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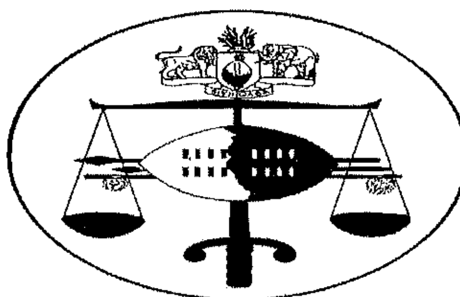

IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 8/2020

In the matter between:

TREVOR SHONGWE — Appellant

and

MACHAWE SITHOLE N.O. — First Respondent

ESWATINI ROYAL INSURANCE CORPORATION — Second Respondent

NEUTRAL CITATION: *Trevor Shongwe v Machawe Sit/tole and Another [2021] (08/2020) SZICA 1 (JO August 2021)*

CORAM: NSIBANDEJP, VAN DER WALT JAANDMAZIBUKO JA

HEARD 04, 05 May 2021

DELIVERED: 10 August 2021

Summary

Appeal -jurisdiction of Industrial Court of Appeal - expressly restricted to questions of law by <u>*section 19(1)*</u> *of the Industrial Relations Act 2000 - such a peremptory statutory provision*

Appeal - basic principles pertaining to unambiguous and decisive distinction between questions of law, questions of fact and questions of exercise of judicial discretion restated - an appeal on a question of law, shorn of all embellishments simply, means an appeal in which the question for argument and determination is *what the true rule of law is on a certain matter - includes where Court a quo had overlooked a principle of law and failed to apply same because of such oversight*

Appeal - point of departure in determining a question of law would be to deem the Court a quo 's *factual findings to be correct and Industrial Court of Appeal may also have regard to uncontested facts appearing fi·om record of the proceedings a quo insofar as such facts are not inconsistent with those found by the Court a quo*

Recusal of Chairman of disciplinary tribunal - basis principles restated

Stay of disciplinary proceedings pending determination of Court proceedings - filing of Court application does not automatically stay disciplinary proceedings but

not a prerequisite that application to Court for such stay has to be preceded by application for stay before Chairman of disciplinary tribunal

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JUDGMENT

VAN DER WALT,JA A

BACKGROUND

[l] The factual matrix underlying this appeal, briefly, is that the Appellant Employee, as Applicant, during the course of a disciplinary enquily approached the Court *a quo* on an urgent basis for a stay of disciplinary proceedings against him pending review of the refusal of the First Respondent (hereinafter referred to as the "Chainnan,") an attorney appointed as Chairman by the Employer (the Second Respondent,) to recuse himself.

[2] The basis for the recusal sought, in essence, was that criminal proceedings had been instituted against a fellow employee relating to the same subject matter serving before the Employee's disciplinary tribunal and that the law film of which the Chainnan is a partner, was acting as the attorneys for the other employee. The Employee in his Founding Affidavit contended amongst others that: ***"A scenario may arise during the disciplinary hearing whereby as an accused employee, I may argue that it is the [Chairman's]***

client that was

negligent for the transaction complained of and should be held liable. There is no way I can get justice from the [Chairman] if I were to make those allegations since this is his law firm's client. "

[3] The Chairman's Ruling dismissing the application for his recusal, contain statements by the Chairman to the effect that he did not personally know the other employee or the matter in question but all he knew, as at the time that the hearing commenced, was that it had been a matter for bail handled by his partner, and that the matter had since been taken over by other attorneys.

[4] The main relief sought by the Employee was setting aside the Chairman's refusal to recuse himself and the Employee in his Founding Affidavit formulated his Grounds for Review as follows:

"GROUNDS FOR REVIEW

13. *The ruling by the 18[1] Respondent is grossly unreasonable, irrational, improper and unlawful in that;*

13.1. *The failure by the 18[1] Respondent ought to have declared the obvious conflict of interest arising from his office representing a fellow employee in respect of the same charges I am facing.*

13.2. *The failure by the 18[1] Respondent to declare the conflict of interest in the matter is not just an irregularity that has the potential to taint the outcome of the disciplinary hearing but is in fact bordering on unethical and unprofessional conduct.*

13.3. *It matters not that the 2nd Respondent knew of the potential conflict in agreeing to the appointment of the 18[1] Respondent, but the duty was upon the latter to do the 1·ight thing and recuse himself in the matter,*

or, at the very last declare to the parties that his office is representing the resigned employee who is also facing criminal charges on similar facts.

