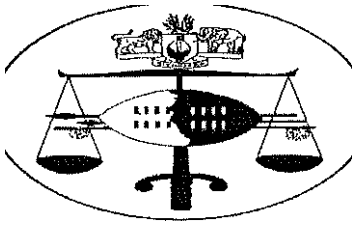

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE Case No 47/2022

In the matter between:

TREVOR SHONGWE 1st Applicant

SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS 2nd Applicant

And

ESWATINI ROYAL INSURANCE CORPORATION 1st Respondent

BANELE GAMEDZE N.O 2nd Respondent

Neutral citation: Trevor Shongwe & Another v Eswatini Royal Insurance Corporation & Another [47/22) [2022] SZIC 23 (14 March, 2022)

Coram: **NGCAMPHALALA AJ**
(Sitting with Mr.MP. Dlamini and Mr. E.L.B. Dlamini, Nominated Members of the Court)

Date Heard: 2nd February 2022

Date Delivered: 14 March, 2022

SUMMARY: Disciplinary code and procedure - article 3.1.10- deviation from disciplinary code-removal and setting aside of ruling of chairperson-points in limine raised-no exceptional circumstances exist for court to intervene.

Held- Point in limine dismissed-exceptional circumstances exist for court intervention-application granted for removal of chairperson and setting aside of ruling -no order to costs.

JUDGMENT

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[1] The 1st Applicant is Trevor Shongwe an adult Liswati male ofManzini, District ofManzini.

[2] The 2nd Applicant is Swaziland Union of Financial Institutions and Allied Workers, a union duly established in accordance with the labour laws of the country, based in Mbabane district ofHhohho.

[3] The pt Respondent is Eswatini Royal Insurance Cooperation, a statutory corporation with capacity to sue and to be sued in its own name, based at Mbabane, district ofHhohho.

[4] The 2nd Respondent is Banele Gamedze N.O, an adult Liswati male cited herein in his capacity as the Chairperson of the ongoing disciplinary hearing, based in Mbabane, district ofHhohho.

[5] BRIEF BACKGROUND

The present proceedings seek to declare the appointment of the 2nd Respondent as chairperson of the pt Applicant's disciplinary hearing,

unlawful and wrongful. Alternatively reviewing correcting and setting aside the 2nd Respondent's decision of declining to recuse himself from being chairperson of pt Applicant's disciplinary hearing, on the grounds that such decision is irrational, improper and unlawful.

[6] ist Applicant avers that around the 15th 0f Fe bruary 2022, his representatives and himself, which included Ms. Jabu Shiba, the secretary General of the Swaziland Union of Financial Institutions and Allied Workers (SUFIAW) were called to attend his disciplinary hearing. It was his submission that on arrival at the hearing he discovered that the 2nd Respondent had been appointed by the 1st Respondent to chair the hearing. The Applicant submitted that the appointment of the 2nd Respondent was done without prior consultation with himself or his representatives, making the said decision illegal and unlawful.

[7] The illegality in the decision of the appointment of the chairperson emanates from the provisions of the **Collective Agreement and Disciplinary Code** in **Article 3.1.10,** which provides therein that, a full disciplinary hearing shall require the appointment of an in-house committee. On the same day the 15th of February 2022, ist Applicant through his representative requested the 2nd Respondent to recuse himself, as his appointment was not in line with the agreed disciplinary code, nor did union consent to the appointment.

[8] Further in a previous hearing of the matter, the parties had agreed to the appointment of an external chairperson in deviation of the code. However,

same had been done under the understanding that the parties would agree to the deviation and further to the appointment of the chairperson.

[9] Applicant avers that on the day, the chairperson heard submissions on the application for his recusal and subsequently issued his ruling on the 16th of February 2022. In the ruling he declined to recuse himself, stating that the parties had agreed to the deviation of the code, and had also agreed to the appointment of an external chairperson, this he based on the appointment of the previous chairperson in the matter of one Mr. Machawe Sithole, who was subsequently removed from chairing the proceedings due to a conflict of-interest issue.

[1O] The 1st Applicant avers that the decision by the 2nd Respondent of deciding not to recuse himself in the matter is irrational, grossly improper and demonstrates a failure by a functionary to properly apply itself to the facts and law. It is on this basis that the Applicants have approached the Court under the certificate of urgency seeking an order in the following terms:

10.1 That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis;

10.2 That a rule nisi be and is hereby issued calling upon the Respondents to show cause why;

10.2.1 An order should not be issued stopping the on-going disciplinary hearing against the Applicant pending finalization of this matter in Court.

