set out by the Applicant to warrant that this Court should set aside its business and deal with this matter on an urgent basis. This is particularly so, because this Application is not one for a review of any of the rulings of the Chairman of the Disciplinary Hearing. The 1st Respondent further argued that in the absence of the cogent primary Jurisdictional facts that ought to be set out in the Application, the Court does not have the requisite jurisdiction to deal with this matter at this stage. As such, it ought to be dismissed as it has been held by the Courts that the Industrial Court would be loathe to intervene in incomplete disciplinary hearings.

They should only do so, where exceptional circumstances have been set out.

[7] It was argued *contra* by the Applicant's counsel, that S8 of Industrial Relations Act, confers jurisdiction to this Court to deal with any matter, that arises in the context of the employer and employee relationship. The Applicant argued that since one of the contentions that have been raised, is the implementation of COVID-19 Regulations that have been promulgated by Government under The Disaster Management Act, which restrict movement of citizens in the country. The Applicant therefore, contends that he is restricted and also at risk together with his attorney. The inconvenience that has been caused by the enforcement of the COVID-19 regulations, is also one of the issues that makes it is extremely difficult to travel on the roads. As such it may be difficult for him to get to work.

[8] The Applicant also argued that, he has set out exceptional circumstances in paragraph 48 of his Founding Affidavit. The Applicant contended that, the charges preferred against him are actuated by bad faith.

[9] The Applicant further contended that, in as much as the Disciplinary hearing is chaired by an independent Chairman, it is the employer that has preferred the charges. The Chairman will only make recommendations to the employer, regarding his findings. It is the employer who takes the ultimate decision to dismiss or not. The Chairman does not have a substantial interest in the matter. In buttressing this argument, Applicant's counsel cited the case of **Piet Zacharias Ebersohn N. O. vs Swaziland Development and Savings Bank and another: case no.**65/2015;

> *"[19] It would appear to be settled law now that the effect of non-joinder in law is not to result in the dismissal of a matter. Non-joinder is dilatory in that the Court may still stay the proceedings until the party is joined or given notice of proceedings.* ***In Amalgamated Engineering Union vs Minister of Labour 1949 (3) SA 637 at 653****. The Court suggested two tests in order to decide whether a third party had a direct and substantial interest. The first was to consider whether the third party would have locus standi to claim relief concerning the same subject matter. The second was to examine whether a situation could arise in which, because the third party had not been joined; any order the Court might make would not be res judicata against him, entitling him to approach the Court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance".*

[10] An Applicant seeking an interdict of disciplinary proceedings pending the finalisation of a matter must establish the following requirements:

10.1 That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or is prima facie established though open to some doubt;

10.2 That if the right is only prima facie established, there is a well ground apprehension of irreparable harm to the Applicant if the interim relief is not granted and ultimately succeeds in establishing his right;

10.3 That the balance of convenience favors that granting of an interim relief;

10.4 That the Applicant has no other satisfactory remedy.

**See: SWAZILAND DIARIES VS MEYER SLR 1970-76 at 91.**

[11] In circumstances where the Respondent has not filed any opposing papers, the proper manner of approach is to take the facts as set out by the Applicant in the Founding Affidavit and to consider them having in regard to the inherent probabilities if the Applicant could on those facts, obtain relief at the final hearing.

**See: RAWJEE BROS VS DE VEGA & ANOTHER SLR 1997 TO 1981 pages 125- 132.**

[12] The matter at hand is slightly different from the one cited above. The Applicant is applying for a *rule nisi*, despite that the 1st & 2nd Respondents have filed answering affidavits, and having raised Preliminary Points of Law. The Court is enjoined to consider the legal objections raised by the Respondents. It would be a different case, if the Respondents had not filed anypapers. The Court would have had to follow the principles as laid down in the **Rawjee Bros case (supra).**

[13] The principle that the Court will not lightly interfere with an employer prerogative to discipline or even dismiss staff, has been consistently applied by the Courts, both in this jurisdiction and outside. In the matter of **(Walhause & Others v Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113(A**) the Court held that:

> ***"by virtue of its inherent powers to restrain legality in the inferior Courts the Supreme may in proper cases grant relief by way of review, interdict of mandamus against a decision of a Magistrate Court even before conviction. This however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power, for each case must depend upon its circumstances…. and will do so in rare cases where grave injustice might result or where justice might not by other means be attained…"***

We will now consider the specific circumstances of the case at hand, to ascertain if those rare circumstances have been set out in the Applicant's papers.

[14] **CHARGES INSTITUTED IN BAD FAITH**

14.1 One of the prayers sought by the Applicant is an order interdicting the 1st Respondent from proceeding with the Disciplinary hearing against the Applicant and setting aside the charges against the Applicant on the basis that the same have been instituted in bad faith.

