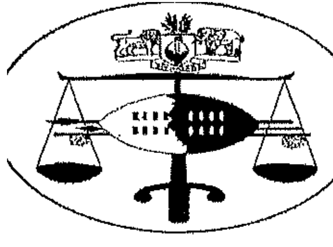


INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

Case No.015/2020

In the matter between

SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORICERS 1st Appellant

SANDILE MAMBA 2nd Appellant

KWANELE VILANE 3'd Appellant

And

ESWATINI DEVELOPMENT & SAVINGS BANK 1st Respondent

DUMASE NXUMALO N.O. 2nd Respondent

Neutral citation: Swaziland Union of Financial Institutions and Allied Workers and 2 others vs Eswatini Development & Savings Bank and Another (015/2020) [2021] SZICA 06 (September 2021)

Coram: **MAZIBUKO JA, NSIBANDE JP, NKONYANE JA**

Date argued: **26 July 2021**

Delivered:

24 September 2021

Summary: I. *Employees accused of misconduct at the workplace. Employees summoned to a disciplinary hearing. Employees elected to be represented by a union official - at the hearing. Employer objects to union - representation for the employees. On the 27th October 2020 the chairperson issued a ruling in favour of the employer. The chairperson denied the employees permission to be represented by a union official. Chai1person directed that the disciplinary hearing will proceed on the 29th August 2020.*

2. *Employees (assisted by the union) applied to the Industrial Court for an urgent interim relief for the stay of the disciplinary hearing pending finalization of the main application. In the main application, the employees challenged the ruling of the chairperson and sought to have it set aside.*

3. *The employer opposed the application and raised 3 (three) points in limine. The matter was argued based on the points in limine. The application was dismissed based on the points in limine. The employees appealed the Industrial Court ruling.*

Held: The Industrial Court made substantive errors of law- hence the Court ruling was set aside. The Court issued an order regarding continuation of the disciplinary hearing.

D. MAZIBUK.O JA

JUDGMENT

BRIEF BACKGROUND

1. Before Court is an appeal of a judgment of the Industrial Court, dated 10th May 2021, issued under SZIC case no. 313/2020.

   1.1 The 1st Appellant is; Swaziland Union of Financial Institutions and Allied Workers (also referred to interchangeably as union or pt Appellant). The founding affidavit (before the Industrial Court) was deposed to by Ms Jabu Shiba in the capacity of Secretary General of the 1st Appellant.

   1.2 The 2nd and 3rd Appellants are; Mr Sandile Mamba and Mr l(wanele Vilane respectively. The 2nd and 3rd Appellants filed

confirmatory affidavits. The 2nd and 3rd Appellants were also 2nd and 3rd Applicants before the Industrial Court.

1.3 The 1st Respondent is Swaziland Development and Savings Bank. The 1st Respondent was also 1st Respondent before the Industrial Court. At all times 1naterial to this matter the 2nd and 3rd Appellants were e1nployees of the 1st Respondent, based in the Information and Technology Department.

1.4 The 1st Appellant and the 1st Respondent have concluded a Recognition and also a Collective Agreement. The latter agreement was introduced as exhibit SWl.

1.5 The 2nd Respondent, Ms Dumase Nxumalo is chairperson of a disciplinary hearing in which 2nd and 3rd Appellants appeared as accused - employees. The 2nd Respondent, was also cited as 2nd Respondent before the Industrial Court. The 2nd Respondent did not oppose this appeal and will accordingly abide by the decision of the Court.

1.6 When the 1natter was before the Industrial Court, the legal position of the 2nd Appellant was considered to be si1nilar to that of the 3rd Appellant - hence the same argument was presented in respect of

both 2nd and 3rd Appellant. An extract of the founding affidavit reads thus - at paragraph 17:

"] 7. *The position of the 1st Respondent with regards to the 2nd Applicant applies with equal force to the 3rd Applicant."*

A similar approach was adopted by the parties before the present Court.

2. DISCIPLINARY CHARGES

About the 16th October 2020, the 2nd and 3rd Appellants were charged with similar disciplinary offences by the 1st Respondent, viz: *'gross insubordination and gross negligence.* ' The disciplinary hearing was scheduled for the 20th October 2020. At the disciplinary hearing the 2nd Appellant was represented by an official fro1n the union (1st Appellant) named Ms Jabu Shiba.

3. REPRESENTATION OF THE EMPLOYEES AT DISCIPLINARY HEARING

The 1st Respondent was represented at the hearing by an officer named Mr Mkhweli. Mr Mkhweli raised an objection at the hearing when he realized that the 2nd Appellant was represented by a union official - aforementioned. The basis for the objection was that Mr Mkhweli had

classified the 2nd Appellant as a member of staff and he (Mr Mkhweli) therefore concluded that the 2nd Applicant did not qualify to be a member of the union (1st Appellant) - and by extension did not qualify to be represented by a union official.

4. The 1st Appellant argued at the hearing that the 2nd and 3rd Appellants are union members. These 2 (two) employees joined the union (1st Appellant) on or prior to the 16th September 2020. According to Ms Shiba, the 1st Appellant notified the 1st Respondent in writing on the 16th September 2020 that the 2nd and 3rd Appellants had since joined the union (1st Appellant) and consequently the 1st Respondent was requested to deduct membership fees from their salaries. The aforesaid letter from the union (1st Appellant) to the 1st Respondent was presented as exhibit SW6.

5. The pt Respond(mt replied exhibit SW6 by writing exhibit SW7, dated 22nd September 2020. According to the 1st Respondent the 2nd and 3rd Appellants are not eligible to join a trade union because it was alleged that *"The employees hold staffjob positions."*

6. RULING BY CHAIRPERSON ON REPRESENTATION

At the disciplinary hearing the parties could not agree on the issue of representation as shown in exhibits SW6 and SW7. The chairperson was requested to make a ruling on that dispute - which she did - as shown below:

"20. The ruling by the chairperson, which was delivered on the 27th October 2020 was to the effect that the 2nd and 3rd Applicants cannot be members of the 1st Applicant and therefore cannot be represented by union officials at the on-going disciplinary hearing."

