IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Held at Mbabane Case No.: 7/2018

In the matter between

MBONGISENI NKAMBULE **Appellant**

And

MAJOZI SITHOLE N.O. **1ST Respondent**

THE CENTRAL BANK OF SWAZILAND **2ND Respondent**

Neutral Citation: *Mbongiseni Nkambule Vs Majozi Sithole N.O. & Another 7/2018; [2018] SZICA 10 (24 October 2018)*

Coram: Hlophe AJA, Dlamini(T)AJA, Langwenya AJA.

For the Appellant: Mr K. Q. Magagula

For the Respondents: Mr Z.D. Jele

Date Heard: 27th September 2018

Date Judgement Delivered: 23rd October 2018

Summary

Labour Law – Appellant served with both notice and disciplinary charges and called to attend a disciplinary enquiry on a given date –Appellant institutes urgent proceedings to inter alia interdict the disciplinary hearing as well as declare it as irregular, unlawful and an unfair labour practice –Whether Court entitled to interfere in incomplete disciplinary proceedings –Court a quo decides that it had no power to interfere in incomplete disciplinary proceedings –Settled principle is that the Industrial Court ought not interfere in incomplete proceedings except where there are exceptional circumstances –Whether any exceptional circumstances established in the matter –Court convinced exceptional circumstances not established –Appeal dismissed.

JUDGMENT

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[1] The question for determination in this appeal is whether the Industrial Court has power to intervene and interfere in incomplete disciplinary proceedings. The question goes further; if the answer was that it does, under what circumstances does it do so. Proceeding from the premise that it does under certain circumstances the next question is whether such circumstances were met in this matter to necessitate the intervention and interference by the Industrial Court.

[2] It should be mentioned that the other question raised in terms of the Notice of Appeal, which was however not pursued during the hearing, related to the correctness or otherwise of the striking out of the minutes of the Second Respondent's Executive Committee on the basis that they contained confidential material. I clarify from the outset that this was not made an issue in this appeal during the hearing, thereby leaving what I have referred to as the central question as captured in the foregoing paragraph and as discussed herein below.

[3] The centrality of this question to the appeal was acknowledged by the parties during the hearing of the matter notwithstanding that the record had suggested that there were other issues to be determined including the condonation for the late filing and service of the appellant's Heads of Argument as well as the other issues contained in the Notice of Appeal filed by the appellant. I must clarify therefore, and for purposes of removing any doubt there could be, that the parties agreed that the condonation application was not being opposed and that this court should allow it. When it was mentioned, again at the commencement of the hearing, that the question for determination was the one recorded in the first paragraph and its ancillary questions, we had no misgivings about the approach because we also agreed

that all the other issues raised ex-facie the Notice of Appeal were one way or the other dependent on the determination of the central question referred to above.

[4] The background to the matter is that the appellant as the applicant instituted proceedings before the Industrial Court where he sought an order inter alia interdicting a disciplinary hearing he had been summoned to attend following his being charged with various disciplinary offences which included absenteeism, insolence and insubordination. He had in trying to make his point, annexed to the application minutes of the Second Respondent's Executive Committee (Exco) meeting chaired by the First Respondent in his capacity as the Governor of the Second Respondent. He had also sought among those orders, one declaring the intended disciplinary process as irregular, unlawful and an unfair labour practice.

[5] As a basis for the reliefs sought, which included an order interdicting the disciplinary hearing and another one declaring it irregular, unlawful and an unfair labour practice, the appellant contended that at a meeting of the

Second Respondent's Executive Committee (Exco), held on the 27th March 2018, he had delivered a certain report required of him.

[6] After he was through with that he said he was asked by the First Respondent as the Chairman if he had anything else to say. Assuming that to be a call for him to vent out his frustrations, he said he then raised several issues which included his registering his displeasure in the manner certain complaints about the department he headed were handled. He claimed that whilst in his presence there was pretence that everything was well; that position would change as soon as he was not there. A lot of disturbing things would allegedly be said about him behind his back. He claimed to have also been asked for a sick sheet for his absence at work a few days earlier, by the First Respondent yet he did not report to him as he reported to the Deputy Governor. To him this suggested he was not being trusted. He stated a lot of other complaints.