14.2 The basis for the assertion that the disciplinary charges have been instituted in bad faith, appears in paragraph 48 of the Founding Affidavit. Where the Applicant basically argues that the employer has already taken a decision that the Applicant and his colleague (who is not a party to these proceedings) are now surplus to the organisations requirements and needs. The Applicant argues that this is not on account of any redundancy but it is merely on the ground to refresh the management structure.

14.3 We note that this very same issue or complaint was raised by the Applicant to the Chairman of the Disciplinary Hearing. In a written decision by the Chairman, which forms part of papers before Court marked annexure "BT5", the Chairman overruled this objection.

14.4 This then begs the question, how can this very ground be said to be comprising an exceptional circumstance to warrant this Court to intervene and interdict the incomplete disciplinary proceedings. The very same issue was deliberated upon during the disciplinary proceedings and a pronouncement was made on it by the Chairman.

14.5 It could be different, if the Applicant was before Court on a review application, seeking to review the decision of the chairperson. But, this is not the case. The current application is not one for a review. The intervention of the Courts through review proceedings, is based upon the Court's power to restrict illegalities and promote fairness and equity in labor relations.[1]

14.6 At this point the Disciplinary Hearing is still continuing at the 1st Respondent's undertaking, there is a witness on the stand. This matter is for all intents and purposes still pending before the Chairman of the Disciplinary Hearing. This Court cannot decide the same issue relating to the charges being instituted in bad faith, where the very same issue has been decided by the Chairman.

[15] **SUSPENSION OF THE DISCIPLINARY HEARING UNTIL SUCH TIME THAT THE COVID-19 (CORONAVIRUS) PANDEMIC HAS SUBSIDED**

15.1 The other ground on which the Applicant has premised his application for the Court to intervene and interdict the Disciplinary Hearing, is on the basis that human life is precious and irreplaceable.[2] Applicant argues that right to life is constitutionally guaranteed and should not be lightly disregarded.

15.2 The basis for this argument by the Applicant, is that to proceed with the Disciplinary Hearing under the state of emergency[3], would expose his health and compromise his life. The argument being that if the hearing is allowed to proceed, he is then compelled to leave his home

[1] See Max Mkhonta vs RSSC case no.4/2019 page 11
[2] See paragraph 52 of the Applicant's founding affidavit

and attend the Disciplinary Hearing at the 2nd Respondent's premises which would in a way expose him and his attorney to contracting the virus.

15.3 This argument suffers the same fate as the previous one. This issue was also raised before Chairman of the Disciplinary Hearing and the Chairman dealt with it decisively in paragraph 4.2, 4.3, 4.4, of his ruling which is contained in annexure "BT7".

15.4 Again, the Applicant did not review this decision. The current application serving before us, is not one of review. Hence our hands are tied to adjudicate on this very point, whilst the matter is pending before the Disciplinary Hearing. In the circumstances, it is our considered view that this ground as well, can not constitute an exceptional circumstance warranting the intervention of this Court in the incomplete disciplinary proceedings.

15.5 We share the sentiments that were expressed in the case of Steven **Ngobe vs Prasa Cress and Another Case No. 514/2016**, where Judge Andrea Vanikerk emphasised the principle in the following words, ***"The urgent roll in this Court has become increasingly and regrettably populated by applications in which intervention is sought one way or another, in work place disciplinary hearings. The present application is a prima facie example by the application to review and set aside Advocate Casim ruling or recusing to grant the Applicant the final relief he now seeks would obviously put an end to that component of the review as well as the referral to the same herein. All of this is indicative of an attempt to use this Court and its processes to frustrate the work place processes already underway."***

15.6 In essence, the Judge in the above Judgment was expressing his dissatisfaction in the trend of litigants to approach the Court and seek its intervention to interdict incomplete disciplinary hearings where no case of exceptional circumstances had been made.

[16] In the matter **of Sazikazi Mabuza vs Standard Bank Industrial Court no. 30011/2007;** the Court expressed similar sentiments where it stated as follows;

"*The attitude of the Courts has long been that it is inappropriate to intervene in employers' internal proceedings until they have run their Court exceptional circumstances*".

[17] **INTERDICTING AND RESTRAINING THE 1ST RESPONDENT FROM PROCEEDING WITH THE DISCIPLINARY HEARING AGAINST THE APPLICANT IN THE ABSENCE OF THE EMPLOYEE'S LEGAL REPRESENTATIVE OF CHOICE WHERE SUCH ATTORNEY IS UNABLE TO ATTEND THE HEARING DUE TO THE COVID-19 (CORONA VIRUS) PANDEMIC**

17.1 The other basis on which the Applicant seeks from the Court is to issue a *rule nisi* is in the basis that the Chairman refused an application by his attorney that the matter be deferred to such time when the lockdown is over due to the fact that his legal representative fears to be exposed to COVID-19 by attending the hearing. This issue as well is within the competency of the Chairman to deal with. It must be raised at the Disciplinary Hearing.