(Record page 14)

7. URGENT APPLICATION AT THE INDUSTRIAL COURT

All 3 (three) Applicants were dissatisfied with the ruling of the chairperson. The Appellants challenged that ruling by filing an urgent application at the industrial Court for relief as follows:

"]. That an order be and is hereby issued dispensing with the normal forms of service and time limits and hearing this matter on an urgent basis.

2. *That a rule nisi be and is hereby issued calling upon the Respondents to show cause why:*

2.1 *An order should not be issued temporarily stopping the disciplinary hearing against the 2nd Applicant scheduled for the 29th October 2020 pending.finalization of the present application before the above Honourable Court.*

2.2 *The rule nisi issued in terms of prayer (2.1) above operates with immediate interim relief and be returnable on a date and time to be determined by the above Honourable Court.*

3. *That an order be and is hereby issued declaring that the written decision issued by the 2nd Respondent effectively denying that the 2nd and 3,·d Applicants be represented by the l8^1 Applicant in their on-going disciplinary hearing is wrongful and unlawful.*

4. *That an order be and is hereby issued declaring that the 2nd and 3rd Applicants have a Constitutional right in terms of Section 32. (a) and (b) to join the l8^1 Applicant and thereafter to be represented by the said union in any disciplinary proceedings in accordance with the collective agreement entered into between the l8^1 Applicant and the 2nd Respondent.*

5. *Costs of Application against the F[1] Respondent*

6. *Further and I or alternative relief"*

(Record pages 5-6)

8. POINTS IN LIMINE RAISED BY 1sT RESPONDENT

The 1st Respondent opposed the application. The 1st Respondent raised 3 (three) points *in limine*, which were presented in what the pt Respondent called - a preliminary answering affidavit. The 1st Respondent summarized its points *in limine* as follows:

"I wish to raise preliminary points of law relating to urgency, failure to move an application to stay the disciplinary proceedings before the chairman of the hearing, and failure to establish primary facts warranting that the Court should intervene in the incomplete disciplinary hearing."

(Record page 64)

9. The points *in limine* were argued on the 28th October 2020, and the Industrial Court delivered an Ex Te111pore ruling the same day. The Industrial Court upheld the points *in limine* and dismissed the

application. About the 10th May 2021 the Industrial Court delivered its written reasons for the aforesaid ruling.

9.1 Fr01n the outset the Industrial Court mentioned that; (with the consent of the parties), it dealt solely with the points *in limine,* and did not venture into the1nerits of the n1atter. The first point that the Court dealt with was that of urgency.

URGENCY

9.2 Under the rubric of urgency the 1st Respondent submitted that it had been given less than 2 (two) hours notice to *"consider this application, instruct attorneys and file answering affidavits, in the event that it wishes to oppose the application."*

(Record page 64)

9.3 The 1st Respondent added that it had been given short service of the application such that it considered the Applicants' [Appellants'] conduct to be unreasonable, oppressive and that it constituted an abuse of the Court process. The 1st Respondent urged the Court to refuse to enrol the application as one of urgency.

9.4 A contrary argument from the Appellants was that the application was urgent and the prayer for the interim relief had to be brought before Court not later than the 28th October 2020. The 2nd and 3rd Appellants wanted a representative of their choice at a disciplinary hearing that was scheduled to proceed on the 29th October 2020.

9.5 The 1'1 Respondent had indicated in the charge sheet that the offences that the 2nd and 3rd Appellants were facing are gross. The 2nd and 3rd Appellants submitted that, that is all the 1nore reason they needed to be properly represented at the disciplinary hearing.

NO REPRESENTATION FROM COLLEAGUES AT THE WORKPLACE

9.6 The 2nd and 3rd Appellants further stated that they had failed to get representatives among their colleagues at the workplace. The colleagues expressed fear of being victimized by the 1st Respondent in the event they represented the 2nd and 3rd Appellants at the disciplinary hearing. The said colleagues even feared being seen in the company of the 2nd and 3rd Appellants - hence the prospect of

representation fro1n colleagues failed to materialize.

10. GROUNDS OF APPEAL

The Appellants noted an appeal against the judgment of the Industrial Court. The amended grounds of appeal read thus:

"l. The Court a quo erred in law and in fact in holding that there were no exceptional circumstances established by the Appellants in their papers necessitating that the Court intervenes in the disciplinary hearing of the 2nd and 3rd Appellants.

2. *The Court a quo erred in law and in fact in not holding that the employer's conduct of denying the 2nd and 3rd Appellants the right to be represented by l8^{1} Appellant in their on-going disciplinary hearing constituted sufficient grounds for the Court a quo to intervene and determine whether the employer's decision was correct in the circumstances of the case.*

3. *The Court a quo erred in law and in/act in dismissing the Appellant's application on the merits without pleadings having been closed and without heads of arguments being filed in the matter.*

4. *The Court a quo erred in law and in fact in not holding that the 2"d and 3,·d Appellants were already fully paid up members of union (1st*

Appellant) at the time of the disciplinary hearing and that as of right, the 2nd and 3rd Appellants were entitled to be represented by the]st Appellant until their membership was set aside by a competent legal forum, namely the Conciliation, Mediation and Arbitration Commission or the Industrial Court of Eswatini.

5. *The Court a quo erred in law and in fact in holding that an application for stay of the disciplinary hearing had to be made before the Chairperson of the hearing prior to an interim urgent relief being sought from the Industrial Court.*

6. *The Court a quo erred in law and in fact in holding that the abridgement of the time limits by the Appellants was unreasonable or and/or holding that the Appellants could have approached the Court on an earlier date[sic}.*

7. *The Court a quo erred in law and in fact in holding that 'it was common between the parties that these positions (held by 2"d and 3rd Appellants) fell under "staff". "*

11. An urgent application before the Industrial Court is governed by rule 15 of the Industrial Court 1ules. The Industrial Comt caine to a conclusion

that the Appellants had failed to meet the stringent requirements of rule 15. This Court will give further attention to the provision of rule 15 later in this judgment.

