IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No. 259/23

In the matter between:-

KINGSLEY ZULU Applicant

And

ZWELI JELE N.O 1st Respondent

DORPTHEA SWANEPOEL N.O 2nd Respondent

LINDIWE NDZEMBWE N.O 3rd Respondent

HUWEI TECHNOLOIES ESWATINI (Pty) Ltd 4th Respondent

Neutral citation: Kingsley Zulu vs Zweli Jele N.O (182/17) [2022] SZIC121 (November, 2023)

Coram: **DLAMINI NG'ANDU - JUDGE**
(Sitting with Ms.P.P. Dlamini and Mr.N.M.V. Gumbi Nominated Members of the Court)

HEARD: **09 October 2023**

DELIVERED: **27 November 2023**

RULING ON THE POINT IN LIMINE

[1] The Applicant, one Kingsley Zulu filed and urgent application against the Respondent herein for the following orders;

1. **Dispensing with the rules of Court in relation to the manner of the service time limits and hearing this matter as one of urgency.**
2. **Condoning the Applicant non-compliance with the rules of the Honorable Court.**
3. **Reviewing, correcting and or setting aside the ruling that was handed down by the 1st Respondent on the 5th of September 2023 in the pending disciplinary hearing between the Applicant and the 4th Respondent.**
4. **That in its stead, the 1st Respondent ruling of the 5th of September 2023 be corrected with the following orders by the Honorable Court;**
   - **4.1. That Applicant was not afforded reasonable notice to prepare for the disciplinary hearing.**
   - **4.2. That the main charge in count 2.1 as well as the alternative charge of gross negligence thereof be and is hereby struck off the charge sheet/notice of disciplinary hearing dated 16th August 2023 on account of some amounting to double jeopardy to Applicant.**
     - **4.2.1. Alternatively that count 2.1 and the alternative count thereof amount to unnecessary splitting of charges.**
   - **4.3. That the 2nd Respondent's entry permits into the Kingdom of Eswatini under the category of a Technician personnel did not entitle her to be an initiator in the disciplinary hearing involving the Applicant and the 4th Respondent.**

4.4. That the 3rd Respondent be and is hereby disqualified from being a co-initiator in the pending disciplinary hearing between the Applicant and the 4th Respondent on account of the fact that she (3rd Respondent) is a competent witness in the very same disciplinary proceedings.

5. That pending finalization of this matter, or determination of the prayer 3 above, the pending disciplinary hearing instituted by the 4th Respondent against the Applicant be and is hereby stayed.

6. That the 1st Respondent be and is hereby called upon to transmit to the Registrar of the Honorable Court within 7 days of service upon him of the copy of this notice of motion, the record of proceedings of the disciplinary hearing pending against Applicant at the behest of the 4th Respondent.

7. Cost of suit in the event of opposition of the Application.

8. Granting further and alternative relief.

[2] The 4th Respondent, not only did they oppose the Application but also raised some *point in limine* which we are called upon to deal with at this stage.

The points raised were as following;

1. **Lack of urgency**. The Respondent argument was that there matter though brought on urgency lacked urgency in that the ruling the Applicant sought to have reviewed by this Court was delivered on the 5th of September 2023 and Applicant only brought the urgent application on the 18th of September 2023 and therefore the urgency was self-created as they failed to explain why they did not act sooner.

2. **Lack of jurisdiction**. That the Industrial Court does not have power to review the decision of the 1st Respondent.
3. **Lack of Exceptional circumstances** before the Court can intervene in incomplete disciplinary hearings.

[3] Let me now deal with the point raised. The Applicant's argument on the point was that the urgency was not self-created as they did not wait for 14 days as suggested by the Respondent but rather brought the matter within six days after the delivery of the ruling. That the matter was then urgent as the next hearing date was set for the 25th and 26 of September 2023. Applicant lodged their application on the 15th of September and urged the Court to take judicial notice that the 6th of September was a holiday.

[4] It is worth noting that the application was lodged before this Court on the 15th of September 2023 and the notice to oppose was also filed with the Court on the same date.

