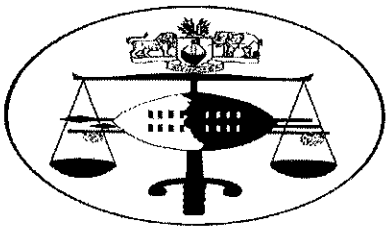

IN THE INDUSTRIAL COURT OF ESWATINI

Case No 258/2023

In the matter between:

MNDENI SHABANGU Applicant

And

INGCAMU HOTEL (PTY) LTD t/a HILTON GARDEN INN MBABANE 1st Respondent

NCAMSILE MBINGO N.O 2nd Respondent

Neutral citation: Mndeni Shabangu v Ingcamu Hotel (Pty) Ltd t/a Hilton Garden Inn Mbabane (258/2023) [2023] SZIC119 (22nd November, 2023)

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

Date Heard: 1st November, 2023

Date Delivered: 22nd November, 2023

SUMMARY – ***The Applicants has brought an urgent application to this Honourable Court seeking an order interdicting disciplinary hearing- review of chairperson decision- removal of the chairperson – matter to start de novo-application is opposed - points in limine raised by the 1st Respondent-urgency- lack of exceptional circumstances warranting Courts intervention/ failure to comply with Rule 15 (a) and (c) of Rule of Court- lack of jurisdiction.***

Held –*1. The second point in limine that there are no exceptional circumstances warranting the Courts intervention is upheld.*

2. The Applicants Application is dismissed on this point in limine.

3. No order as to Cost

JUDGMENT

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[1] The Applicant is Mndeni Shabangu an adult liswati male of Mbabane, employed by 1st Respondent as Finance Manager.

[2] The 1st Respondent is Ingcamu Hotel (Pty) Ltd t/a Hilton Garden whose description was not provided to the Court.

[3] The 2nd Respondent is Ncamsile Mbingo cited herein, in her official capacity as the Chairperson of the Disciplinary hearing whose further particulars were also not provided to this Court.

[4] The present application came by urgent application wherein the Applicant, seeks to interdict and or restrain order against the 1st and 2nd Respondent from proceeding with the disciplinary hearing, pending the review and setting aside of a decision handed down by the 2nd Respondent on the 27th October, 2023. It was the Applicant's further prayer that the 2nd Respondent be removed as chairperson of the hearing, and that he be allowed to seek external legal representation and be provided access to his work laptop. The Applicant now approached the Court seeking an order in the following terms:

4.1 The Applicant is condoned for the non-compliance with the forms, time limits, manner of service and this matter is enrolled to be heard as one of urgency.

4.2 A rule nisi is hereby issued calling upon the Respondents to show cause on a date to be fixed by the above Honourable Court why an order in the following terms should not be made final;

4.3 The Respondents are interdicted and /or restrained from proceeding with the disciplinary hearing against the Applicant pending the finalization of this matter.

4.4 The decision of the 2nd Respondent handed down on the 27th October, 2023 denying the Applicant external legal representation in the internal disciplinary hearing is reviewed and/or set aside;

4.5 The Applicant is entitled to the external legal representation in the internal disciplinary hearing;

4.6 The 1st Respondent is directed and/or compelled to avail to the Applicant his work laptop for an hour in order for him to retrieve information on same in preparation for his defence;

4.7 The 2nd Respondent is removed as the chairperson of the internal disciplinary hearing

4.8 The Respondent are ordered to pay the costs of the application.

4.9 Pending finalization of the matter in due course it is ordered that prayer 4.3 should operate with immediate and interim effect.

4.10 Granting the Applicant further and/or alternative relief.

[5] The Application first came before this Court on the 30th October, 2023 wherein the parties agreed on dates for the filing of further pleading as well as heads of argument. It was agreed that the matter be postponed to the 1st November, 2023 at 8:30 am, on which date the matter was eventually heard

and judgment accordingly reserved. The 2nd Respondent was not part of the proceeding as he had agreed to abide by whatever decision the Court takes.