INDUSTRIAL COURT RULING ON URGENCY CONTRADICTORY ORDER

11.1 The Industrial Court stated as follows in its judg1nent:

·"*22. The contentions put forward by the Applicants in their founding affidavit in an effort to substantiate why they came to Court under a certificate of urgency and within these stringent timelines does not meet the threshold of Rule 15. It is on this premise that the Court is of the view that the Applicants have failed to meet the threshold with regards to urgency, and therefore this point in limine* is *dismissed."*

(Judgment page 11)

11.2 When the Industrial Court stated that the point *in limine* was dismissed, it 1neant that it had decided the issue of urgency in favour of the Appellants. In other words the Court was confirming that the Appellants' case was urgent and that the l8[1] Respondent's point *in limine* was unsuccessful.

11.3 In the su1n1nary of the judg1nent the Industrial Court stated as follows:

" ... *No urgency- matter is improperly before Court* ... "

(Judgment page 2).

11.4 The latter statement meant that the Court had decided the point on urgency in favour of the 1st Respondent - meaning that the application was dismissed for lack of urgency.

11.5 Clearly the 2(two) statements aforementioned which had been issued by the Industrial Court, in the same judgment, are contradictory. The Court clearly committed an error of law in the manner it decided the question of urgency. It is either the question of urgency was decided in favour of the Appellants or the 1st Respondent, but not both. Before Court, counsel for the Appellants and counsel for the 1st Respondent had different versions of the decision of the Court - as stated above. The afore1nentioned contradiction resulted in a confusion.

11.6 This Court is authorised, by rule 7 of the Industrial Court of Appeal rules, to decide on the lawfulness or otherwise of the

judgment of the Industrial Cou1t, and in so doing this Court will not be confined to the grounds that are raised by the Appellants.

INDUSTRIAL COURT OF APPEAL - RULE 7

11.7 Rule 7 reads thus:

"The appellant shall not, without leave of the Industrial Court of Appeal, urge [argue] or be heard in support of any ground of appeal not stated in his notice of appeal, but the Industrial Court of Appeal in deciding the appeal shall not be confined to the grounds so stated."

11.8 The litigants are entitled to a clear and unequivocal decision on the question of urgency. The Industrial Court failed in that regard and consequently that pa1ticular decision of the Industrial Court is liable to be corrected on appeal.

COURT'S INTERVENTION IN UNCOMPLETED DISCIPLINARY HEARING

12. One of the grounds of appeal was in relation to the power of the Industrial Court to intervene in an uncompleted disciplinary hearing. This issue was also raised by the 1st Respondent in its points *in limine.* The general

rule is that the Industrial Court is loath to intervene in an uncompleted disciplinary hearing except where there are exceptional circumstances in the case which would compel the Court to do so.

EXAMPLES OF EXCEPTIONAL CIRCUMSTANCES

13. · Examples of exceptional circumstances that have compelled the Courts to intervene in unc01npleted disciplinary hearing include (but not lin1ited to) the following-

13.1 to prevent grave injustice from occurring,

13.2 where justice 1nay not by other 1neans be obtained,

13.3 where the Court seeks to prevent irreparable harm being suffered by an employee.

13.4 In the matter of ABEL SIBANDZE VS STANLIB SWAZILAND (PTY) LTD and ANOTHER SZICA case no 5/2010 (unreported), the Court stated the rule as follows:

"41. The attitude of the Courts therefore, is not to intervene in the employers [employer's] disciplinary proceedings until they

have run their course, except where compelling and exceptional circumstances exist, entitling the Court to do so."

(At page 31)

13.5 In the matter of VANWYK. VS MIDRAND TOWN COUNCIL AND OTI-IERS 1991 (4) SA 185 (w), the Court expressed itself as follows:

"... *where a Court was asked to interfere with proceedings in progress it should only do so in the rare cases where grave injustice might otherwise result or where justice might not by other means be obtained."*

(At page 185)

13.6 The case of VANWYK VS MIDRAND TOWN COUNCIL (supra) was quoted with approval by the Industrial Court in the matter of: SAZIKAZI MABUZA VS STANDARD BANK. OF SWAZILAND LTD AND ANOTHER SZIC case no 311/2007 (unreported).

13.7 In the matter of GUGU FAI(UDZE VS THE SWAZILAND REVENUE AUTHORITY AND 3 OTHERS, SZICA case no 8/2017 (unreported), the Court clarified the position further when it said:

"*... the Court has jurisdiction to interdict any unfair conduct including a disciplinary action in order to avert irreparable harm being suffered by an employee.*"

(At page 19)

13.8 It is a question of law when the Industrial Court makes a determination - whether or not there exists exceptional circumstances that would compel the Industrial Court to intervene in an uncompleted disciplinary hearing. In making that determination the Court will have to interprete the provisions of rule 15 as read with the relevant legal authorities. When the Industrial Court makes an error in the interpretation of the law or in the application of the law to the facts, that error becomes one of law and is appealable to this Cou1i.

14. CI-IAIRPERSON'S RULING ON THE 27TH OCTOBER2020

The prayer that the Industrial Court had to determine on the 28th October 2020; was for a grant of an order for a te1nporary stay of the disciplinary hearing - pending finalization of the main application which the Court was yet to determine on a future date. The disciplinary hearing - aforementioned had been scheduled to proceed on the 29th October 2020. In the 1nain application the Appellants were challenging the 1uling of the chairperson which had been delivered on the 27th October 2020. The chairperson had declined the 2nd and 3'd Appellants permission to be represented by a union official at the hearing. The 2nd and 3rd Appellants had stated their reasons for appointing a union official to represent them at the hearing.

15. An excerpt of the founding affidavit reads thus:

"26. I respectfully submit that the charges the 2nd and 3rd Applicants are facing seem to be serious. The 1st Respondent has classified both charges as being "gross" and one does not know what is meant by classifying these charges as such. It would be unfair to then prescribe who should represent them.