I 3.4. When consulting with their client (Linda Nzuza) who also happens to be my former colleague/co-employee, and in moving the bail application on his behalf, certain confidential disclosures were made to the office of the pt Respondent by this employee relating to the same charges which I am also facing.

13.5. The pt Respondent is more likely to hold me liable and attribute everything upon me whilst seeking to have his office's client absolved ji·om the charges.

I 3.6. It is immaterial that the former employee is represented by the pt Respondent's partner. The paramount issue is that the former employee is a client of the P[1] Respondent's law firm and as such he might be treated more favourably than me since I am not a client to 1'[1] Respondent's law firm."

[5] The Employer opposed the application *inter alia* on the *in limine* basis that the Employee should have applied to the Chairman for a stay of the disciplinary proceedings before approaching the Court *a quo*. The Court *a quo* was not persuaded by this argument and in dismissing same, stated that:

"To refer the matter back to the chairman, solely for the application for a stay and thereafter have the Applicant come back to this very same Court would not bejust. He is already here. In the specific circumstances of this case, we find it to be prudent and fair to dismiss the point in limine in respect of the stay."

[6] The Court *a quo* proceeded to determine the matter on the merits as follows:

"25. We understood Counsel for the Applicant, Mr B.S Dlamini, as advancing the same argument[1] *during the hearing.* ***He argued that the gravamen of the Applicant's complaint, is not the apprehension of bias, but is institutional basis*** *emanating fi·om the fact that the 18*[1] *Respondent is partner in the same law firm as the attorney that represented the Applicant's ex colleague ...;*and

"28. When looking at the particular circumstances of this case, more especially the fact that at the time the 18[1] *Respondent was seized with the matter he did not have any lmowledge of the details of the matter that his partner was handling.* [sic] *When we consider the allegations that have been made in the founding affidavit of the Applicant against the 1st Respondent as grounds constituting his allegedly* [sic] *bias.* ***<u>They are to the effect that, he acted irregularly by not declaring an obvious conflict of interest arising from the office representing a fellow employee. We find that such allegations are not supported by facts.</u>*** [2]

[3]*At the time the Applicant deposed to the affidavit the l8*[1] *Respondent had already made the ruling we would have expected the Applicant to deal with contents of the 18*[1] *Respondent's ruling. The 1st Respondent outlined in his ruling that he did not /mow at the time he took the assignment that his partner, Mr Magagula, had represented the ex-colleague of the Applicant.* "

[7] The Court *a quo* thereafter decided and dismissed the application.

B THE APPEAL AND THE CROSS APPEAL

[8] Both parties were dissatisfied with the outcome of the case, culminating in the instant appeal and cross-appeal, the Employee being represented by Mr B. S. Dlamini and the Respondent by Mr Z. Jele:

[1] i.e. institutional bias
[2] Own abbreviation
[3] Own emphasis and underlining

B.1 **APPELLANTS'S GROUNDS OF APPEAL**

"1. The Court a quo erred in law and in fact in holding that the Appellant's cause of action was founded on a ground of 'institutional bias ' as opposed to a determination of whether the appointed chairperson was 'ethically or legally conflicted' to sit as chailperson.

2. *The Court a quo erred in law and in fact in not holding that the appointed chairperson of the disciplinary hearing (1st Respondent) was ethically and/or legally conflicted to sit as chairperson of the disciplinary hearing as his law firm was also defending another resigned employee in a criminal matter arising from the same transactions in which the Appellant is charged with by his employer.*

3. *The Court a quo erred in law and in fact in not holding that in the absence of an affidavit to the contrary, the l81 Respondent's law firm was still representing the resigned employee charged on the same transactions as the Appellant.*

4. *The Court a quo erred in law and in fact in not holding that it was legally wrong/or the 2nd Respondent to oppose the application in the Court a quo on behalf of the 1st Respondent as this amounted to relying on 'hearsay evidence' on the factual involvement of the 1st Respondent's law firm in the matter.*

5. *The Court a quo erred in law and in fact in issuing a final judgement without one member of the Court consenting to such a judgement. The structure of the Industrial Court is such that all the members of the Court and the Presiding Judge must agree before a judgement can be issued to the parties."*

B.2 **RESPONDENT'S GROUNDS OF CROSS-APPEAL**

"a) The Court a quo erred in law and misdirected itself in finding that it was nonessential for the Court to wait for the Chairman of the disciplinary hearing to first give out pronouncement on the issue of stay. The Court ought to have found that the chairperson should be first given an opportunity to deal with the issue of stay.