BRIEF BACKGROUND

[6] The Applicant is employed by the 1st Respondent as a Finance Manager. On the 23rd October, 2023 he was charged by the 1st Respondent's General Manager with gross offensive behavior, gross insubordination, and dishonesty. The hearing was scheduled to proceed on the 27th October, 2023 however on this date the Applicant advised the Respondent that he was not ready to proceed as he required external legal representation, citing that none the of Managers, who are his colleagues could adequately represent him. Further that he required access to his laptop in order to access emails and documents which would form part of his evidence.

[7] The 1st Respondent's representative opposed the applications, and oral submission were made and heard by the 2nd Respondent. The 2nd Respondent upon hearing submissions from both parties declined the first application by the Applicant for external legal representation citing internal policies. On the second preliminary point as raised by the Applicant of access to his laptop, the 2nd Respondent directed that the Applicant write down the emails and documents he required, and the matter was stood down to twelve noon to allow the Applicant to furnish the Chairperson with the documents he required.

[8] When the hearing reconvened at twelve noon the Applicant was not present. The 2nd Respondent waited for the Applicant for an additional thirty minutes, whereupon he accordingly postponed the disciplinary hearing to the 31 October, 2023 for continuation at 8:30am. Before the said date the Applicant proceeded to file the present application before Court.

AD POINTS *IN LIMINE*

[9] The Respondent has raised four points of law, **lack of urgency, failure to comply with Rule 15(a) and (c) of the Industrial Court Rules** and **lack of exceptional circumstances, jurisdiction**. At the hearing of the matter the parties agreed to argue the matter holistically dealing with the points *in limine* and the merits of the case.

RESPONDENT'S SUBMISSION

[10] The 1st Respondent was the first to give evidence, it was its argument that the Applicant has failed to state why the matter is urgent in terms of **Rule 15 (a) and (c) of The Industrial Court Rules, 2007** and why he may not be afforded substantial redress in due course. It was its argument that the rules relating to urgency require the litigant to demonstrate that if the Court does not come to his assistance, he will suffer irreparable or irredeemable harm. It averred that the Applicant only deals with the issue of urgency on page 17 of the Founding Affidavit. It was its argument that the Applicant has dismissably failed to establish any grounds for urgency.

[11] It was its further averment that the application does not meet the requirements of Rule 15 of the Rules of Court. It averred that the Applicant has to demonstrate two stages in terms of Rule 15 before a matter can be heard as urgent. The Applicant is required to explicitly state why he cannot be afforded redress in due course, the Applicant has failed to state the reason that render the matter urgent, except that his hearing was postponed, and will be heard on the 31st October, 2023, surely this cannot render the matter urgent.

[12] It was its averment that when a party brings a matter on a Certificate of Urgency it is asking the Court to open the door for it and move from its normal roll, and other matters that are before it to hear the matter on an urgent basis. The Applicant is required to demonstrate that the hearing of the matter is that of life or death, and that the hearing of the matter in due cause will render it academic. The Court was referred to the case of **EDWIN MANANA V ESWATINI WATER AND AGRICULTURAL DEVELOMENT ENTERPRISE AND ANOTHER I/C CASE NO 220/22**, in support of this argument. It was the 1st Respondent's averment that the Applicant has failed to meet the threshold as envisaged in Rule 15 of the Court Rules, and as such the application should be dismissed on urgency alone.

[13] On the second point *in limine* it was its argument that the Applicant has failed to raise any exceptional circumstances warranting the Courts intervention, and review of the decision of the 2nd Respondent. It was the 1st Respondent's submission that the general rule when it comes to

representation, is that only exceptional circumstances warrant the deviation from the disciplinary code within each establishment. It was the 1st Respondent's argument that Applicant's claims that **Section 14 (a) of the Constitution of Eswatini** gives him an overriding right to representation discarding internal policies within its institution is incorrect, the Applicant does not have an absolute right to external representation. It was its further argument, that the Industrial Court has stated that only in exceptional circumstances should the right to external representation be exercised.