[7] Although he did not repeat it in his affidavit supporting the application it is not in dispute that he had told that meeting in the presence of the First Respondent, his Chief Executive Officer, that he hated people like him who

were given to telling lies. The charges that followed were after these incidents or exchanges according to the papers filed of record as supplemented by the parties counsel during the hearing of the matter.

[8] In their opposition to the application, the Respondents filed an opposing affidavit in which they raised at least two points in limine. One of the points was that the applicant had unlawfully annexed to his application minutes of a meeting of the Second Respondent's Executive Committee (Exco) which were said to have contained confidential information. By annexing the said minutes and thereby disclosing the alleged confidential information to the public, an application was made for an order preventing the media from publishing the contents of the said meeting and secondly for another order striking out the said minutes. It was argued there that the applicant had been irresponsible in the extreme by publishing such minutes in the manner done and that his said conduct was contrary to section 20 of the Legislation establishing the Central Bank of Swaziland which prohibited the publication of confidential information belonging to the Bank unless there was an order of court authorizing same.

[9] The other point raised which turned out to be central to the determination of the application was that the Industrial Court had no power or jurisdiction to interfere in incomplete disciplinary proceedings. It was argued that the court would do this in very limited instances where there existed special or exceptional circumstances justifying such a departure from the general rule. It was argued further that in the matter at present, the applicant had not established the existence of such special or exceptional circumstances and that therefore the court should not interfere, but should dismiss the application.

[10] The court a quo had, after listening to the argument upheld the two points raised in limine referred to above. For the sake of clarity, the court a quo decided the matter purely on the two points in limine and never dealt with the merits including the other issues raised by the Appellant. The Appellant, upon being dissatisfied with the decision or Judgement of the Industrial Court, noted an appeal to this Court hence this judgment. In the said notice the appellant contended briefly the following:-

> *10.1 The Learned Judge President erred in Law that the Industrial Court does not have jurisdiction to hear and*

adjudicate over the application brought by the applicant a quo.

10.2 The Learned Judge a quo erred in law and in fact that, that (sic) a chairperson of the Disciplinary hearing can issue declaratory orders.

10.3. The Court a quo erred in law to struck (sic) out the minutes of the Respondent's Executive Committee (exco) without the required notice in terms of the Rules of Court.

10.4 The appellant herein begs leave of court to supplement the grounds of appeal once written reasons are issued by the court a quo.

[11] True to the last ground of appeal stated above, the Appellant filed supplementary grounds of appeal later, in which he stated as follows:-

11.1 The Court a quo erred in law by not interrogating the exceptional circumstances as presented on the Appellant's founding affidavit.

11.2 The Court a quo misdirected itself in ruling that the Appellant should seek redress simultaneously in Court and to the Chairperson of the Disciplinary hearing while the Court is already seized with the legal issues.

11.3 The Court a quo erred in Law and in fact to rule that the chairperson of the disciplinary hearing had the discretion to determine declaratory objections, such declarations vest with the Industrial Court.

11.4 The Court a quo erred in law and in fact to overlook that the applicant was being subjected into (sic) an unfair labour practice.

11.5 The Court a quo erred in law and in fact in expunging the minutes of the Executive Committee on the bases (sic) of confidentiality and in terms of the Central Bank of Swaziland Order.

11.6 The Court a quo erred in finding that the Appellant jumped the gun by approaching the Court instead of attending the disciplinary hearing.

[12] Although several points had been raised per the notice of appeal and its supplement, that when the hearing eventually occurred, both parties agreed that the point for decision was that set out in paragraph 1 of this judgement; which is to say whether the Industrial Court does have jurisdiction to interfere in incomplete Disciplinary proceedings including the ancillary questions that if it does have such powers, under what circumstances can it do, so as well as whether in the present matter, such circumstances were established.