b) The Court a quo erred in law and misdirected itself in finding it had jurisdiction to intervene in disciplina,y hearings that are incomplete whereat it had found that the courts should be slow to interfere in incomplete internal disciplina,y hearings. The Court a quo ought to have found that the Applicant failed to establish exceptional circumstances warranting the courts intervention. The Appellant reserves the right to supplement the grounds of this appeal. "

C PRELIMINARY MATTERS

[9] The Employee filed a Notice to Raise a Point *In Limine* to the effect that the cross-appeal was filed out of time and that no condonation had been applied for. However, Rule 23(1) provides that: *"It shall not be necessary for a respondent to give formal notice in terms of Rule 6 of a cross appeal but every respondent who intends to apply to the Industrial Court of Appeal for a variation of the order appealed against shall, not less than four days before the hearing, give notice of such intention to any parties who may be affected by such variation"* and this point was not pursued on behalf of the Employee.

[10] The Employee's Grounds of Appeal Court were styled that the Court *a quo* " *... erred in law and in fact..."* and this Court *mero motu* raised the issue that **section 19** of the Industrial Relations Act, 2000 (hereinafter referred to as the "Act") restricts appeals to questions of law only. Mr Jele readily and in our view correctly, abandoned the second ground of the cross-appeal relating to the existence or absence of exceptional circumstances, as constituting a question of fact and not of law. Mr Dlamini sought to persuade this Court that all the Employee's Grounds of Appeal constituted questions of law, Mr Jele contending to the contrary.

[11] In the end result, the appeal revolved around the issues whether the Employee's Grounds of Appeal constituted questions of law and if so, whether the Court *a quo* e1Ted in respect thereof and/or in respect of the remaining ground of the cross-appeal. Since it appears that the distinction between questions of law and other questions may have become obscured over time, the parties were afforded the opportunity to file supplementary Heads of Argument thereon and in respect of ancillary topics.

D PARTICULAR APPLICABLE LEGAL PRINCIPLES

D.1 APPEAL TO INDUSTRIAL COURT OF APPEAL

[12] **Section 19(1)** of the Act is a peremptory provision which stipulates that:

"There shall be a right of appeal against the decision of the Court 011 a question oflaw to the Industrial Court of Appeal" and **Rule 6(4)** of the Rules of this Court requires that: ***"The notice of appeal shall set forth concisely and under distinct consecutively numbered heads the grounds of appeal and the points of/aw*** [4] ***upon which the Appellant relies."***

[13] What a question oflaw entails for purposes of an appeal to this Court, has been authoritatively pronounced upon by the Eswatini Courts with reference to principles expounded by the South African courts in respect of **section l 7C(l)(a)** of the South African Labour Relations Act, 28 of 1956 which provides that: ***"(a)ny party to any proceedings before a Labour Appeal Court***

[4] Own underlining

may appeal to the Appellate Division ... against a decision or order of the Labour Appeal Court ***<u>(except a decision on a question of fact)</u> . . .***" These principles have become incorporated in our law, as appears from *inter alia* the following local judgments: [6]

Swaziland Electricity Board v Collie Dlamini: [7]

> "*[6] The question that immediately announces itself in this enquiry is what* is *meant by a question of law as opposed to a question of fact.*
>
> *In* **MEDIA WORKERS UNION OF SA** *v* **PRESS CORPORATION OF SA LTD,** *1992 (4) SA 79l(A) @ 795 EM GLOSSKOPF JA referring to SALMOND ON JURISPRUDENCE 12*[11]*' edition @ 65-75 stated that:*
>
> ***<u>"The term "question of law" ... is used in three distinct though related senses. In the first place it means a question which a court is bound to answer in accordance with a rule of law - a question which the law itself has authoritativelv answered to the exclusion of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and iustice of the matter. In a second and different signification, a question of law is a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter.</u>*** *A third sense in which the expression "question of law" is used arises from the division of judicial functions between a judge and ju,y in England and formerly, in South Africa. The general rule* is *that questions of law in both the aforegoing senses are for the judge, but that questions of fact (that is to say, all other questions) are for the jury."*
>
> *And at 796, the learned Judge of Appeal referring to the notions of question of fact and question of judicial discretion quoted SALMOND where the author states that:*

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[5] It is important to note that there are significant differences between Eswatini and South African labour law and reference to extracts from South African authorities herein, are confined to concepts common to both legal systems

[6] Own underling and emphasis

[7] ***Appeal Case 2/2007*** as quoted in ***The Chairman, Civil Service Commission v Isaac M.F. Dlamini /14/2015} [2016} SZICA 01 /31 March 2016}***

"Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose. Matters of right and judicial discretion are not the subject of evidence and demonstration, but argument, and are submitted to the reason and conscience of the court. In determining questions of fact the court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the accused has committed the criminal act with which he is charged is a question of fact; but whether, if guilty, he should be punished by way of imprisonment or only by way of fine, is *a question of judicial discretion or of right. ...*

Matters and questions which come before a court of justice, therefore, are of three classes:

(1) ***Mutters and questions of law - that is to sav, ull tlwt are determined bv authoritutive legal principles:***

(2) ***Matters und questions ofiudicial discretion - thut is to sav, ull matters und questions as to what is right, iust, equituble, or reasonable, except so fur us determined bv law*.**

In mutters of the first kind, the dutv of the court is to ascertain the rule of law and to decide in uccordunce with *it*. ***In matters of the second kind, its dutv is to exercise its morul iudgment in order to ascertain the right und iustice of the case. In mutters of the third kind, {fact[its dutv is to exercise its intellectual iudgement on the evidence submitted to*** *it* ***in order to ascertuin the truth.***"[8]

13.2 Fmiher guidance can be found in ***Registrar of the High Court*** & ***2 Others v Subuthu Faith Gumedze*** [9] wherein it was held in effect, if the appropriate law was not applied because of an oversight, that there had been a failure in law and that the question, therefore, is ultimately one of law:

'***Appeal Case 2/2007*** as quoted in ***The Chairman, Civ/1 Service Commission v Isaac M.F. Dlamini (14/2015) [2016] SZICA 01 {31 March 2016):*** *Own emphasis and underlining*

[9] ***(5/2013) [2012] SZICA 9 {29th October 2013),*** *Paragraph [BJ, own emphasis and underlining*

"[8] *We must point out ji-om the onset that in as much as at first sight the question as to whether there was consultation or not appears to be one of fact, the matter raises a point of law in the circumstances of this case. It is our considered view that* ***the Honourable Judge in the court a quo failed in law when he overlooked the principle of our law*** *as laid down in the* ***Plascon Evans Paints Ltd v Vein Riebeeck Paints (Pty) Ltd 1984 (3) 623 (A)*** *at 634-635 as fully demonstrated later in this judgment. The question before court therefore is ultimately one of law and the appellant adopted a correct procedure by appealing.* "

[14] Since an appeal to this Court on a question of fact (and /or matters of judicial discretion) is precluded by the Act, the point of departure in dete1mining a question of law, would be to deem the Court *a quo* 's factual findings to be correct since same are not capable of being disturbed on appeal to this Court. In ***Standard Bank of Swaziland Limited v Wiseman Simelane***[10] the following excerpt from **National Union of Mineworkers v East Rand Gold and Uranium Co Ltd**[11] was endorsed:

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

[15] Logic would dictate that a Court of Appeal is also entitled to have regard, in addition, to uncontested facts appearing from record of the proceedings *a quo* insofar as such facts are not inconsistent with those found by the Court *a quo.*

1o **Case 25/2001 dated 18th November 2004**

11 **1992 (1) SA 700 {A)** at 723 E-F, cited with approval in the **Media Workers Association** case referred to in the ***Swaziland Electricity Board v Collie Dlamini*** judgment *supra*

12 *Cf* **Performing Arts Council of The Transvaal v** Paper **Printing Wood And Allied Workers Union and Others 1994 (2) SA 204 {A)** at 214 E-G

D.2 RECUSAL IN THE WORKPLACE

[16] Mr Jele referred this Court to the following authorities and in particular to extracts dealing with recusal within the context of the common law as well as within the context of institutional bias:[13]

16.1 ***Swaziland Development and Savings Bank and Savings Bank and Tennyson Nzima, Industrial Court Case No: 613/2008,*** citing the case of **Enrico Bernert v ABSA Bank Limited:**

"The test for recusal which this Court has adopted is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts that a judicial office,· might not bring an impartial and unprejudiced mind to bear 011 the resolution of the dispute before the Court.

The court aligns itself with the test as stated by the Constitutional Court of South Afi•ica. In the Enrico Bernert case (supra) the court quoted with approval the following statement fi·om the case of the President of the Republic of South Africa & Others v South Afi·ican Rugby Union & Others, 1999 (4) SA 147 (CC) at paragraphs 36-9 that:
"It follows fi·om the foregoing that the correct approach to this application for the ***recusal of members of this Court is objective and the onus of establishing*** *it* ***rests upon the Applicant. The question is whether a reasonable, objective and informed person would 011 the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and the submissions of Counsel."***