27. *It is important that the 2nd and 3rd Applicants be represented by the union since its officials are experienced and professionals [sic} in handling Disciplinary proceedings between employers and employees in the financial sector.*

28. *It is submitted that internal employees are hardly conversant with disciplinary procedures. In fact, a majority of them have no clue at all on what is required in representing a fellow employee since it is not their field.*

29. *Both the 2nd and 3rd Applicants have communicated to me that they would find it hard to get a fellow employee to represent them in the on-going disciplinary hearing since employees are scared of victimization to the extent that some would even be scared to be seen standing or be seen in the company of these two employees.*

30. *It is therefore in the interest of justice, fairness and equity that the two employees be represented by an independent and experienced official of the union in the charges they are facing.* "

(Record page 15)

16. In order to motivate their prayers the Appellants fmiher stated the following:

16. l *"32. If the disciplinary hearing were to proceed as normal on the 29th October 2020, then the application reversing the 2nd Respondent's decision will be rendered academic and the 2nd and 3rd Applicants would have been deprived of the fundamental right to be represented by a union official as provided for in the collective agreement entered into between the parties.*

33. *The Respondent will not suffer any substantial prejudice in that, amongst other things, internal disciplinary processes may sometimes take long because justice and fairness require that all the rights of the parties must be properly determined, sometimes by external forums, like the Court in the present matter.*

34. *The 1st Respondent itself has given the 2nd and 3rd Applicants a period of less than 2 days to prepare and subject themselves to the disciplinary hearing. The ruling by the chairperson was*

delivered on the 2Jlh October 2020 and told to come to the hearing on the 29th October 2020. This is improper and unlawful. "

16.2 *"37. I submit that if the matter were to take the normal course, the 2nd and 3rd Applicants stand to siifler irreparable harm in that the matter will have proceeded before the Chairperson without proper and effective representation as provided in the Collective Agreement entered into betvveen the parties. There is a reason and a purpose on why the parties specifically agreed that union members who are employees of the 1'1 Respondent must be represented by union officials in on-going disciplinary proceedings.* "

(Record page 16-17)

17. The 1st Respondent opposed the application and supported the ruling by the chairperson. The issue of representation is of paramount importance to an employee who has been summoned to attend a disciplinary hearing. According to authority:

"The right to representation has been described as an entitlement requiring weighty reasons for it to be denied."

GROGAN J: WORKPLACE LAW, 10th edition, Juta, 2009

(ISBN 13: 978-0-7021-8185-6) page 240.

18. In the case of the 2nd and 3rd Appellants the importance of representation at the disciplinary hearing was emphasized by the natnre of the charges they were facing. The 1st Respondent had referred to the charges as being *'gross'*. An employee who faces a disciplinary charge which involves an ele1nent of gross misconduct- should be given a hearing on his choice of a representative. Where the employee is dissatisfied with the ruling of the chairperson on the question of representation, that employee should be given a hearing by the Industrial Court in order to test the accuracy of the said ruling.

19. SHORT NOTICE OF RESUMPTION OF THE DISCIPLINARY HEARING

Among the reasons for which the Industrial Court dismissed the application was that the 1st Respondent had been given short notice of the application. The Court stated as follows in its written ruling:

"As stated by Mr Jele, the 1st Respondent was given less that [than] 2 hours to come to Court, ostensibly because the matter is urgent. This is extremely unreasonable and amounts to the 1st Respondent not being granted a fair hearing."

(Judgment page 9)

19.1 The Honourable Court was correct when it stated as a general principle that:

"A litigant who comes to Court must be apprised of the case it has to meet and must be afforded sufficient time to engage the services of an attorney to represent him if it [he] wishes."

(Judgment page 9)

19.2 The Court also reinarked that it would amount to a denial of a fair hearing when a litigant is given an extre1nely or unreasonably short notice ofa date of hearing of his 1natter.

19.3 After the Court had pronounced the general principle and had made the aforementioned remark, it concluded that since the application was enrolled on the 28th October 2020, and was to be heard the same day, the 1st Respondent was denied a fair hearing - due to the extremely short notice of the application.

19.4 The Cou1i however 1nade an error of law when it failed to apply the same legal principle and also make the same remark when it considered the circuinstances of the 2nd and 3rd Appellants. Had the Court considered the circumstances of the 2nd and 3rd Appellants, using the same approach as it did regarding the 1st Respondent, the Cou1i would have realized that as a matter of fact; the Appellants had also been given extremely sho1i notice by the chairperson from the date of the ruling viz; 27th October 2020, to the date of resumption of the disciplinary hearing viz; 29th October 2020.

19.4.1 The chairperson gave the Appellants a few hours on the 28th October 2020 to find a new representative, and also for that representative to make the necessary preparation in order to be ready to represent the Appellants at the resumption of the hearing on the 29th October 2020.

19.4.2 Fu1ihermore, the chairperson gave the Appellants a few hours on the 28th October 2020 to engage the services of an atton1ey (if they wanted to challenge the chairperson's ruling), and also for that attorney to n1ake the necessary preparation in order to have

the urgent 1natter set down for hearing at 14hr30 on the same day, viz; 28th October 2020.

19.4.3 The Appellants were clearly prejudiced by the extremely short notice that they had been subjected to by the chairperson. The conduct of the chairperson was unfair to the Appellants.

19.4.4 To borrow the words of the Industrial Comt, in the same ruling, this Comt declares that the conduct of the chairperson as regards the short notice was extremely unreasonable and ainounts to the 2nd and 3rd Appellants being denied a fair hearing either at the resumption of the disciplinary hearing or in a subsequent urgent Court application.

19.4.5 In as far as short notice was concerned; the 2nd and 3rd Appellant - just like the 1st Respondent, were in a similar circumstance - in that both parties had received sho1t notice. It is in the interest of justice and fairness that litigants who are in a similar circumstance, be treated similarly. It is an error of law for a Court to treat si1nilarly circumstanced persons - differently.

19.4.6 THE APPELLANTS' URGENT APPLICATION WAS JUSTIFIED

The sho1t notice that the 2nd and 3rd Appellants were subjected to, viz; from the date of the chairperson's ruling namely 27th October 2020, to the date of the resumption of the disciplinary hearing namely 29th October 2020, resulted in an urgent state of affairs. That urgent state of affairs compelled the Appellants to file an urgent application before Court. The Industrial Cou1t made an error of law when it failed to consider the urgent state of affairs which the Appellants had been subjected to and the effect it had on the application which the Appellants had filed before the Industrial Court on the 28th October 2020. The Appellants were con1pelled by the prevailing circumstances on the 28th October 2020, to file an urgent application before Court - giving the 1st Respondent a few hours notice to respond. The effect of the short notice that the Appellants were subjected to will also be dealt with later in this judgment.