10.2.2 That the rule nisi issued in terms of prayer (2.1) above operates with immediate interim relief pending finalization of this matter.

10.3 That an order be and is hereby issued declaring that the appointment of the 2nd Respondent to chair the on-going disciplinary hearing of the 1'[1] Applicant contrary to the Collective Agreement and Disciplinary Code is wrongful and unlawful. Alternatively;

10.4 That an order be and is hereby issued reviewing, correcting and setting aside as being irrational and/or grossly improper, the 2nd Respondent's decision of declining to recuse himself as Chairperson of the on-going disciplinary hearing against the 1'[1] Applicant.

10.5. Costs of application against the Respondents

10.6 Further and/or alternative relief.

[11] The Applicant's application is opposed by the l't Respondent and an Answering Affidavit was duly filed and deposed thereto by Ms. Carol Muir, 1st Respondents Human Resources Manager. The Applicants thereafter filed their Replying Affidavit. The 2nd Respondent has not filed any papers before

Court and will abide by the Court's decision. The matter came before Court on the 21't of February 2022, wherein the parties agreed that the status core would be maintained and agreed on the timelines for the filing of all pleadings,. heads of arguments and agreed on the 1st of March 2022 as the date for argument. On the 1stof March 2022 the 1st Respondent raised a point *in limine,* applying for the two bundles of documents filed by the Applicants on the 28th of February 2022 to be excluded from the pleadings. Upon hearing submissions from both parties, the court upheld the point *in limine,* and agreed to the exclusion of the two bundles of documents from the pleadings. The matter was argued, and judgement was reserved.

ANALYSIS OF FACTS AND APPLICABLE LAW

[12] The pt Respondent raised a point of law in its Answering Affidavit.

Lack of exceptional circumstances warranting the intervention of the Court

[13] As the parties agreed to deal with the mater holistically, the Applicants were the first to adduce evidence. The Applicant's case was premised on the collective agreement and disciplinary code in particular article 3.1. l O of the code which reads;

"If the matter required a full hearing, the Human Resources Manager shall appoint an in-house committee which shall consist of the Legal Department to prosecute the employee and a chairperson to preside over the matter'

[14] It was the Applicant's contention that there is no dispute that the parties agreed to use the services of an external chairperson to preside over the 1st Applicant's disciplinary hearing, further that, there is an agreement regarding in deviation of article 3.1.10 of the disciplinary code, agreed to between the 2nd Applicant and the 1st Respondent. It is however his averment that the point of departure emanates from the position taken by the 1st Respondent that the agreement to the deviation, was that it (l't Respondent) would be given the prerogative to appoint any chairperson it deems fit. The Applicants dispute this averment and submitted that the agreement between the parties was that the exte1nal Chairperson would be mutually agreed upon by the parties involved.

[15] On the 15th of February 2022 the chairperson heard the parties on the point of departure, being the mutual appointment of the external chairperson and mutual agreement of the chairperson to be appointed. The second point of departure was the absence of the Human Resources representatives, as per the disciplinary code, this point was however clarified and fell away. On the remaining issue the Chairperson prepared a ruling and on the 16th of February 2022 and dismissed the point *in limine* and ordered that the parties avail themselves for the hearing. The ruling issued by the Chairperson, was submitted as evidence and is marked annexure **TS2.**

[16] It is on this basis that the Applicant now comes before Court, seeking the Court's intervention. It is the Applicants contention that the reasoning given by the 2nd Respondent of refusing/declining to recuse himself is inational, grossly unreasonable and has no legal basis. Further the 2nd Respondent is conflicted having presided over a disciplinary case of the 2nd Applicant's

Secretary General. The Applicants averred that the 1st Respondent did not engage them in any fonn of consultation, nor did it seek their consent in taking the decision to appoint the 2nd Respondent to chair the hearing.