16.2 Grogan, **Workplace Law (9th Ed)** at pages 197 to 198:

[13] Own emphasis and underlining in cases to follow

"The point of disciplinary hearing is to enable the presiding officer to weigh the evidence for and against the employee and to make an informed and considered decision. This presupposes that presiding officers must have, and keep, an open mind throughout the proceedings. ***The rule against bias emanates from administrative law, which requires that an officer presiding at a disciplinary hearing not only be impartial in fact, but also that there should be no ground for even suspecting that his or her decision might be shaped by extraneous factors, even if this is in fact not the case.*** *Decisions of administrative tribunals have been set aside merely on the ground that the person charged might reasonably suspect that the presiding officer was biased.*

Similar considerations apply in employment law, which requires that presiding officers should not have been involved in the incident which gave rise to the hearing, or have any possible personal interest in the outcome of the dispute, or have been involved in trapping the employee or otherwise have harboured a demonstrable suspicion against him.

If employees have reason to doubt that a presiding officer is impartial, they may request the presiding officer to recuse himself or herself. If the presiding officer refuses such an application when recusal was called for, the employee does not waive the right to a fair hearing by withdrawing, and the dismissal may be held to procedurally unfair. "

16.3 ***Graham Rudolph v Mananga college and Another, Industrial Court Case No: 94/2007:***

"33. The application of the common law test for disqualifying bias is *not, in our view, inappropriate to the context of employment. Confidence in the disciplinary process is an important part of harmonious industrial relations and the avoidance of conflict at the workplace. Grave consequence, including the loss of livelihood, may flow from the disciplinary enquiry.* ***Impartiality of the presiding officer and the appearance of independence is as important in private disciplinary hearings as in judicial and public administrative hearings, subject to proper allowance being made for the 'institutional bias' implicit in the employment disciplinmy process".***

16.4 Lynette ***Groening v Standard Bank Swaziland and Another, Industrial Court Case No 222/20008:***

"6. This court laid down the test for disqualifying bias in the employment context in the case of ***Graham Rudolph v Mananga College & Another (Unreported IC Case No. 94/2007),*** *where we held that the common law test of "a reasonable suspicion of bias" applies but subject to proper allowance being made for the "institutional bias" implicit in the employment disciplinary process.*

7. ***The notion of "institutional bias" allows a person to chair a hearing even where his connection with the institution concerned might arouse a suspicion of inevitable bias, provided there is no probability that he is actually biased.*** *This kind of bias* is *accepted as necessarily built into the employment internal disciplinary process, wherein the presiding officer is a representative of the employer - see* ***Graham Rudolph (supra) paragraphs 27 - 33*** *and the cases cited therein.*

8. *Whilst institutional bias normally arises when a manager from within the employer's institution* is *appointed to preside over a disciplinary hearing, it may arise when an outsider* is *appointed - for instance a manager ji·om a related company, or an officer from the Federation of Swaziland Employers, or - as in this case - a professional engaged to serve as presiding officer.*

9. ***In our view, any appearance of bias arising from tlte appointment of the employer's attorney to preside over a disciplinary hearing is a matter of institutional bias. It arises solely from tlte professional connection between the institution and the attorney. In the context of an internal disciplinary hearing, the perception of bias which arises from the professional attorney client relationship is as acceptable as the bias implicit in a hearing chaired by a manager of the employer. Indeed, an attorney is likely to be perceived as more impartial than a manager.***

10. *Naturally an attorney may be disqualified from presiding if he/site has any personal interest in the case over and above his professional remuneration or if there is any other feature or involvement which precludes him/her from*

!tearing the matter fairly and impartially and reaching an i1tdepende11t decision. "

D.3 **STAY OF DISCIPLINARY PROCEEDINGS PENDING DETERMINATION OF APPLICATION TO INDUSTRIAL COURT *re* CHAIRMAN'S REFUSAL TO RECUSE**

[17] There does not appear to be any statute or case law in point that deals with the question as to whether or not, in the case of a Chairman's refusal to recuse himself or herself, an application for a stay of the disciplinary proceedings pending determination of a Court application, has to be made to the Chai1man before the Court may be approached for a stay. Absent clear authority, a process of deduction will have to be resorted to when this issue is considered later hereunder.

E **APPLICATION OF THE LAW TO THE GROUNDS ADVANCED AS GROUNDS OF APPEAL**

E.1 **APPELLANT'S GROUNDS OF APPEAL**

E.1.1 First Ground i.e. ***"The Court a quo erred in law and in fact in holdi1tg that the Appellant's cause of action was founded on a ground of 'institutional bias' as opposed to a determination of whether the appointed chairperson*** [14] ***was 'ethically or legally conflicted' to sit as chairperson.***

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[14] As a matter of interest, the Latin word *"manus"* means the hand or handle, resulting in words such as *"manual," "manufacture"* and *"manuscript."* The word *"chairman"* would designate the handler of the chair, or the hand controlling the chair. In this context, it is not gender specific.