[18] **DIRECTING THE 2ND RESPONDENT TO FORTHWITH WITHDRAW ALL PERMISSIONS, EXEMPTIONS AND/OR DISPENSATIONS GRANTED TO THE 1ST RESPONDENT TO CARRY ON ITS BUSINESS DURING LOCKDOWN PERIOD**

18.1 The 1st Respondent raised a Point in Limine with regard to the jurisdiction of the Court to hear and adjudicate on this prayer.

18.2 The 2nd Respondent has raised a Point in Limine in response to this and it is crutch as follows; prayer 2.4 of the Notice of Motion has sought against government falls outside this honourable Court's jurisdiction. The 2nd Respondent is not the Applicant's employer the relief is itself not a labour law remedy.

18.3 When the Principal Secretary issued annexure "BT6", of the Founding Affidavit, and "CA2" hereto annexed, he was exercising public powers as an executive functionary of Government. His decision can be challenged by way of a Review in the High Court. This Court therefore does not Jurisdiction to adjudicate and determine the prayer sought herein.

18.4 **The Industrial Relation Act 2000 in Section 8** states as follows;

*"8 (1) The Court shall, subject to section 17 and 65, have exclusive jurisdiction to hear, determine and grant an appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen's' Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between and employee in the course of employment or between an employer or employer association and a trade union, or staff*

*association or between an employees' association , a trade union, a staff association, a federation and a member thereof*".

18.5 The permits that the Applicant seeks the 2nd Respondent to withdraw in his prayer 2.5 are also part of annexure that are annexed in the Applicant's application marked "BT6". It is this document that was issued by the Ministry of Commerce, Industry and Trade, and it was issued to the 1st Respondent authorising it to operate during the partial lock down period and it was issued under the hands of Mluleki Dlamini, who was the Acting Principal Secretary at the date this document was issued.

[19] In response to this Point in Limine, Mr. Mavuso, counsel for Applicant argued in his own papers that the Government of Eswatini has already classified the 1st Respondent as falling under the manufacturing industry. He proceeded to argued that this prayer in a way, is a labor matter. In the sense that interest of employees are not being taken in o account. As an alternative argument, Mr. Mavuso submitted that the Court under further and alternative relief can leave the instrument intact. But all the same, grant the Applicant the relief that he seeks. The argument being that, the reality on the ground is that the 1st Respondent is using this instrument dangerously to the detriment of the Applicant.

[20] When the Principal Secretary under the Ministry of Commerce, Trade and Industry issued the permission allowing the 1st Respondent to operate during the CODIV-19 Lock down period, it did so exercising its executive powers as a Ministry tasked with commerce. The permit was to allow the 1st Respondent to trade, despite the provisions of the regulations that are issued under The Disaster Management Act. In our view, the permit was not issued to the 1st Respondent in its capacity as an employer but as a business allowing it to trade.

[21] That is basically allowing it to open its gates. As to how it relates with its own employees whilst it is trading during the lockdown, is another issue that does not fall within the sphere of the Ministry of Commerce. The relationship between the 1st Respondent and its employees as it conducts its business during the lockdown is now a labour issue that falls outside the Ministry of Commerce, Trade and Industry.

[22] This Court does not have jurisdiction to order the 2nd Respondent to withdraw permits that were issued by it exercising its executive powers. That is clearly outside the jurisdiction of this Court as outlined in **Section 8 of the Industrial Relations Act**. That is not an employer-employee issue.

[23] This Court therefore, cannot pronounce on the propriety or the circumstances under which those permits were issued because that does not fall within our jurisdiction. The Applicant was at liberty to challenge the propriety of the issues and the permits to an industry that has already been classified as a manufacturing industry at the High Court which would have had a competent jurisdiction with that administrative issue. In this circumstance this point by the 2nd Respondent is upheld as well.

[24] We accordingly make the following order:

24.1 The Points in Limine raised by the 1st and 2nd Respondents are hereby upheld.

24.2 We make no order as to costs.

The Members agree.

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**B. W. MAGAGULA**
**ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

**For Applicant:** Mr. T. Mavuso (Motsa Mavuso Attorneys)

**For 1st Respondent:** Mr. Z.D. Jele (Robinson Bertram Attorneys)

**For 2nd & 3rd Respondents:** Miss N. Xaba (Attorney General's Chambers)