[14] It was its averment that from inception when the Applicant received his letter charging him, he indicated that he would require external representation, he had a fixed intention. It further averred that the Applicant has not alluded to the colleagues that he approached for representation before opting for external representation. It was its averment that the Applicant does not place the Court into its confidence, and state which colleagues he approached and they refused to represent him, which evidence is key in the present proceedings.

[15] It was its averment that what is evident from the minutes is that the Applicant on the day of the hearing, stated that he was not ready to proceed because he wished to seek external representation. It was the 1st Respondent submission that the Applicant has failed to set out any exceptional circumstances warranting the Court's intervention. In support of its argument the Court was referred to the case of **LONDIWE MALAMBE V MUNICIPAL COUNCIL OF MBABANE IC CASE NO 177/2019.**

[16] In closing its argument on this point, it was the 1st Respondent's argument that the Court when dealing with the matter before it, it should disregard the **SAZIKAZI MABUZA V STANDARD SWAZILAND I/C CASE NO 311/07**, matter as relied upon by the Applicant. It was its averment that in the **SAZIKAZI MABUZA** case the Chairperson presiding over the matter had a legal background that is why external representation was allowed, contrary to the present case where the Chairperson has no legal background. It was its averment that in the present case the Chairperson is a human resource officer, without sufficient legal knowledge. Hence bringing an external legal representative would tilt the scales, and the Court's role is to ensure that the scales are balanced within the workplace.

[17] It was its averment that on the date the Applicant made it application for representation, it failed to disclose any reason to the Chairperson, why it was seeking external legal representation, save to state that his colleagues would not be able to adequately represent him. It was its submission that the Applicant was only now in its Founding Affidavit advancing other reasons why he seeks external legal representation, which submissions were not made before the Chairperson. That further with the submission as made before the Chairperson the Chairperson was correct in arriving at the decision that the Code should not be deviated from. The Applicant from its pleadings has failed to establish that the 2nd Respondent did not apply her mind when reaching its decision.

[18] It averred further that the Applicant before coming to Court had the right to ask for a stay of the disciplinary hearing and appeal the decision as

provided for in the 1st Respondent's disciplinary code, before reviewing the 2nd Respondent's decision with the Court structure. The Applicant is seeking the removal of the 2nd Respondent as chairperson; however, such application has not been presented before her, but has only been brought to the attention of the 1st Respondent in the Applicant Founding Affidavit. It was its averment that the Court cannot *moro motu* intervene and deal with the issue, the Applicant is required to raise the issue before the 2nd Respondent who is seized with the disciplinary process. Thus the 2nd point *in limine* should be dismissed.

[19] The Respondent briefly dealt with the remaining point on jurisdiction, it was its averment that the Court is a creature of statute, and accordingly the Applicant should have pleaded with the Court's jurisdiction and further state why the Court should hear the matter, which they have only done in their Replying Affidavit and not in the Founding Affidavit. It averred that the Applicant has failed to set out the requisite jurisdictional facts for the Courts intervention, and the matter should accordingly be dismissed.

[20] On the merits it was the 1st Respondent's argument that the Applicant seeks that the chairman of the disciplinary enquiry should be removed ostensibly on the basis that he is friends with the General Manager. It was its averment that the relationship that exists between itself and the 2nd Respondent is purely a professional relationship. The 2nd Respondent having rendered services to the 1st Respondent, and this relationship is regulated and governed by professional and ethical standards.