[13] The question whether the Industrial Court has power or jurisdiction to interfere in incomplete disciplinary proceedings by making such orders as an interdict to such proceedings or certain declarations having the effect of interfering with a disciplinary hearing has been a subject of several judgements of the Industrial Court, the Supreme Court as well as commentaries by certain eminent writers on the subject. It has been widely agreed that, the Industrial Court should be slow in doing so except in exceptional circumstances. The premise for the Industrial Court being slow in interfering in incomplete disciplinary proceedings is the realization that discipline at the work place is a preserve of management in exercise of its Managerial Prerogative.

[14] We agree with the extract from one of the celebrated writers in Labour Law, Professor Grogan in his book titled **"Workplace Law", 9th Edition, at page 91**, to which we were referred by Mr Jele for the Respondent, where the position was expressed as follows:-

> *"The power to prescribe standards of conduct for the Workplace and to initiate disciplinary steps against transgressors is one of the most jealously guarded territories of Managers everywhere, forming as it does an integral part of the broader right to manage, or "Managerial prerogative."*

[15] This excerpt does no more than underscore the significance of the employer's right to deal with disciplinary matters without interference from such structures as the courts, so as to enable him or her manage the workplace by ensuring adherence by employees to the standards of conduct set by him, thus ensuring that there is the observance of discipline by the employees.

[16] The preserve of the employer to manage the workplace has been recognized in several judgements of the Industrial Court and this Court. In **Sazikazi Mabuza V Standard Bank of Swaziland Limited And Another, Industrial Court Of Swaziland, Case No. 311/2007** the position was expressed as follows at Paragraph 30:-

> *"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."*

[17] The Industrial Court in that manner went on to trace the foundations of that principle to what it referred to, still at paragraph 30 as the "long established principle in our courts that as a general rule a superior court will not entertain an appeal or application for review, when such appeal or review seeks to interfere with uncompleted proceedings in an inferior court." This rule or principle was traced to such cases as **Lawrence V Assistant Magistrate, Johannesburg 1908 TS 525; Walhaus V Additional Magistrate, Johannesburg 1959 (3) SA 113 (A) and Ismail And Others V Additional Magistrate, Wynberg & Another 1963 (1) SA 1 (A)**.

[18] During the hearing of the matter, Mr Magagula for the appellant's stand point was that he was not aware of any statutory provision which stated that the Industrial Court has no power to interfere in incomplete disciplinary proceedings. Whereas he may perhaps be correct about the existence of a statutory provision to that effect; he certainly would not be correct that there is no existence of a legal principle to that effect given what has already been cited above. Clearly this was erroneous view from Mr Magaugla as it cannot now be denied that what he is disputing is now an established practice in the Industrial Court and its genesis has been established in the foregoing paragraph including its existence as a rule or principle now, as set out in various judgements of the Industrial Court and the Industrial Court of Appeal, which include **Sazikazi Mabuza V Standard Bank of Swaziland Limited and Another (Supra)**. **Ndoda Simelane Vs National Maize Corporation, Industrial Court Case No. 453/2006**, **Graham Rudolf V Mananga College and Another, Industrial Court Case No.94/2007** as well **Bhekiwe Dlaminni V Swaziland Water Services Cooperation I.C.A. Case No.13/2006 and Swaziland Electricity Board V Michael Bongani Mashwama & Others I.C.A. Case No.21/2000.**

[19] In the **Ndoda Simelane V National Maize Cooperation (Supra) judgement,** the position was stated briefly as follows at paragraph 19.3 of the said judgement:-

> *"The Court is loathe to usurp the discretion of the chairperson of a disciplinary enquiry unless he has unreasonably fettered or abdicated his discretion (CF. Mahumanis Case at page 2315 para 14.)*