20. INDUSTRIAL COURT - RULE 15

As stated above, urgent matters are regulated under rule 15, of the Industrial Court rules. The following excerpt from rule 15 is relevant to the matter before Court:

"15 (1) A party that applies for urgent relief shall file an application that so far as possible complies with the requirement of rule (14).

(2) *The affidavit in support of the application shall set forth explicitly -*

(a) *the circumstances and reasons which render the matter urgent;*

(b) *the reasons why the provisions of Part VIII of the Act should be waived; and*

(c) the reasons why the applicant cannot be afforded substantial relief at a hearing in due [course}.

(3) *"On good cause shown, the court may direct that a matter be heard as one of urgency.* "

When rule 15 (2), (b) 1nentioned *'Act'*, it meant the Industrial Relations Act nol/2000 as amended.

21. COMPLIANCE WITH RULE 15(2) (a)

The 2nd and 3rd Appellants did c01nply with rule 15(2) (a) in the manner they filed their application before Court, for the following reasons:

21.1 The said Appellants did explain the circmnstances and reasons which rendered their matter urgent. In particular the said Appellants testified that the ruling by the chairperson was served on them on the 2?lh October 2020. This is the ruling that denied the 2nd and 3rd Appellants pennission to be represented by a union official at the disciplinary hearing.

21.2 What is noticeably missing from the ruling is the fact that the Industrial Court did not make a finding that; the Appellants had an opportunity of filing their urgent application before Court - earlier than the 23th October 2020. The absence of that specific finding means that the Appellants could not be censured for filing their urgent application in Court on the 23th October 2020.

21.3 In order to obtain an order for a stay of a disciplinary hearing that was scheduled to proceed on the 29th October 2020, the Appellants had to file their application before Court earlier than the 29th October 2020. The only day that was available for the Appellants to bring theit application to Court was the 23th October 2020, and that was the same day the Appellants filed their

application. The 2nd and 3rd Appellants acted with the urgency that was required in rule 15 (2) (a).

21.4 The Appellants were conect in their submission; that their interest in being represented by a union official at the disciplinary hearing had to be determined, by the Court, before the disciplinary hearing resumed. If the question of representation would eventually be decided by Court - in favour of the Appellants, then the said Appellants would be entitled to insist on being represented by a union official when the disciplinary hearing resmned - and that entitlement would by then have the support of a Court order.

DUTY OF THE COURT TO PROTECT EMPLOYEES FROM FORESEEABLE IRREPARABLE HARM

21.5 The 2nd and 3rd Appellants would suffer irreparable harm if they were to appear at the disciplinary hearing without a representative of their choice. A representative is a defender. The duty of a representative is to protect and assist the accused - e1nployee who is facing a charge or charges of 1nisconduct. It is the duty of the Court to protect an employee from in-eparable harm, especially where such harm is foreseeable and preventable. This is another

reason the Court finds that the Appellants had complied with 1ule 15 (2) (a).

21.S.1 The said Appellants have stated that they are facing disciplinary charges which carry an element of gross misconduct. The Appellants required a skilled and experienced representative to defend them at the hearing. The Appellants are convinced that union officials have the requisite skill and experience to defend them, and that their colleagues - at the workplace - lack the requisite skill and experience.

21.5.2 The said Appellants argued that their defence would be compro1nised if they are not assisted by a representative of their choice at the hearing. A compro1nised defence could lead to a conviction on the disciplinary charges. A conviction which is a result of a compromised defence would lead to irreparable harm on the en1ployee concerned. An urgent application for a stay of the disciplinary hearing was imperative in order to give the Appellants an opportunity to challenge the ruling of the chairperson on the question of representation.

JUSTICE COULD NOT BY OTHER MEANS BE OBTAINED

21.6 If the 2nd and 3rd Appellants were to eventually succeed in their Court application, for instance, in getting a representative of their choice (after the disciplinary hearing had been concluded), their victory would be hollow and academic. Whatever victory the Appellants expected from their Court application - would have no retrospective effect. It was in the interest of justice that the issue of representation of the Appellants be determined before the disciplinary hearing resumed. That process required the Industrial Court to hear and :finalise the n1ain application before the disciplinary hearing resumed. This is a case where justice (to the Appellants) could not by other means be obtained.

21.7 It was also in the interest of justice that the disciplinary hearing be stayed te1nporarily pending finalization of the main application in Court. Since the resumption of the disciplinary hearing was hnn1inent, on the 29th October 2020, it was urgent therefore that the temporary stay of the disciplinary hearing be

granted prior to the 29th October 2020. The urgent application

that the Appellants filed before Court on the 28th October 2020 was accordingly justified. For this reason as well the Court finds that the Appellants complied with rule 15(2) (a).

21.8 The alleged short notice - of a Court application that the Appellants gave the 1st Respondent on the 28th October 2020 (for instance 2:30ln-s), was a direct result of the short notice - of the resumption of the disciplinary hearing, that the 1st Respondent gave the Appellants on the 27th October 2020. It was the 1st Respondent's conduct that created urgency in the matter. The 1st Respondent cannot be allowed to create an urgent state of affairs then challenge the Appellants for moving an urgent application in order to arrest the aforesaid urgent state of affairs, which if left unattended - would result in irreparable harm to the said Appellants.

EXCEPTIONAL CIRCUMSTANCE

21.9 The irreparable harm afore1nentioned was an exceptional circu1nstance which should have compelled the Industrial Court to intervene in an uncompleted disciplinary hearing.

21.10 The Industrial Court applied a wrong principle when it stated stated that:

"It is trite law that the Court will not come to the assistance of an employee before a disciplinary inquiry 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 anticipate the outcome of an incomplete disciplinary process. This in effect means that the point of law on the intervention of this court in incomplete disciplinary enquiry succeeds."