[21] Further, the Applicant failed to raise the recusal application before the chairperson, and as a consequence thereof the chairperson has not made a ruling on her recusal. It was its submission that the Courts approach to the question of recusal of a chairman, must be guided by the well established and well traversed principles. The test for removal of a chairperson on the basis of bias, is that of a reasonable apprehension of bias, and the suspicion must be based on reasonable facts and not suppositions. The Applicant has failed to prove that, save to state that the 2nd Respondent has done work for the 1st Respondent. In closing it was its submission that discipline in the workplace is the prerogative of the employer. The Courts will not easily interfere with the employer's unfettered authority to discipline its employees and to maintain order in the workplace. It was its submission that the Applicant has failed to prove that he tried to secure internal representation. Further there is nothing untoward about the chairperson declining the application for legal external representation. The Court was referred to the **NDODA SIMELANE V NATIONAL MAIZE CORPORATION LTD (453/06) SZIC 70**, where the Court stated in paragraph 7 of the judgment:-

> "This *does not however mean that an employee is entitled to be represented by a legal practitioner at his/her disciplinary hearing. On the contrary, it appears to be settled law that there is no general right to legal representation at a disciplinary hearing.*"

It was the 1st Respondent's submission that in this judgment the Court held that the Chairperson has discretion to determine whether legal representation can be admitted. Further that having enjoyed this right and having issued a ruling in the issue of representation, this does not

automatically render the ruling reviewable, compelling circumstances need to exist in order for the Court to be able to review such ruling. It was its averment that the Applicant has failed to show the existence of any compelling circumstances and therefore its application should be dismissed with costs.

APPLICANT'S SUBMISSION

[22] In rebuttal the Applicant began its argument by dealing with the points *in limine* as raised by the 1st Respondent. On the point on urgency, it was its argument that in its Founding Affidavit it has set out the history of the matter, even setting out the history before he was charged, but however the 1st Respondent has opted to read paragraph 33 of the Founding Affidavit in isolation which the Applicant argued is not permissible in law. It averred that the key point is that he is a senior manager responsible for the Finance Department, above him is the General Manager, therefore he is not just a manager, that can easily be represented by a fellow colleague, but a senior manager with only the General Manager above him.

[23] The Applicant submitted that he was called to a disciplinary hearing on the 27th October, 2023, wherein he raised preliminary points, one of which was the issue of legal representation, in circumstances wherein the General Manager is not only the complainant but the Initiator in the proceedings. The Applicant raised the issue before the 2nd Respondent and was overruled, and the matter was adjourned and postponed to the 31st October, 2023. It was his submission that he wasted no time after the postponement and instituted the present application and served same on the 1st Respondent

the very same day. What he primarily seeks is an interim interdict to stay the proceedings which were to commence on the 31st October, 2023. If the proceedings were to proceed on the said date, they would have proceeded without him having legal representation.

[24] It was his submission that he wasted no time in approaching this Court, to try and seek relief in proceedings which he deemed were unfair, and to ask for the Court's intervention. It was his further submission that legal representation was not his only concern, but he was further refused access to his laptop, which he requires for his defence. It was his averment that he has clearly demonstrated the urgency of the matter, and that had he failed to file the present application, the hearing would have proceeded without him having representation in a hearing he already deemed unfair. Further he would have proceeded without the laptop which he required for his defence. It was his averment that even if he had approached the Conciliation Mediation Arbitration Commission, the Commission does not have powers to issue out interdicts and as such he would not have received any relief. The only relief is through the Court, which has the core function of ensuring fairness in disciplinary proceedings.

[25] On the second point *in limine*, that there are no exceptional circumstances demonstrated to warrant the Court's intervention. It was the Applicant's submission that the 1st Respondent has placed reliance on the **SAZIKAZI MABUZA (SUPRA)** case and stated that the Court should disregard this judgment as it is old law. Further that in the said case the Court came to its decision to grant legal representation because there were attorneys involved

in the disciplinary hearing, which assertion is incorrect. It was its argument that in paragraph 4 of the judgment, the Court made a general observation that the enquiry was chaired by 2nd Respondent who was a senior labour relation consultant, whilst the bank was represented by two senior managers. Therefore, the said judgment is on all fours with the present matter before Court.

