IN THE INDUSTRIAL COURT OF APPEAL

CASE NO.13/2006

In the matter between:

BHEKIWE DLAMINI	**APPELLANT**
AND	
SWAZILAND WATER SERVICES CORPORATION	**RESPONDENT**

CORAM	**ANNANDALE JP** **MATSEBULA JA** **MAPHALALA JA**
FOR THE APPELLANT	**MR. SIBANDZE**
FOR THE RESPONDENT	**ADV. P.E. FLYNN (instructed by Sibusiso B. Shongwe & Associates)**

JUDGEMENT
19 SEPTEMBER 2006

Matsebula JA

[1] This is an appeal against a judgment of the Industrial Court; appealing against a judgment handed down in the court a quo in Case No.411/2006. The judgment is attached to the notice of appeal as annexure "A".

The grounds of appeal are the following:-

1. ***The court a quo erred in law in finding that the misconduct alleged by the Respondent, to have been committed by the Applicant had not come to the awareness of the Respondent on the 10th March 2006, that, on the papers before court there was an allegation which was not denied and it was common cause that the Respondent became aware of the alleged misconduct on the 10th March 2006, however did not intend to proceed with a disciplinary hearing.***

2. ***The court a quo erred in law in failing to find that as the matter of law and fact that Respondent waived its rights to take disciplinary action against the Appellant.***

3. ***The court a quo erred in law in finding that the Disciplinary Code which is an annexure to the Recognition Agreement between the Respondent and the Water Services Corporation Trade Union did not apply to the Appellant.***

4. ***The court a quo erred in law in finding that clause 2.4 of the Recognition Agreement between the Respondent and the Swaziland Water Services and Allied Workers Union as excludes the Appellant from operation of the Disciplinary Code and failed to find correctly that the aforesaid clause 2.4 merely excluded the Appellant from membership of the Union and from collective bargaining by the Union on her behalf.***

5. The court a quo erred in law in giving any weight and recognizing the unsigned recognition agreement between the Respondent and the Swaziland Water Services Staff Association as a effective agreement in that in terms of the Agreement itself, it would only take effect upon signature.

Appeals to this court are regulated in terms of Section 19(1) of the Industrial Relations Act 2000 (Act 1 of 2000) The Act.

Section 19(1) of the Act reads as follows:-

"There shall be a right of appeal against the decision of the court on a question of law to the Industrial Court Appeal."

An appeal against pure factual finding is therefore not permissible in terms of the above quoted section. However a litigant is not without a recourse where the Industrial Court makes an error to its factual findings depending on the circumstances of a particular case a factual finding applied by the trial court incorrectly, it can give rise to a legal issue which in turn can then be properly appealed against. In other words, a factual finding applied incorrectly by the Industrial Court is a legal issue and as such can be appealed against by a litigant. In the **NATIONAL UNION OF MINEWORKERS VS EAST RAND GOLD AND URANIUM COMPANY LTD 1992(1) SA 700 A** @ 723 E-F an appeal was noted and the Appeal Court said the following:-

"It would appear that we are required to determine whether on the facts found by the Labour Appeal Court it made a correct decision and order. That is a question of law. If it did the appeal must fail. If it did not, then this Court may amend or set aside decision or order or make any other decision or order according to the requirements of the law and fairness."

The case above was also quoted by this court in the case of **V.I.P. PROTECTION SERVICES VS SINAN NHLABATSI CASE NO.10/2004** at
page 4 of the judgment.

Mr. Flynn on behalf of the respondent argued before us that, grounds 1 and 2 of appellants' grounds of appeal involved findings of fact on the affidavits before the ***court a quo*** and as such the finding may not be appealed against in terms of Section 19(1) of the Industrial Relations Act. Mr. Flynn argues further that in any event the ***court a quo*** made a correct factual finding where it stated at page 9 paragraph 20 that-
"We do not agree with the applicant's contention that the respondent became aware of the alleged misconduct on the 10* March 2006. On that date the alleged misconduct had not taken place. The applicant on the memorandum marked "BD.4" made an endorsement asking the Finance Manager to oblige. The operation Director also made an endorsement on that same document in which he told the applicant that she and her staff should pay the invoice as the amount therein was not budgeted for."

[7] The endorsement referred to by the learned judge in the court a quo reads in long hand,
"Please be advised that payment required has no budget. You are requested to notify your staff to make payment contributions towards the invoice payment. All other regions made their own contributions towards the celebrations."

The endorsement is dated the 10th March 2006.

The factual finding therefore made by the learned judge in this regard cannot be faultered. Mr. Flynn's submission that on the 10th March 2006 the Operations Manager was expecting that appellant and her staff would oblige and was therefore not aware of any misconduct on the 10th March 2006. We agree with this submission.