[18] Insofar as the purport of this Ground is that the Court *a quo* applied the wrong legal principle/s to the facts, it would constitute a question of law in the sense of an enquiry as to " ... ***what the true rule of law is on a certain matter.*** "

[19] The leitmotif of the Employee's Grounds for Review and later the Employee's Grounds of Appeal, was that representation of the other employee by the Chairman's law firm constituted a conflict requiring recusal. The predominant tenor of the Judgment of the Comt *a quo* was that the matter stood to be decided on the basis of ***institutional bias,*** which as is set out above, would come to the fore where there is a connection between the Employer and the Chairman.

[20] The approach adopted by the Comt *a quo* in this regard, *prima facie,* appears to be erroneous in that the complaint *in casu* was legal representation of a fellow employee, which did not relate to or found a *nexus* between the Chairman and the Employer. Secondly, the grounds for review as set out in the Founding Affidavit alluded to earlier above, expressly refer to a conflict of interest com1ected to a fellow employee.

[21] Muddying the waters somewhat is the statement by the Comt *a quo* in Paragraph 25 of the Judgment (repeated for ease of reference) reading that: *"25. We understood Counsel for the Applicant, Mr* ***B.S*** *Dlamini, as advancing the same argument*[15] *during the hearing.* ***He argued that the gravamen of the Applicant's complaint, is not the apprehension of bias, but is institutional basis*** *emanating from the fact that the 1'1 Respondent is partner in the same*

[15] i.e. institutional bias; own emphasis and underlining

law firm as the attorney that ***__represented__*** *the Applicant's ex colleague ....* This would suggest that Mr Dlamini, during the course of argument, changed tack from the point of departure set out in the Founding Affidavit but on an overall perspective, one is inclined to give Mr Dlamini the benefit of the doubt in the sense that his submissions may have been misunderstood or misconstrued by the Court *a quo.*

[22] In any event, it appears evident that institutional bias was not the appropriate and therefore not the true or conect rule of law governing the factual matrix in question.

[23] Yet, the matter did not end there in that the Court *a quo* in fact also dealt with the Employee's allegations as to a conflict posed by *ongoing* legal representation and more specifically, in Paragraph 28 of the Judgment quoted above, by holding, in a somewhat terse *ratio decidendi*, but a *ratio decidendi* never the less, that: ***"They are to the effect that, he acted irregularly by not declaring an obvious conflict of interest arising from the office representing a fellow employee. We find that such allegations are not supported by facts."***

[24] The Court *a quo* in effect made a factual finding that there was no ongoing representation as was alleged by the Employee, and this factual finding cannot be disturbed on appeal. On the face of it, therefore, this ground of appeal is doomed to fail.

[25] However, what appears not to have been taken into account by the Court *a quo,* was that it was common cause that the Chairman's firm, at least at some

stage, had acted as the other employee's legal representatives i.e. that there had been such legal representation *per se.* A fact that is common cause would have the same legal effect as an express factual finding, incapable of being disturbed on appeal and thus serving as a point of departure for detennining a question of law.

[26] It is evident that the Court *a quo* had overlooked the legal implications oflegal representation *per se* of a fellow employee implicated in the same alleged misconduct. This Court cannot simply turn a blind eye to the potential ramifications of an issue which may have demanded closer enquiry and scrutiny but did not enjoy same. Not only are the Comi *a quo* and this Comi enjoined by the Act to ".. *.promote fairness and equity in labour relations"* but in terms of its Rule 7, this Comi shall not be confined to the grounds stated in the notice of appeal, which would permit for re-examination of this evident oversight.

[27] A detailed analysis as to whether the legal duties of att01neys towards their clients (including as regards confidentiality) endure after tennination of mandate by either, is not necessary at this junction. The issue can be simply considered against the backdrop of the following statements in the ***Lynette Groening*** case and by **Grogan,** referred to above:

"10. ***Naturally an attorney may be disqualified from presiding if he/she has any personal interest in the case over and above his professional remuneration or if there is anv other feature or involvement which precludes him/her from hearing the matter fairlv and impartially and reaching an independent decision"*** and ***"The rule against bias emanates fi·om administrative law, which requires that an officer presiding at a disciplinary hearing not only be impartial in fact, but also that there should***

be no ground for even suspecting that his or her decision might be shaped by extraneous factors, even if this is in fact not the case."