[26] It was the Applicant's submission that the charges as preferred against himself are against the General Manager, and therefore exceptional circumstances exist that warrant deviation from the disciplinary code, and him being granted the right to external legal representation. The Court as stipulated in the **SAZIKAZI MABUZA** judgment can intervene to restrain illegalities and promote fairness and equity in labour relations. It was therefore the Applicant's submission that this is an exceptional case warranting the Court's intervention.

[27] It was further its averment that the 2nd Respondent mechanically applied the disciplinary code by stating that external representation is not permitted by the Code. She failed to exercise her discretion judiciously, and failed to apply her mind to the issues as raised by the Applicant as this is not an ordinary disciplinary hearing, as it involves a senior manager, including the General Manager. It was its averment that it is a reasonable concern deserving consideration that fellow managers would be reluctant to represent him to defend charges involving the General Manager. Therefore the 2nd Respondent failed to apply her mind to the issues thus rendering her decision reviewable and to be set aside.

[28] In light of the **MABUZA** case the Court has the power to come to assistance of the Applicant as the function of the Court is to promote fairness within the disciplinary hearing. It was its averment that the Court cannot watch an unfair hearing proceed, and only come to the assistance of the Applicant once he is dismissed, the Court has the right to intervene and declare such proceeding unfair to ensure fairness, thus it has shown exceptional circumstances warranting the Court's intervention.

[29] On the point as raised by the Respondent that the Applicant has failed to exhaust internal remedies by appealing the decision. It was its averment that the disciplinary code does not make provision for appeal during the disciplinary process, but the appeal process as provided for in the Code is after the employee has been dismissed. Thus, the appeal process as provided for in the Code, does not make provision for the present circumstances. The Applicant therefore had no other alternative relief available to him but to approach this Court and seek for its intervention.

[30] On the issue of jurisdiction the Applicant briefly stated that from papers it is clear that the matter before it, is one of employer/employee and the Court cannot shut its doors on the Applicant, and to do so would defeat the purposes of the **Industrial Relations Act** which is to ensure fairness in the workplace. It was therefore its submission that the Court therefore has the necessary jurisdiction to hear the matter. Therefore, the points *in limine* as raised by the 1st Respondent should be dismissed.

[31] The Applicant proceeded to deal with the merits of the matter, it was his submission that **Section 14 (1) of the Constitution (supra)** guarantees the right to a fair hearing, it was its argument that it has not been afforded a fair hearing. it averred that it is being denied legal representation in circumstances where it is evident that it cannot be adequately represented by a fellow employee. It was his submission that even though there is no general right to legal representation in internal disciplinary proceedings, there are special circumstances where legal representation is afforded to an employee in order for the employee to have a fair hearing like in the present case.

[32] In support of this argument the Applicant referred the Court to the case of **NDODA SIMELANE V NATIONAL MAIZE CORPORATION (supra),** where the Court stated that the common law does require disciplinary proceeding to be fair and if, in order to achieve such fairness in a particular case legal representation may be necessary. The Court was also referred to the case of **DLADLA V ADMISTRATOR NATAL 1995 (3) SA 769 (A), and the case of MEC, DEPARTMENT OF FINANCE, ECONOMIC AFFAIRS & TOURISM NOTHERN PROVINCE V MAHUMANI (2004) 25 ILJ 2311(SCA)** wherein the Court dealt with the issue of external legal representation in disciplinary proceedings and the circumstances warranting same, and the consideration to be determined when granting legal representation.