[8] In its judgment, the ***court a quo*** states at page 9 paragraph 22 that the alleged misconduct occurred when respondent realized that it would have to pay for what it had advised the appellant that she should inform her members of staff to make contributions towards the payment as early as the 10th March 2006. This court, therefore agrees with learned judge of the ***court a quo*** in its paragraph 20 of its judgment at page 9 that alleged misconduct had not taken place on the 10th March 2006. It follows that the ground of appeal no.1 cannot succeed.

[9] It would iogically, follow that if this Court's finding in respect to grounds no.1 fails, ground no.2 i.e. that the respondent waived its rights to take disciplinary action against the appellant on the basis that respondent was aware of the alleged misconduct as early as the 10th March 2006 must also fail. However, in view of Mr. Sibandze's detail submission on the question of waiver, it might be appropriate for the sake of completeness to briefly deal with the concept of waiver. This court had an occasion to deal with the vexed question of waiver in a recent case **APPEAL CASE NO.01/2004 USUTU PULP COMPANY (PTY) LTD AND JACOB SEYAMA AND FOUR OTHERS** at page 4 where the following appears,

"The intention to waive a right cannot be lightly inferred but must clearly appear from respondent's words or conduct..."

Then reference is made to a whole range of cases and it is not necessary to quote all those cases. However in **MAC FARLANE VS CROOKE 1951(3) SA 263 (K)** the following appears,

"A waiver is never presumed, and must be clearly proved... The onus is strictly on the appellant. He must show that the appellant with full knowledge of its right decided to abandon it whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact depending on the circumstances. It is always difficult and in this case specially difficult to establish."

This court in terms of the ***stare decisis*** principle is bound by its previous judgment. In this particular case this court finds that appellant has not even made an attempt to discharge the onus resting on its shoulders. This court finds that grounds no.2 also fails.

[10] Turning now to deal with grounds of appeal numbers 3 to 5. Mr. Flynn submits that those are grounds raising issues which the disciplinary hearing is the proper forum to deal with and this court has no justification to intervene and impose its own findings. Mr. Flynn further submitted that certain findings of fact made appellant cannot challenge on appeal. The se findings of fact were made by the court a quo; and they are of a factual nature. These findings must of necessity be dealt with by the chairperson at the disciplinary hearing and can not properly be dealt with by the Industrial Court less still by the Industrial Court of Appeal which in terms of Section 19(1) of the Industrial Relations Act referred to in paragraphs (3) and (4) above, deals only with questions of law.

[10.1] Mr. Flynn submits further that the ***court a quo*** was never the less correct in its interpretation of the disciplinary code relied upon by the appellant. It was Mr. Flynn's submission that the code applies to all employees which the Union is entitled to represent in the categories for which it is recognized.

[11] Mr. Sibandze on behalf of the appellant argued at great lengths that respondent was not entitled in terms of the applicable disciplinary code to adopt the attitude it adopted. It is my considered view that this is a problem which can adequately be dealt with by the Disciplinary Chairperson at the hearing. **I** fail to understand the resistance on the part of the appellant to submit to the hearing of the disciplinary hearing chaired by any person other than a member of the respondent as per order by the learned judge of the ***court a quo*** at page 12 paragraph (33) (3) of its judgment.

It is this court's considered view that even the bizarre situation where appellant suddenly finds herself faced with new charges of misconduct, instead of, according to her counsel, the charges which respondent had elected previously not to take action upon. All these can be dealt with by the disciplinary chairperson.

[12] I do not propose to deal in any greater detail with Mr. Sibandze's submissions on the questions of respondent's raising new charges of misconduct.

[13] All the difficulties arising out of the charges intended to be preferred against the appellant, time limits and the procedures to be followed are issues that lie clearly within the ambit of the disciplinary hearing. It is well established law that this court will not normally usurp the functions of an internal disciplinary enquiry. It will only do so under rare and exceptional circumstances. These rare and exceptional circumstances would be present where the disciplinary enquiry constitutes an interference with the activities of a trade union.

It is my considered view that the present matter is not one where this court can justifiably intervene. The appellant will have ample opportunity to raise its objection before a disciplinary hearing. See in this regard **SA COMMERCIAL CATERING AND ALLIED WORKERS UNION VS TRUWORTHS 1999 20 TLJ 639 LC.** This court shares the sentiments expressed in that case; in view of the attitude this court is adopting concerning the order made by the court a quo in its paragraph (33) of its judgment.

[14] Considering all the submissions made by both counsel, this court is unable to faulter the judgment of the ***court a quo.*** I accordingly dismiss the appeal with costs.

J.M. MATSEBULA
JUDGE OF APPEAL

I AGREE
J.P. ANNANDALE
Judge President

I AGREE

B.B: MAPHALALA

Judge of Appeal