4.1. Parties appeared before this Court on the 18th of September 2023 and the matter was postponed to the 21st September 2023 to enable the Applicant to file their papers in response to the *points in limine* raised. On the 21st of September a further postponement was granted to the 27th of September but unfortunately on the 27th of September coram was not properly formed as one members was not available and the matter was adjourned to the 9th of October 2023 for argument of the *points in limine*.

4.2. Indeed on the 9th of October 2023 the *points in limine* were argued. It is worth noting that the disciplinary hearing whose decision or ruling the Applicant was challenging or is still challenging this application had been set

for the 25th and 26th of September 2023. That meant that the application was therefore filed with the Court just seven (7) days before the date of the hearing. It would appear therefore that by the time the matter was argued the date of the hearing had long passed even though all papers that needed to be filed were already before Court. In essence the point of urgency was academic. That as it may be, it is important to emphases that any party bringing a matter before Court on a certificate of urgency has to ensure that they fully demonstrate in their papers that indeed the matter is urgent and that the urgency is not self-created for the simple reason that the certificate of urgency calls upon the Court to drop everything else and attend to that matter without a waste of time. The Court therefore expects a full disclosure on the papers why the matter is urgent so as to avoid an abuse of the Court's processes.

4.3.The Applicant admits in their papers that it took them ten calendar days to approach the Court after they became aware of the 1st Respondent's ruling and the next set date for the disciplinary hearing. There's no explanation as to why they felt the need to wait that long in view of the fact that they were fully aware of the next set date for the hearing. A serious litigant would not wait for the count down before they move swiftly to exercise their rights. This Court does frown on such conduct and consequently confirms the points that this matter was not urgent, the Applicant deliberately waited a while after getting the ruling from the Respondent only later rush to Court on a certificate of urgency. The point consequently succeed, though academically as it has been overtaken by events date of the hearing has long passed.

[5] Second point-lack of jurisdiction. The case of **STANDARD BANK OF ESWATINI AND FREEMAN LUHLANGA- INDUSTIAL COURT OF APPEAL OF ESWATINI case no. 14/2021** dealt extensively with the issue of whether or not the Industrial Court has jurisdiction to entertain incomplete disciplinary hearings. The Court therein concluded at page 52 of the judgment that;

> *"The Industrial Court enjoys no inherent supervisory reviews or like power to restrain illegality or prevent miscarriage of justice, its jurisdiction is strictly as prescribes in the* ***Section 8 (1) of the Industrial Relation Act.***
>
> *The concept "Disciplinary Action" under "dispute in* ***Section 2 of the Industrial Relation Act*** *is to be interpreted in the wide sense as to include uncompleted disciplinary proceedings, unfair treatment during the course of incomplete disciplinary proceedings may amount to the unfair treatment of employees which is sought to be avoided by* ***Section32 (4)(d) of the Constitution,***
>
> *Such unfair treatment, in turn may justify the invocation of the Industrial Court powers under* ***Section 16 (8) of the Industrial Relation Act, 'provided that exceptional circumstances for such intervention are shown'***
>
> *Previous decisions to the effect that* ***intervention is in incomplete disciplinary proceedings may be permitted in exceptional circumstances,*** *stand to be confirmed but same are so confirmed based on the ratio decided set out above"*

[6] The position therefore remains that the Industrial Court generally has no power to intervene in incomplete disciplinary proceedings except where there exist **"Exceptional circumstances"** warranting the Court to intervene in the incomplete disciplinary hearing. The question to ask therefore is whether in the fact of this matter there are any such factors constituted "exceptional circumstances"? That takes us to the 3rd *points in limine.*

[7] Lack of exceptional circumstances; the question of what constitutes exceptional circumstances was considered in the case in INCABETA HOLDINGS AND ANOTHER vs ELLIS AND ANOTHER 2014 (3) SA 189 as follows

> *"What constitute "exceptional circumstances" has been addressed as follows;*
>
> 1. *What is ordinarily contemplated by the word* ***"exceptional circumstance"*** *is something out of the ordinary and of an unusual nature. Something which is exceptional in the sense that the general rule does not apply to it, something uncommon, rare or different, "besonder", "seldsaan", "uitsondelink or in hoe mate ongewoon"*
> 2. *To be exceptional the circumstances concerned must arise out of or be incidental to the particular case.*
> 3. *Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion, their existence or otherwise is a matter of fact which the Court must decide accordingly*
> 4. *Pending on the context in which it is used the word* ***"exceptional"*** *has two shades of meaning, the unusual or*

different, the secondary meaning markedly unusual or especially different.