[20] In the **Graham Rudolph V Mananga College Judgement (Supra**) the position that a court is reluctant to interfere in incomplete disciplinary proceedings was captured in the following words at paragraph 46 of the unreported Judgement:-

> *"The Court has often expressed its reluctance to interfere with the prerogative of an employer to discipline its employees or to anticipate the outcome of an incomplete disciplinary process. See **Bhekiwe Dlamini V Swaziland Water Services Corporation (ICA Case No. 13/2006); Thobile Bhembe V Swaziland Government And Others (I.C. Case No.5/2001). Swaziland Electricity Board V Michael Bongani Mashwama & Others (ICA Case No. 21/2000)**.*

[21] It therefore cannot be true to say that there is no principle of law which decrees that the Industrial Court has no power to interfere in incomplete disciplinary proceedings as Mr Magagula wanted to suggest. What is true is that such a rule is more a general one whose exception is that the Industrial Court will only interfere in incomplete disciplinary proceedings in very rare instances where there are exceptional or special circumstances. Put differently it is said this will be where an injustice is bound to occur if the Industrial Court does not interfere. It has in fact been said that this will happen in those instances where irreparable harm or prejudice is bound to be occasioned the applicant.

[22] To underscore this exception to the general rule the Industrial Court put the position as follows in paragraphs 34, 35, 36 and 37 of the **Sazikazi Mabuza V Standard Bank and Another (Supra) Judgement,** which are in our view apposite herein.

> *"34. We do not think that any distinction can or should be drawn between statutory disciplinary tribunals and private disciplinary enquiries in the application of the* ***Walhaus principles*** *(i.e. Principles from the case of Walhaus V*

Additional Magistrate, Johannesburg 1959(3) SA 113 (A), referred above). The notion that the Industrial Court may intervene in uncompleted disciplinary proceedings " in rare cases where [a] grave injustice might otherwise result or where justice might not by other means be obtained" appeals to ones sense of justice.(emphasis and bracketed explanation added).

35. *The intervention of the Court, though in the nature of a review, is based upon the Court's power to restrain illegalities and promote fairness and equity in labour relations.* ***Van Wyk V Midrand Town Council & Others (Supra) 187-8. Section 8 (4) of the Industrial Relations Act 2000*** *as read with* **Section** ***4(1)(6)***.

36. *Whether the Court will intervene depends on the facts and circumstances of each particular case. It is not sufficient merely to find that the chairperson of the disciplinary enquiry came to a wrong decision. In order to justify intervention the Court must be satisfied that this is one of those rare cases where a grave injustice might result if the chairperson's decision is allowed to stand.* ***(See Weber and Another V***

Regional Magistrate Windhoek and Another 1969(4) SA 394 (SWA) aat 399 D).

37. *The possibility of the Court being overwhelmed by a flood of ill-conceived or underserving applications for relief cannot justify the court refusing altogether to entertain applications for intervention in disciplinary proceedings – otherwise relief would be denied to those rare cases where a miscarriage of justice might otherwise occur”*.

[23] The position is therefore settled in our law that despite the general rule captured above, in certain exceptional circumstances, the Industrial Court may interfere in incomplete disciplinary proceedings. That principle having been established, the next question is whether in the present matter such exceptional circumstances were established.

[24] It was the finding of the Court *a quo* that whereas the appellant’s complaint had been that he was charged by the wrong person as he did not report to the First Respondent who charged him; and that there was no offence he had committed for him to be charged, as well as that the disciplinary proceedings

against him were irregular and that he therefore could not be expected to attend such proceedings, there was nothing in those issues that could not be determined or decided by the Chairman of the disciplinary enquiry. They were in fact the preserve of the chairman in as much as nothing exceptional was disclosed in them.

[25] In fact according to the court *a quo,* the appellant had failed to show that there was the potential of a miscarriage of justice if he attended the disciplinary hearing. It concluded that the applicant had jumped the gun by coming to court instead of attending the disciplinary hearing and asking the chairperson to make a determination of all the issues he was relying upon before the Court *a quo*.