[28] The Employee raised the possibility that he may argue that that the other employee was negligent and should be held liable. A possibility of conflict or counter-accusations between the relevant co-accused employees therefore need to be taken into account. It does not require a stretch of the imagination that any possible finding adverse to the Employee by the Chairman which directly or indirectly favours the other employee, would immediately raise the spectre of bias of loyalty to a former client.

[29] It does not matter whether there is actual bias or not and whether or not such legal representation was only temporary or still ongoing; the crucial enquiry is whether it can be said that the facts and circumstances are such as to bring about, in the mind of a reasonable litigant, *"even a suspicion"* that the Chairman's decision *might* be shaped by the extraneous factor of such representation.

[3O] The applicability of the rule against bias in the case of legal representation *per se*, evidently was overlooked by the Court *a quo* and the Court *a quo* did not apply same to the facts. [17]

In the end result, the appeal should be allowed on this basis.

E.1.2 Second to Fourth Grounds of Appeal

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[16] Own underlining

[17] *Cf* ***Registrar of the High Court** & **2 Others v Sabatha Faith Gumedze*** *supra*

[32] These grounds revolve around the issue of conflict, which has been decisively addressed above. It therefore is not necessary to consider the further grounds, including determining whether these Grounds constitute questions of law or questions or fact.

E.1.3 Fifth Ground i.e. ***"The Court a quo erred in law and in fact in issuing a final judgement without one member of the Court consenting to such a judgement. The structure of the Industrial Court is such that all the members of the Court and the Presiding Judge must agree before a judgement can be issued to the parties."***

[33] This ground is defeated by **<u>Section 8(6)</u>** of the Act, which provides that:

"(6) Any matter of law arising for decision at a sitting of the Court and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the presiding judge of the Court provided that on all other issues, the decision of the majority of the members shall be the decision of the Court."

E.2 **RESPONDENTS' GROUNDS OF APPEAL**

[34] It is trite that the mere filing of an application in the Industrial Court does not in law automatically stay disciplinary proceedings.

[35] The Respondents' remammg Ground of Appeal is to the effect that the Chairman had to pronounce on the issue of a stay first, before the application including the prayer for a stay could be ente1iained by the Court *a quo.* This

indubitably constitutes a question of law in that: ***"the question for argument and determination is what the true rule of law is on a certain matter."*****.** [18]

[36] The Court *a quo* decided this point without reference to any statute law or to case authorities and evidently, did so on a basis of what would be just, prudent and fair. [19]

[37] As authority for the contention that the Chairman first had to decide an application for stay, Mr Jele referred this Court to cases that are to the effect that issues are to be determined by the Chailman first.

37.1 As a general principle, these cases would appear to be persuasive but closer examination of the specifics demonstrate that this cannot serve as a broad and unqualified notm in that specified *"issues"* could be disce1ned only in the cases of ***Mbongseni Nkambule v Majozi Sithole and Another, Case No 7/2018*** and ***Ndoda Simelane v National Maize C01poration, Case No 452/2016.***

37.2 The latter entailed whether the relevant employee had been entitled to legal representation and the main issues in the former were objections that the employee had been charged by the wrong person and that no offence had been committed. None of these cases dealt with procedural mechanisms such as a postponement or a stay.

[18] ***Swaziland Electricity Baard v Callie Dlamini*** case *supra*
[19] Paragraph [5] *supra*

[38] It is the Employee's contention that a preceding stay decision is not required and Mr Dlamini adopted a sweeping argument attacking the very justifiability of the rule that the Industrial Court will only interfere in incomplete disciplinary matters in exceptional circumstances. Mr Dlamini articulated this argument follows:

"It is titus submitted that reading the provisions of the Industrial Relations Act 2000 holistically, there is nothing therein, directly or indirectly; expressly or impliedly, in which it can be said or inferred that the legislature intended that access to the Industrial Court, in the context of disciplinary hearings, should only be allowed in exceptional circumstances. In the contrary, we find provisions that opens the door wide to any aggrieved employee by a decision or action taken by the employer in disciplinary proceedings."

[39] For current purposes, Mr Dlamini's above submission will be considered within the context of an application for a stay only.

[40] The Industrial Comt is a creature of statute and access to it is defined in the Act and the Rules of the Industrial Court promulgated under section 22 thereof. The salient aspects thereof can be summarised as follows:

40.1 Section 8 of the Act vests the Industrial Court with exclusive jurisdiction to hear all matters, be it arising out of enactment or common law, where the dispute pettains to employer-employee relationship, but subject to **sections 17** (arbitration) and **65** (Patt VIII, CMAC.)