(17] To further compound the matter, the assertion by the 2nd Respondent to the effect that general agreement was conferred upon the employer to engage any external chairperson is totally wrong and untrue. The Applicants averred that the previous chairperson Mr. Machawe Sithole, was mutually agreed upon by the parties and the expectation in the present matter, was that again the parties would mutually agree upon the chairperson, otherwise there would be no agreement

(18] In closing their submissions, the Applicants averred that a balance of convenient favours the granting of the relief sought having complied will all the elements of the granting of an interdict.

(20] In rebutting, the 1st Respondent raised a point *in limine*, stating that there are no exceptional circumstances in the case which warrant the intervention of the Court in the ongoing disciplinary hearing. The 1st Respondent averred that it is a settled principle of law in this jurisdiction that the Court will not intervene or interfere with incomplete disciplinary proceedings, unless there are exceptional circumstances. The party who must prove that there are exceptional circumstances is the 1st Applicant's, who have failed to do so in the circumstances, and on this point the Applicants claim must fail.

AD MERITS

[19] On the merits of the case it is the pt Respondent's contention that in 2019, the 1st Applicant together with other employees were charged by itself, having been implicated in fraudulent transaction. It was 1st Respondent's averment that the 2nd Applicant was engaged and informed that the disciplinary proceedings were to be commenced against its members. It was further its averment that during those discussions it was agreed between the parties that external chairpersons would be appointed to chair all the disciplinary hearings including that of the 1st Applicant. In support of this argument the 1st Respondent referred into the record **annexure Rl** which reads;

The Manager-HR & Administration
Eswatini Royal Insurance Corporation
P.O Box 917
MBABANE

Dear Madam,

RE: <u>THEMBI MABUZA'SHEARING CHAIRMAN</u>

1. *We refer to the above matter which is current(v ongoing at the Corporation.*
2. *We would like to propose that the Corporation considers appointing an external Chairman for her matter in line with the arrangements agreed between the parties in respect of the ongoing disciplinary hearings of her colleagues so as to ensure, that there is consistency in this regard.*
3. *We shall await your 1-*
   esponse Yours faithfully

J.BSHIBA

SECRETARY GENERAL

[20] It was the 1st Respondents submission that it was on the basis of this agreement as aligned in the correspondence that the parties agreed to an external Chairperson being appointed at the prerogative of the employer. It was therefore on this basis that the 2nd Respondent was appointed, afterMr. Sithole was removed by the Court, to sit as chairperson based on biasness. The 1st Respondent submitted further using its prerogative as employer, it proceeded to appoint the 2nd Respondent, in line with the agreement as per **Annexure Rl.** Therefore, it is evident from the above that the basis for the removal of the Chairperson in that is contrary to **article 3.1.10** by the Applicants is wanting. 1st Respondent contends that the Applicants are not being candid with the Court, because they agreed to the deviation from **article 3.1.10** of the Disciplinary Code, and **Annexure Rl,** is proof of that agreement.

(21] Mr. Simelane for the pt Respondent referred the Court to paragraph- 15, and 16 of the Chairpersons Ruling, wherein he pointed out to the Court, that the issue of deviation from the code was clearly addressed. It was his submission that on that basis there was no need for the Applicants, to approach the Court challenging the Chairpersons ruling. In closing the 1st Respondent submitted that the Applicants were abusing the Court process, and the filing of the application was done in a mala fide manner, with the objective of delaying the disciplinary hearing. Further that the discipline of employees in the workplace rests squarely with the employer, therefore the prerogative to

appoint a chairperson lies with it. Employees on the other hand, have a right to apply for the recusal of a chairperson, only if the Chairperson has a conflict of interest, or where there is a reasonable apprehension of biasness which the 1st Respondent argued is not present in this case. Therefore, there is no duty for the 1st Respondent to consult with the Applicant on the appointment of the 2nd Respondent, and the deviation from the Code was by mutual consent, therefore the application should fail.

[22) It is trite law that the Courts 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 it employees or even anticipate the outcome of an incomplete disciplinary process. These sentiments were shared in the case of, **GUGU FAKUDZE V REVENUE AND OTHERS,** where the Court stated the following:

"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. "

[23] 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 an 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 i1Teparable harm being

suffered by an employee. Put differently where exceptional circumstances exist for the Court to intervene, it will.