[33] It was its further submission that the 1st Respondent has not stated what prejudice it stands to suffer if a legal representative is granted, the fact that

the disciplinary code does not permit legal representation is not on its own a ground to refuse legal representation. Further since the deponent is also the complainant, the Applicant averred that no one within the company can satisfactorily represent him for fear of victimization. Further that the charges preferred against him warrant summary dismissal, thus he stands to suffer irreparable harm if a fair hearing is not afforded to him. Thus the 2nd Respondent has failed to make a fair ruling and failed to apply her mind judiciously.

[34] It was the Applicant's submission that the **NDODA SIMELANE (SUPRA)** case is a classic within our jurisdiction, which spells out when the Court can intervene and grant external legal representation in a disciplinary hearing. The Court should consider, whether a fellow employee of equal status is available to represent him, whether representation by a subordinate would be degrading or hamper his defense, whether an employee can satisfactorily represent the Applicant in a matter involving the Chief Executive Officer as the complainant. The fourth consideration is whether it is appropriate to get relief from a sister local organization, whether charges are complex or legal to warrant the need for an attorney, and whether the charges would result in a dismissal. It was its evidence that it has met all the requirements as stipulated in the **NDODA** case.

[35] It was its averment that the 1st Respondent will not suffer any prejudice if external representation is granted, and that the 1st Respondent has not pleaded that it will suffer any prejudice. Further that the Court is suited in

terms of **Industrial Relation Act** to give an adequate and just remedy to Applicant to ensure a fair hearing as guaranteed by the Constitution.

[36] On the recusal it was its submission that the Court has the power to remove the 2nd Respondent on the basis that she materially failed to apply her mind to the facts of the case. In support of its argument the Applicant referred the Court to the case of **JOHANNESBURG STOC EXCHANGE V WITWATERSRAND NIGEL 1988 (3) SA 132 (A), 152C TO 152D,** where Corbert JA explained failure to apply one's mind. It was its argument that in view of the allegations contained in the papers before Court, in *casu* it has laid a factual basis for the aforesaid ground of review. It was its submission in closing that the 2nd Respondent has failed to apply her mind, and she failed to approach the hearing with an objective mind, but is approaching it based on previous history it has with the 1st Respondent. Lastly, she is not a trained legal professional with the capacity of guarding against being biased. It was its prayer that for the hearing to proceed fairly, it should start de novo, and that a new chairperson be appointed to hear the matter, and that in the interest of justice the order as prayed for in the application be granted.

ANALYSIS OF EVIDENCE AND THE APPLICABLE LAW

[37] The Court will firstly deal with the points *in limine* as raised by the 1st Respondent. The provisions of Rule 15 (2) (a), (b) and (c) are peremptory for urgent applications. The Court may direct that a matter be heard as one of urgency on good cause shown that it is upon satisfactory compliance

with **Rule 15 (2) (a), (b), (c) of the Rules of the Industrial Court**. Failure to comply with Rule 15 will result in a party failing to show cause, and as a result fail to prove the urgency. The onus is on the Applicant to demonstrate in the body of the affidavit facts which will persuade the Court to hear the matter on an urgent basis. There is no list of circumstances that automatically qualify a matter to be heard on an urgent basis. Each matter is to be dealt with on its own peculiar facts.

[38] In similar decided cases the Courts have accepted that the Applicant would satisfy the requirements of urgency if he were to demonstrate a well-grounded apprehension of irreparable harm if urgent relief is not granted. In the case of, **ZODWA MKHONTA V ELECTRICITY BOARD IC CASE NO 343/2002** the Court stated:

> *"...Applicant has on a balance of probabilities demonstrated the urgency of the matter by establishing a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted."*

This Court agrees with this principle too, that a well-grounded apprehension of irreparable harm must be proven to justify urgency.

[39] The Court is mindful that all disputes that come before it for determination are to some extent urgent to the Applicants who bring them. However, the Applicant by simply stating that the matter is urgent, does not necessarily advance his case.

