IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 205/2019 [E]

In the matter between:

PHESHEYA NKAMBULE Applicant

And

NEDBANK (SWAZILAND) LTD 1st Respondent

MUSA SIBANDZE N.O 2nd Respondent

Neutral citation: Phesheya Nkambule v Nedbank (Swaziland) Ltd and Another (205/2019 (E)) [2020] SZIC 75 (10 June 2020)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 04 June 2020

Date Delivered: 10 June 2020

RULING ON POINTS *IN LIMINE*

[1] The Applicant approached the Court for 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 of urgency.

2. Condoning the Applicant's non-compliance with the Rules of this court as relate to service and time limits.

3. That a Rule Nisi do hereby issue calling upon the 1st Respondent to show cause on a date to be determined by the Honourable Court why an order in the following terms should not be made final:

3.1 Staying the continuation of the disciplinary hearing scheduled to commence on the 11th June 2020;

3.2 Reviewing and setting aside the ruling of the 2nd Respondent of 31st July 2019 and substituting same with the following orders:

3.2.1 Declaring the charges preferred against the Applicant on 11th July 2019 as time barred and being of no force and/or effect from the date of judgement of this Honourable Court;

3.2.2 Declaring the second disciplinary hearing initiated by the first Respondent to be null and void and of no force or effect;

3.2.3 Removing the 1st Respondent from being the chairperson of the disciplinary hearing and directing the disciplinary hearing

to commence de novo as of the fate of the judgment of this Honourable Court;

3.2.4 Compelling the 1st Respondent to furnish the Applicant with the further particulars requested in the letter dated 24th July 2019.

4 Prayers 1,2 and 3 to operate with immediate and interim effect pending finalisation of this matter.

5. Further and/or alternative relief."

[2] The Respondent has opposed that application and raised points *in limine*. The points were as follows:

(1) **Improper service** –

The Respondent submitted that there had been improper service of this application in that it was served on the Respondent's attorneys instead of the Respondents directly. This they alleged, prejudiced the Respondent by removing its right to choose attorneys to whom instructions could be given regarding this matter.

(2) **Lack of urgency of application**

The Respondent complaint herein was twofold – firstly, that the applicant had unreasonably abridged the timelines within which it was expected to react to the application; that to file an application at 12:30pm on the 3rd June and set it down for hearing at 9:30am the

next day constitutes an abuse of the court process and should be centured by the court.

Secondly, that the applicant knew on 6th May 2020(when his application in the High Court was dismissed for lack of jurisdiction) that this court was the correct one in which to bring the application but sat on his laurels until 3rd June to file the current application; that the urgency is therefore self-created.

3. **Abuse of court process**.
4. **Absence of grounds for review**.
5. **Items of relief**.

[3] We have listed the last three points raised by the respondent because we find that they do not strictly constitute points of law. In our view, they touch upon the merits and are therefore best dealt with at the stage that the merits are dealt with. It is difficult, for example, to decide on whether the applicant has set out the primary facts that warrant the court to interfere in an incomplete disciplinary hearing without delving in to the merits of his application. In the circumstances we dismiss these points and will consider the points of bad service and lack of urgency.

[4] With regard to the issue of service, it is our view that we can not ignore the history of the litigation between these two parties. Whilst strictly

speaking this application, being new before this court, ought to have been served directly on the Respondents as submitted by Mr. Jele, due to the history between the parties and the fact that this application is a replica of the one dismissed by the High Court on 6th My in which Mr. Jele appeared for Respondents we condone the non-compliance with the rules regarding the service of process on the Respondents. The Respondents have not suffered any prejudice that can not be cured by an order of costs.

[5] With regard to the issue of urgency, the Applicant conceded to having abridged the time frames unreasonably to the prejudice of the Respondent and tendered costs as a result.

With regard to the urgency being self-created, the applicant submitted that he was now seeking an order in terms of prayer 3.2.2. – declaring the second disciplinary hearing initiated by the 1st Respondent null and void and of no force and effect. In this regard he argued that-

> *"the matter is sufficiently urgent in that the hearing which I challenge is scheduled to proceed on the 11th June 2020 and I have not unnecessarily delayed in approaching the court pursuant to receiving such notification."*

The Applicant was advised of the new dates of the hearing on 26th May 2020. He further claims urgency on the basis of seeking protection from an unlawful and unfair hearing.

[6] In terms of this court's judgement in **Graham Rudolph v Mananga College Industrial Court Case No. 94/2007**,

> *"a manifest injustice or grossly unfair labour practice in itself does not qualify a party to jump the queue of cases awaiting hearing. It must be shown that the Applicant can not be afforded substantial relief in due course if the matter was to be dealt with in the normal way."*

[7] The applicant is still in the employ of the respondent. To subject him to an unfair disciplinary hearing may be prejudicial to him in that it may result in his dismissal. While it may be argued that he would be afforded substantial relief through the dispute resolution provisions set out in the **Industrial Relations Act 2000** as amended, it is our view that he would have been substantially prejudiced by a dismissal, if it come to that. It is the function and duty of the court to grant relief to victims of injustice and unfair labour practices by enrolling such matters urgently where the applicant stands to be substantially prejudiced. (See **Vusi Gamedze v Mananga College (IC Case No. 267/2006)).**

[8] We are of the view that the applicant has established grounds for urgency in this matter and are inclined to exercise our discretion in his favour and enrol the matter as one of urgency.

[9] As indicated above, the applicant now seeks one prayer. His attorney advised the Court and the respondent of this position after the respondents' attorneys had argued their points *in limine*. In the circumstances we order that the costs of the hearing of 4th June 2020 ought to be paid by the Applicant. This is also in keeping with the tender of costs made by the applicant with regard to the unreasonable abridgement of the time frames herein.

The members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. MLK Ndlangamandla (MLK Ndlangamandla Attorneys)

For Respondent: Mr Z. Jele (Robinson Bertram Attorneys)