(Judgment page 19)

21.11 With respect to the Honourable Court, the correct legal position has been stated above in paragraphs 12 to 13.7. At the risk of repeating ourselves, this Cou1t has stated (with the supp01t of authority), that the Industrial Court will intervene in an uncompleted disciplinary hearing where exceptional . circumstances exist in a paiticular case. The Industrial Court clearly 1nade an error in its interpretation of the law and

consequently arrived at an incorrect decision. Accordingly the first ground of appeal succeeds.

2.12 A legal maxhn that applies in the present case reads as follows:

"Nullus Commodum Capere Potest De Injuria Sua Propria

No man can take advantage of his own wrong."

BROOM H: A SELECTION OF LEGAL MAXIMS, S1[11] edition, 1911, Sweet and Maxwell (ISBN not provided) page 233.

21.13 The 1'[1] Respondent tried to take advantage of its own wrong when it opposed the Appellants' urgent application. As aforementioned the purpose of the Appellants' urgent application was to reverse the unfair decision of the chairperson who had denied the Appellants time to challenge her ruling in Court. It is the duty of the Court to prevent such irregularity from taking place.

21.14 Based on the aforestated legal principle the Industrial Court made an error of law when it concluded that:

"*... no injustice would be suffered by the 2nd and 3'd Applicant [Appellants} from the evidence give {given]"*

(Judg1nent page 19)

21.15 The present Court has made a finding that the Appellants complied with rule 15 (2) (a). In addition, the present Court is satisfied, that the Appellants' application was urgent and deserved to be enrolled as such.

21.16 The urgent application that the Appellants filed in Cou1t on the 28th October 2020 was the only means by which the Appellants could obtain an order for a grant of a temporary stay of the disciplinary hearing. In this case, justice to the Appellants, could not by other means be obtained. The Industrial Court would have been justified to intervene in this particular uncompleted disciplinary hearing.

22. PART VIII OF THE ACT NOT APPLICABLE

The Appellants would not have been able to get redress if they had referred their grievance as a dispute to the Conciliation, Meditation and Arbitration Commission (hereinafter referred as the Commission), established under Part VIII of the Act.

22.1 The aforementioned danger that the Appellants sought to prevent by way of an urgent application, could not be prevented

by (the Appellants) - reporting a grievance as a dispute before the C01nmission. The Appellants needed an urgent - injunctive relief in order to avert imminent danger and to maintain the status quo which prevailed when the ruling of the 27th October 2020 was issued, by the chairperson. The aforementioned im1ninent danger would have occurred if the Appellants were to appear at the disciplinary hearing without a representative of their choice.

22.2 The Com1nission has no power to grant injunctive relief. The Commission has only a statutory 1nandate to attempt to resolve disputes through conciliation. The Industrial Court however has power, inter alia, to grant injunctive relief. The Act provides as follows - regarding the power of the Industrial Court:

"8(3) In the discharge of itsfimctions under this Act, the Court shall have all the powers of the Iligh Court, including the power to grant injunctive relief"

22.3 Appellants are correct in their argument that the Com1nission does not have jurisdiction to grant the relief that they had applied for - before the Industrial Court. The Appellants were

justified

in asking the Industrial Court to waive the provision of Part VIII of the Act, as required in rule 15 (2) (b).

22.4 Even if the C01nmission were to be said to have jurisdiction to grant an injuctive relief (which is not the case), the Commission would have failed to grant such relief to the Appellants on the 28th October 2020, in a dispute that had been reported to it - after the ruling of the 27th October 2020 had been issued. An excerpt of the Act regarding the tin1e lines relating to filing and processing a dispute at the Commission provides as follows:

22.4.1 *"80(1) On receipt of a dispute being reported in terms of Section 76, the Commission shall appoint a commissioner within (4) days who shall attempt to resolve the dispute through conciliation".*

(Underlining added)

22.4.2 *"81(I} A Commissioner appointed in terms of Section 80(1) shall conciliate within twenty-one (21) days of the date of appointment of a Commissioner provided that the parties may agree to extend that periocf'*

(Underlining added)

22.4.3 The Appellants testified as follows regarding Part VIII of the Act:

"38. I therefore respectfully submit that it would not be proper for the matter to be enrolled in the normal way and/or dealt with under Part VIII of the Industrial Relations Act, 2000 in that by the time the matter is heard and finalised through this route, the chairperson who is keen to proceed with the matter without the 2nd and 3rd Applicants being properly represented will have long continued with the hearing and finalized it, much to the prejudice and disadvantage of the two affected employees."

(Record page 17)

COJ\ifPLIANCE WITH RULE 15 (2) (b)

22.5 The Appellants required an urgent Court order in order to protect their rights particularly on the 28th October 2020. The process of conciliation under Part VIII of the Act was not an option that was available to the Appellants.

22.5.1 The process of conciliation requires an aggrieved person to report a dispute before the Com1nission and thereafter the Commission is 1nandated by the Act to appoint a

Con1missioner,

and thereafter the Commissioner is mandated to commence the conciliation process.

22.5.2 The Industrial Court failed to consider the urgency of the relief that the Appellants had presented before Court on the 28th October 2020. Had the Court considered that urgency, the llonourable Court would have realized that the process of conciliation under Part VIII of the Act was not a suitable legal process to provide the relief that was required that day.

WAIYER OF PART VIII OF THE ACT

22.6 When dealing with Part VIII of the Act, the Industrial Court stated the following:

"The Applicants still have redress by appealing the decision of the chairperson and further have the avenue of pursuing their matter, by invoking Part VIII of the Industrial Relations Act 2000 (as amended) if they are dismissed."

(Judgment page 19)

22.6.1 With respect; the I-Ionourable Court missed the point. The Appellants do not have to wait until they are dismissed, in order to exercise their right to be afforded a fair disciplinary hearing.

At any rate it would be too late for the Appellants (or any employee for that matter) to demand a fair disciplinary hearing - after dismissal.

22.6.2 An employee is entitled to a fair hearing from commencement to completion of the disciplinary process. In a matter that is before the Industrial Court it is improper for the Court to ignore an irregularity in a disciplinary process on the basis that - such irregularity would be addressed after the employee has been dismissed.