[26] The exact words of the Court *a quo* were captured as follows:-

> *"The chairperson is yet to exercise his /her discretion on the issues. We have no reason to believe that he will not exercise his/her discretion judiciously. While the court was not told if the chairperson of the disciplinary hearing is external and independent, we are still loathe to usurp the discretion of the chairperson unless he has*

unreasonably fettered or abdicated his discretion. See ***Ndoda Simelane V National Maize Corporation (PTY) LTD Industrial Court Case No.453/06****."*

[27] We are convinced that the court *a quo* cannot be faulted. The appellant had not shown why the chairman of the disciplinary enquiry would not be able to decide the issues he had raised. It is clear he had not shown that he stood to suffer an irreparable harm or a grave injustice if the court *a quo* did not interfere. He had in other words not established exceptional circumstances. It cannot amount to an exceptional circumstances in the context of the above stated principle that the appellant was exercising freedom of expression as allowed by the constitution as alleged by Mr Magagula. We are sure if it was inappropriate for him to be treated in that manner in violation of a right, the chairman should be able to decide that. One can only comment in passing that it is not usual for an employee to tell his superior that he was a liar. We are however doubtful a single incident of that can yield irreparable damage for an employee; the more reason why the chairperson should be able to deal with such an incident.

[28] According to the **Graham Rudolf V Mananga College (Supra) Judgement** at paragraph46 it was stated that the court a quo would be entitled to interfere in a case where there is a :-

> *"…a procedural unfairness which may cause the applicant irreparable harm".*

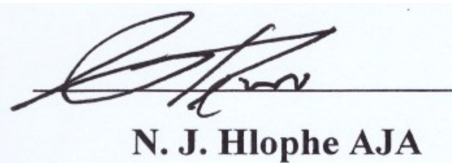
[29] Similarly in **Sazikazi Mabuza V Standard Bank of Swaziland and Another, Industrial Court Case No. 311/2007** at **paragraphs 38 and 39** the Industrial Court said the following which I agree restates the position on when the court *a quo* would be entitled to interfere in incomplete disciplinary proceedings :-

> *"38. It has been held that the failure to furnish sufficient particularity to the disciplinary charges is likely to result in a grave injustice. See* ***Van Wyk V Midrand Town Council And Others (Supra) 188-9; Mhlambi V Matjabeng Municipality and Another (Supra)****…*
>
> *39. In the case of* ***Rudolph V Mananga College (I.C. Case No.94/2007)*** *this court did not require an employee to wait until the termination of a disciplinary enquiry before*

> *challenging the refusal of a Chairman to recuse himself. We stated that the court has often expressed its reluctance to interfere with the prerogative of an employer to discipline its employees or to anticipate the outcome of an incomplete disciplinary process. At the same time, the Court will interfere to prevent a procedural unfairness which may cause the applicant irreparable harm”. (Emphasis added)*

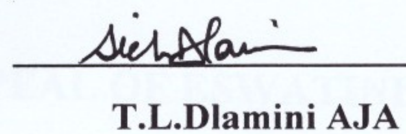
[30] We agree that the appellant did not establish any procedural unfairness that would cause him an irreparable harm just as he did not show that he was going to suffer a miscarriage of justice if the court did not interfere. In other words he did not show that the Chairman of the disciplinary hearing would not be able to determine the issues complained of.

[31] Consequently and for the foregoing reasons we are convinced that the court *a quo* did not misdirect itself in any way in issuing the judgement it did. For that reason, the appellant’s appeal does not succeed; it is dismissed.



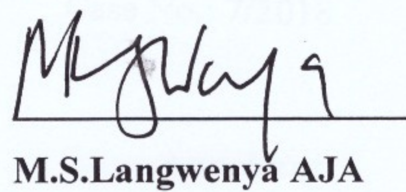
N. J. Hlophe AJA

I agree



T.L.Dlamini AJA

I also agree



M.S.Langwenya AJA