[40] In the present matter the reason the Applicant has approached this Court on an urgent basis is articulated in paragraph 33 and 34 of its Founding Affidavit which reads:

> *"The matter is urgent. On the 27th October, 2023 my disciplinary hearing was postponed to the 31st October, 2023 at 0830hrs. if I were to adhere to the time limits and manner of service then the hearing will then proceed on the said date and the order I will get will only serve an academic purpose. Matters in the long form take about 6 weeks to be heard. That will be prejudicial to me.*
>
> *Part VIII of the Industrial R Act will not assist me as CMAC does not issue interdicts. I therefore pray that the matter be heard urgently."*

Save for the above assertion, the Applicant has failed to articulate to this Court what irreparable harm he will suffer, if the matter is not heard on an urgent basis save to state that the order if obtained in his favour, if due process was to be followed would render the order academic, and CMAC does not issue out interdicts.

[41] When dealing with matters brought on a certificate of urgency, the Court is required to balance the rights and interests of the Applicant with the prejudice that the Respondent may suffer if the matter is heard on an urgent basis. The Applicant has a duty to place before this Court in his Founding Affidavit all the necessary facts in order for the Court to make an informed decision. The Applicant has failed in this regard to provide sufficient facts before Court which render his matter to be heard on an urgent basis. The Applicant has further dismally failed to make a proper case to support his

prayers as prayed for in his application, and failed to establish the requirements of Rule 15 of the Rules of Court. Therefore, the point *in limine* as raised by the 1st Respondent on urgency is therefore upheld, however the Court will not dismiss the application for lack of urgency as the Court was already seized with the matter when the point *in limine* was raised.

[42] Now to deal with the second point *in limine* as raised by the 1st Respondent, the attitude of the Courts has long been that it is inappropriate to intervene in an employer's internal disciplinary proceedings until they have run their course, except in exceptional circumstances. This approach arises from a principle long established in our Courts that as a general rule superior Courts will not entertain an appeal or application for review, when such appeal or review seeks to interfere with incomplete proceedings in an inferior Court. In the case of **GUGU FAKUDZE VS REVENUE AND OTHERS INDUSTRIAL COURT OF APPEAL CASE NO 8/2017** 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.

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."

[43] The attitude of the courts then, is not to intervene in the employer's internal disciplinary proceedings until they have run their course except where compelling and exceptional circumstances exists warranting such interference. The chairperson of a disciplinary enquiry and in whose hands the final decision lies, has a quasi-judicial function. He is by law presumed to be an independent and impartial umpire and to have competence to determine any question in relation to the disciplinary enquiry.

[44] 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 (SUPRA),** 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".

[45] 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, because of the following reasons:

i) Save to state that the 2nd Respondent has worked for the 1st respondent in a professional capacity, he has not shown that the 2nd Respondent is not an independent and impartial umpire, competent of determining the issues before her.

ii) That the 2nd Respondent when coming to the decision not to deviate form the Disciplinary Code and Procedure Policy, she failed to apply her mind judiciously taking into consideration the submission presented to her.

iii) That he will suffer a grave injustice/ irreparable harm if the decision is allowed to stand.

[46] The inherent right to discipline an employee rest with the employer, the Court is always weary to interfere with the prerogative of an employer to discipline its employees or even anticipate the outcome of an incomplete disciplinary process. Taking into consideration all the evidence as submitted before the Court, the Court finds that the Applicant has failed to set out exceptional circumstances warranting its intervention. The point *in limine* therefore succeeds. The Court will not proceed to deal with the remaining points *in limine* and the merits.

Accordingly, the Court makes the following Order:

46.1 The second point in limine that there are no exceptional circumstances warranting the Court's intervention is upheld.

46.2 The Applicant's Application is dismissed on this point *in limine*.

46.3 There is no order as to costs.

The Members Agree.

B. NGCAMPHALALA

ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: Mr. S. Simelane (Robinson Bertram)

FOR RESPONDENT: Mr. M. Dlamini (Dynasty Inc. Attorneys).