22.6.3 Once a person is dismissed fr01n e1nployment he ceases to be an employee, and consequently is no longer eligible for a disciplinary hearing. Likewise, a former employer has no authority to call a person to a disciplinary hearing - who is not its employee. Therefore, a dis1nissal does not provide relief to an employee who is challenging a ruling of the Chairperson on the question of representation - during a disciplinary hearing. The Industrial Court failed to apply the correct law in this regard - hence its 1uling is appealable.

22.6.4 The Appellants were correct in arguing that their case qualified to be considered an exceptional circumstance that woufd compel the Court to intervene in an uncompleted disciplinary hearing. The Appellants have also satisfied the requirements of rule 15(2) (b).

23. CONIPLIANCE WITH RULE 15 (2)(C)

A require1nent in rule 15 (2) (c), is that the Appellants must explain the reason they could not be afforded substantial relief at a hearing in due course.

23.1 If the disciplinary hearing were to proceed on the 29th October 2020, as scheduled, the Appellants would be compelled to appear before the chairperson without a representative of their choice. *A fortiori* the Appellants would be compelled to subject themselves to a disciplinary hearing without their rights to representation being defined by the Court. A hearing in due course could not provide the Appellants the relief that they required.

23.2 If the Appellants were to fail to appear at the disciplinary hearing on the 29th October 2020, they ran the risk that the disciplinary hearing would proceed in their absence, and a further risk is that

an adverse decision would be taken against them, by both the chairperson and the 1st Respondent. A termination of employment is one of the possible adverse consequences that might befall an employee who has failed to appear at a disciplinary hearing. Being absent at the disciplinary hearing, on the 29th October 2020, was not an option that was open to the Appellants.

23.3 The Industrial Cou1i held the view that the Appellants could have appeared at the disciplinary hearing on the 29th October 2020 and apply - before the chairperson, for a stay of the disciplinary hearing. An excerpt of the ruling of the Industrial Cou1i reads thus:

"It is common practice that where a party to a disciplinary hearing is aggrieved and wishes to approach the Courts, an application will be made before the Chairperson and the Chairperson will rule on the issue. This is to ensure the stay of proceedings whilst the aggrieved parry [party] approaches the Courts. This [sic} ensure that either party does not burden the Court, with unnecessary urgent applications as the chairperson will have ruled on the issue. The Court is *however alive to the*

fact that, in certain instances the Chairperson may refuse such an application, and it is in these exceptional circumstances where the Court will intervene."

(Judgment page 12-13)

23.3.1 What is 1nissing from the ruling of the Honourable Court is an answer to the question: who was going to represent the Appellants if they had appeared at the disciplinary hearing on the 29th October 2020, in order to ask for the chairperson's exercise of discretion for a temporary stay of the disciplinary hearing? The 2nd and 3rd Appellants had stated clearly before the chairperson that they had exercised their rights to be represented by a representative of their choice. The chairperson had dis1nissed that resolution. The Appellants had indicated further that they had no confidence in their colleagues - at the workplace. By process of elimination, a conclusion is inescapable that, what the Industrial Court meant was that the Appellants should appear in person before the chairperson on the 29th October 2020. That idea was not an option that was available to the Appellants since the Appellants had

opted to be represented at the hearing - by a representative of their choice.

23.3.2 The rights of an employee to representation at a disciplinary hearing, is a matter of fundamental i1nportance. In other words the aforementioned disciplinary hearing would be tainted with unfairness and/or irregularity if it were to proceed - before the rights of the Appellants - regarding representation - were pronounced by Court.

23.3.3 The Industrial Court asse1ted that the Appellants would only be justified in filing an urgent application in Court after they had subjected themselves before the disciplinary hearing on the 29th October 2020 and the chairperson had dismissed their application for a stay of the disciplinary hearing.

23.3.4 The Industrial Cou1t had overlooked a crucial fact; that the chairperson has the capacity to refuse to entertain the Appellants' interest and request to have the disciplinaiy hearing te1nporarily suspended - pending finalization of the1nain application in Cou1t. The chairperson may thereafter proceed with the disciplinaiy hearing to finality before the Appellants could file or

n1ove their

application in Court. The Court will not grant an order for the stay of a disciplina1y hearing, if that hearing is finalized already.

23.3.5 The assertion by the Industrial Court would expose the Appellants to ineparable hann which the Appellants had taken steps to prevent - by filing an urgent application in Court. This Court concludes that; the assertion by the Industrial Court of referring the Appellants to the chairperson at the disciplinary hearing, was a denial of justice to the Appellants.

FIRST GROUND OF APPEAL

23.3.6 The Appellants have demonstrated the reasons they could not have substantial relief at a hearing in due course. The Appellants have also satisfied the requirements of rule 15 (2), (c). The precarious legal position that the Appellants were placed in when the chairperson issued her ruling - resulted in an exceptional circumstance which required an immediate intervention by the Industrial Court. It was an error of law when the Industrial Court failed to treat the Appellants' legal position as an exceptional circumstance that would compel the Court to intervene in an unc01npleted disciplinary hearing. The Court reiterates that the

:first ground of appeal is upheld. The Appellants had placed sufficient material before the Industrial Cou1t in order for that Court to intervene in an uncompleted disciplinary hearing. The Industrial Court ought to have dismissed the third point *in limine* - and enrolled the matter as urgent.

24. TI-IE COURT DISMISSED AN APPLICATION WHICH WAS NOT BEFORE COURT

There is another error of law that the Industrial Cou1t committed which appears *ex-facie* the written reasons for the ruling. The Honourable Court 1nisunderstood prayers 2, 2.1 and 2.2 in the notice of motion. For the sake of completeness, these prayers are once again reproduced:

"2. That a rule nisi be and is hereby issued calling upon the Respondents to show cause why:

2.1 *An order should not be issued temporarily stopping the disciplinary hearing against the 2nd Applicant scheduled for the 29th October 2020 pending finalization of the present application before the above Honourable Court.*

2.2 *The rule nisi issued in terms of prayer (2.1) above operates with immediate interim relief and be returnable on a date and time to be determined by the above Honourable Court.* "

24.1 On the 28th October 2020 the Appellants had asked the Industrial Court to grant, (on an urgent basis), an interi1n order for a temporary stay of a disciplinary hearing. The hearing had been scheduled to proceed on the 29th October 2020. It was the application for the interiin stay of the disciplinary hearing that was before Court for hearing - on the 28th October 2020 and not the main application.