40.2 **Section 65,** in turn, is qualified by the Rules, and in particular **Rules 14** and **15. Sub-Rule 14(1)** reads: *"Where a material dispute of/act is not reasonably*

foreseen, a party may institute an application by way of notice of motion supported by affidavit;" **<u>Sub-Rule 14(6)(b)</u>** requires attachment to the applicant's affidavit *"In the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission, unless the application* is *solely for the determination of a question of law"* and **<u>Sub-Rule 14(12)</u>** provides that: *"An interlocutory application or an application for the registration of a settlement agreement an arbitration award or a collective agreement, may be set down on at least four (4) days' notice...."* **<u>Sub-Rule 15</u>** provides for urgent applications, **<u>Sub-Sub-Rule 2(a)</u>** calling *for:* "... *the reasons why the provisions of Part VIII of the Act should be waived.* "

[41] It is clear that there is no provision contained in the Act or in the Rules that stipulates or suggests that disciplinary proceedings have to be stayed formally on application to the Chairman, before the affected employee may approach the Industrial Court for relief in respect of those proceedings, including a Comt application for the stay of those proceedings.

[42] Not only is it for Parliament, and not for the Courts, to make laws governing the Industrial Comt but an overview of case authorities also is counter indicative of a legislative intent that the Chairman should be approached for a stay first.

42.1 None of the authorities that this Comt was referred to, suggest that it is not competent for the Court *a quo* to order a stay unless a stay had been applied for first at disciplinaiy hearing level.

42.2 On the contrary, such prayers are not unlmown: in ***Vikinduku Dlamini v SWANNEPHA (02/14)*** **[2014] SZICA 05 (30 September 2014),** for instance, an order staying the disciplinary proceedings issued by consent and in ***Jeffrey Jele v Maloma Colliery Limited & Four Others (182/13) [2013]*** **SZIC 20 (19 June 2013),** also a recusal review application, there had been a prayer for a stay which ultimately did not require decision since the disciplinary hearing had been postponed.

42.3 That a stay is justified in cases involving recusal, appears from the case of ***Rudolph V Mananga College*** above wherein it was held that it was not a requirement for an employee to wait until the termination of a disciplinary enquiry before challenging the refl.1sal by a Chairman to recuse himself. If so, the question arises whether, at the end of the day, it really matters at which level the application for a stay is made.

42.4 One is mindful that the issue now before Court may not have been raised expressly in the cases refetTed to above but by the same token, the apparent absence of objections in the past would suggest acceptance of such prayers as being appropriate.

[43] It follows from the above and in particular, from the absence of a statutory injunction analogous to compliance with Part VIII of the Act, that an applicant may apply to the Industrial Court as first port of call for a stay of the disciplinary proceedings and consequently, that the question of law raised by the Employer has to be answered in favour of the Employee.

F CONCLUSIONS AND ORDER

[44] For the aforegoing reasons, the appeal must succeed and the cross-appeal cannot be upheld.

[45] Accordingly, the following order is made:

1. The appeal is allowed and the Order of the Industrial Court is set aside and substituted with the following Order:

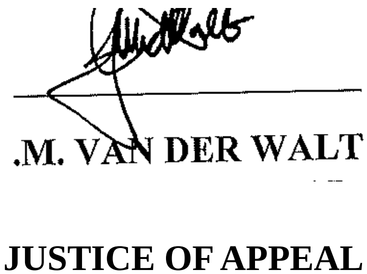
"1. The decision of the First Respondent declining to recuse himself as Chairperson of the disciplinary hearing against the Applicant is hereby reviewed and set aside.

2. *The First Respondent is ordered to recuse himself from the disciplinary proceedings against the Applicant.*

3. *No order as to costs."*

The cross-appeal is dismissed.

3. No order as to costs.



.M. VAN DER WALT

JUSTICE OF APPEAL

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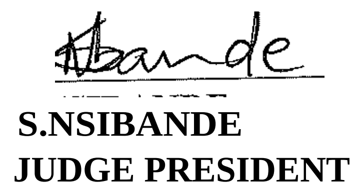
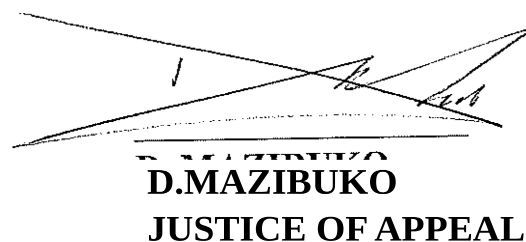


S.NSIBANDE
JUDGE PRESIDENT

I agree



D.MAZIBUKO
JUSTICE OF APPEAL

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