[24] The purpose of a disciplinary code, *inter alia,* is to provide consistency, predictably and convenience in managing disciplinary matters at the work place. The code in question in this matter, is a product of negotiation and agreement between the employer and the trade union. The code is binding on both the employer and the employee. It is not open to the employer to unilaterally deviate from the provisions in the code. The party wishing to deviate from the code needs to engage the other party and further establish that exceptional and appropriate circumstances exist which necessitated the proposed deviation. The same principle would apply where the code has been unilaterally introduced by the employer and its contents have formed part of the terms of the employment contract between the employer and employee.

[25] In the matter of the **NGCONGCO V UNIVERSITY OF SOUTH AFRICA (2012) 33 JLJ 20100 (LC),** The chairman deviated from the code and allowed legal representation from outside the work place. The employer was also permitted to be assisted by a legal representative. The Court approved the chairperson's conduct in deviating from the code, the reason being that: *"there are exceptional circumstances and appropriate circumstances present warranting a departure from the disciplinary code.* "

[26] In the matter **ofNEDBANK SWAZILAND LTD V SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALIED WORKERS UNION AND ONOTHER SZIC CASE NO. 10/2012.** The facts were

similar to the

facts before the court. The employer, a bank and the union had agreed on a disciplinary code. The code provided that the chairperson in a disciplinary hearing should be drawn from senior management of the bank from another branch or department. The employer appointed a chairman from outside the bank without prior engagement with the union. The employer argued that it was necessary for the sake of neutrality to appoint a chairman from outside the bank. The court endorsed the principle that was expressed in the **Ngcongco** case. The court succinctly summarized the principle in its head note as follows:

> *"disciplinary code and procedure-article 2.4.1.2-deviation thereof by one party - as the code* is *the result of elaborate consultation and negotiation between the employer and the employer, the deviation thereof should only be in exceptional circumstances with both parties agreeing to the deviation - unilateral deviation would be viewed by the court as resulting in procedural unfairness.* "

[27] In answering the question whether the Applicants have set out exceptional circumstances for the Court to intervene, the Court ought to consider whether a failure to intervene would result in injustice, or whether the Applicants can achieve justice by other means. The Court has considered this and has arrived at a finding that an injustice would be suffered by the 1st Applicant if the court does not intervene. The ist Applicant has set out exceptional circumstances for the court to intervene. This in effect means that the point of law herein fails.

AD MERITS

[30) The court respectfully agrees with the principle expressed in the **Ngcongco** and **Nedbank** cases. In the matter before Court, it is common course that the parties agreed to the deviation from the code and allowed for an external chairperson. The issue in contention is whether the parties again deviated from the principle that the prerogative to appoint a chairperson lies with the employer. From the only evidence adduced before the court, namely **R1,** which sought to shed light on the mutual agreement to appoint an external chairperson, it is evident from the reading of the letter that there was also an arrangement agreed to between the parties, as to the procedures that would be adopted by the parties, on the appointment of the chairperson.

[31) It is not the norm of the Court to detach powers that are a prerogative of the employer from it. As previously stated, the Court is in agreement with the 1st Respondent, that the right to appoint a chairperson is the prerogative of the employer however this is a case that is peculiar to the norm . The parties mutually deviated from the norm, when they deviated from the disciplinary code. On the evidence adduced it is apparent that in the previous session of the hearing, not only did the parties agree to the deviation of the code, in the appointment of external chairperson, but it is evident that they also agreed to the deviation of the prerogative of the employer to appoint the chairperson. Without minutes from the 1st Respondent whose duty it is to keep minutes, and further correspondence of the terms of the agreement, the Court is inclined to sway in favor of the 1st Applicant. It is evident that such deviation was mutually agreed upon by both parties, hence the appointment of an agreed chairperson in the first

sitting of the matter.

[32] It is further evident that this matter has endured strenuous litigation and both parties have suffered financial stress, and there is a need to put the matter to bed. The parties mutually agreed to the deviation, the parties must again put their heads together, and apply the same principles they did in the first hearing of the matter. After considering all the aspect of this case, considering all the circumstances of the case, the interest of justice, fairness and equity, the point *in limine* is dismissed. The presen1i application succeeds.

[41] The Court makes the following order.

1) The application is granted.
2) There is no order as to costs.

The Members Agree.

ACTING JUDGE OF THE NDUSTRIAL COURT OF SWAZILAND

For Applicant: Mr. B. Dlamini (B.S Dlamini &Associates).

For Respondent: Mr. S. Simelane (SM Simelane & Co)