5. *Where in a statute it is direct that a fixed rule shall be departed from under exceptional circumstances effect will generally speaking, best be given to the intention of the legislative by applying the phrase and by carefully examining any circumstances relied on as allegedly being exceptional."*

[8] At this stage, it is also important to note what was stated in the case **of SAZIKAZI MABUZA vs STANDARD BANK AND ANOTHER INDUSTRIAL COURT case 311/2007** in which it was stated that;

> *"Whether the Court will intervene depend on the fact and circumstance of each particular case. It is not sufficient merely to find that the chairman of a disciplinary enquiry come to a wrong decision. In order to justify intervention, the Court must be satisfied that this is one of those rare or exceptional cases where a grave injustice might result if the chairperson's decision is allowed to stand"*

[9] The Applicant's averment in their papers on this point is that according to them **"exceptional circumstances"** exists for the intervention by the Court and those included inter alia the follow;

9.1. Considering by the 1st Respondent of outside document or material the work permit that was not formerly introduced to him during the hearing.

9.2. Allowing the splitted charges to stand against the Applicant and calling the Applicant to his defence on these duplicated charges

9.3. Allowing the Applicant to suffer double jeopardy in respect of a single course

9.4. Allowing the 3rd Respondent to be ~~no~~-initiator in a hearing where he is supposed to be a witness.

[10] This Court had the pleasure of carefully scrutinizing the ruling handed down on the 5th of September by the 1st Respondent attached to the Applicant herein and marked KZ10.

[11] In his ruling the 1st Respondent, firstly dealt with the minimum requirement for a fair disciplinary hearing and outlined same herein;

- He then went on to deal with the charges that the Applicant was facing as well as the objection that were raised by the Applicant
- He analyzed the point on double jeopardy and the relevant laws applicable thereof and made his findings on the objection
- He proceeded to deal with the issue of splilting of the charges analyzed same, applied the law and made his findings.
- He also dealt extensively with the objection on allowing 3rd Respondent to be co-initiator and made his finding on the matter and that he saw no prejudice likely to be suffered by the Applicant if the co-initiator is called upon to testify as the Applicant would have the right to cross examine the said witness and he accordingly dismissed the objection.
- Finally he dealt extensively with the objection pertaining to the entry permit for Ms Swanepoel and accordingly made his ruling on the matter.

[12] Now clearly the 1st Respondent applied his mind to all the objections that were raised by the Applicant at the disciplinary hearing and made the ruling thereafter. All that the 1st Respondent was required to do at the disciplinary hearing was to

- **Listen to the objections raised by the Applicant**
- **Weight it to determine what is probable**
- **Reach a conclusion based on the facts and the law (basically exercise his discretion judiciously)**
- **If the 1st Respondent has done the above, the Court cannot interfere with his decision because then he would have done what is expected that is to apply his mind to the matters at hand. This would be the case whether or not the Court agrees with his conclusion.**

- **The Court can only intervene if it is shown that "grave injustice will arise if the disciplinary hearing is allowed to proceed or if it is shown that irretrievable harm will occur".**
- **As already been stated above, the 1st Respondent went above and beyond in dealing with all the issues that were raised as objections by the Applicant at the disciplinary hearing we as the Court therefore see no reason to interfere with the disciplinary hearing herein as we see no irreparable harm that likely to occur in this matter.**

[13] Consequently we have come to that conclusion that the Applicant's application cannot succeed, it is dismissed with each party to bear its costs.

The Members Agree.

D. F. DLAMINI-NG'ANDU

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT : Mr. Manyatsi

FOR RESPONDENTS : Mr. B Gamedze