24.2 The Appellants had also prayed in paragraph 2.2 in the notice of motion that the rule nisi should be returnable on a future date, which date would have been determined by the Honourable Court.

There was no application before the Industrial Court for a final order on the 28th October 2020 regarding either the stay of the disciplinary hearing or the main application.

24.3 The n1ain application, nainely; relating to the representation of the

patiies at the disciplinary hearing, was meant to be argued on a

future date which was yet to be determined by Court. The Industrial Court had the power to regulate the dates for filing the outstanding pleadings and to set a date for argument in consultation with the representatives of the parties. The main application was not before the Industrial Court for argument on the 28th October 2020 and was never allocated a hearing date after the 2sth October 2020.

24.4 The Industrial Court issued an order as follows:

"(]) Application is dismissed."

(Judg1nent page 20)

APPELLANTS' THIRD GROUND OF APPEAL

24.5 The Industrial Court erroneously dismissed both the urgent application for a temporary stay of the disciplinary hearing and the main application. As aforementioned the main application was never set down and/or argued before Court, and the pleadings in relation thereto had not been closed. The Industrial Court therefore dis1nissed and application on the 28th October 2020 which was not before Court. The Industrial Court erroneously

exercised jurisdiction it did not have - that particular day. The Appellants' third ground of appeal is accordingly upheld.

THE COURT MADE A FINDING OF FACT WITHOUT EVIDENTIAL SUPPORT.

25. The Industrial Court mentioned also in its reasons for dis1nissing the application that;

"It is common practice in disciplinary hearings that an application is made staying proceeding whilst one party seeks the intervention of the Courts. The sole purpose of this application is to ensure that the two processes do not run concurrently."

(Judgment page 9)

25.1 The reference to the phrase:

"*... common practice in disciplinary hearing,"* which the Industrial Court had mentioned in its ruling, was not pleaded by the parties before Court.

25.2 The Appellants referred to another related portion of the ruling which reads thus:

"The Applicants have been afforded the right to be represented by the chairperson, [sic] and there is nothing that would suggested [suggest] that the Chairperson did not apply her mind when ruling on the matter of representation"

(Judgment page 19)

This portion of the ruling was not pleaded by the parties.

25.3 The excerpts fro1n the ruling - as shown above, clearly indicate that the Industrial Court n1ade findings of fact without the support of the evidence and without hearing the parties on the n1erits. As aforestated the Honourable Court had stated in its ruling that it had confined itself to the:

"*... points in limine and not the merits of the matter."*

(Judgment page 5)

The Honourable Court 1nade an error of law which is appealable. The Appellant's third ground of appeal is once again upheld.

26. THE INDUSTRIAL COURT HAS JURISDITION TO GRANT A TEMPORARY STAY OF A DISCIPLINARY HEARING

Another error which the Appellants identified in the ruling reads thus:

26.1 *"No argument was brought before this Court by the Applicant indicating that an application for stay of the disciplinary process was made before the chairperson."*

(Judgment page 13)

26.2 *"There is no explanation by the Applicants why a formal application was not made before the chairperson advising of their desire to approach the Court."*

(Record page 9)

26.3 There is a marked distinction between the proceedings in a disciplinary hearing and an application before Cou1t for a temporary stay of that disciplinary hearing. The duty of the chairperson is to preside over and 1nanage the proceedings at the disciplinary hearing. At the end of the disciplinary proceedings, the chairperson will decide whether or not the accused - e1nployee

is guilty of the offence he is charged with -based on the applicable legal principles and the evidence.

26.4 When an application - made before Court, for a temporary stay of a disciplinary hearing is successful, it would result in a Cou1i order that would direct the chairperson to temporarily suspend the said hearing, subject to such condition or conditions as the Court 1nay impose. Once a Cou1i order for a stay (of a disciplinary hearing) is granted, the chairperson is legally bound to comply therewith, failing which contempt proceedings may follow.

26.5 The chairperson in a disciplinary hearing cannot grant an order against herself. For instance, the chairperson cannot order herself to te111porarily stay the disciplinary hearing - even if an application with that specific prayer, is brought before her. The best the chairperson could do; is to exercise her discretion not to preside over the disciplinary hearing pending finalization of the main application that is before Court. A disciplinary hearing will not proceed before a particular chairperson, if that chairperson has decided to temporarily refrain from presiding over it.

26.6 However, the chairperson's exercise of discretion to temporarily refrain from presiding over the disciplinary hearing, does not have the effect of a Comt order. For instance, if the chairperson were

to renege on her aforesaid exercise of discretion, her conduct

would not amount to conte1npt of a Court order - because there is no Court order in place. Therefore the risk and repercussion of disobeying a Court order would not be visited on the chairperson should she decide to renege on her decision.

26.7 The Industrial Court is the only forum that has power to grant an order for a te1nporary stay of the disciplinary hearing pending finalization of the application that is before Cou1t. The chairperson has no power to grant that order.

APPELLANTS' FIFTH GROUND OF APPEAL

26.8 As a result of an error of law aforementioned, the Industrial Court failed to exercise its jurisdiction to determine an application that was properly before itself on the 28th October 2020. Instead, the Industrial Court divested itself of its jurisdiction and surrendered

same to another entity (the chairperson), whereas the latter had no

jurisdiction to grant the order that the Appellants were seeking. Consequent to the aforesaid error, the Industrial Court upheld the 1st Respondent's second point *in limine* and dismissed the Appellants' application - yet by exercise of its jurisdiction the Honourable Court ought to have dismissed the aforesaid point *in limine.* The Appellants' fifth ground of appeal is upheld.

27. THE INDUSTRIAL COURT HAS POWER TO GRANT IN INWCTIVE RELIEF

The declaration that has been made by this Court viz; that the Industrial Court is the only forum that has power to grant an order for a temporary stay of a disciplinary hearing, can be confinned from another legal angle.

28.l The order that the Appellants (as Applicants) had prayed for in paragraph 2, 2.1 and 2.2 of the notice of rnotion, viz; for a temporary stay of the disciplinary hearing- pending finalization of the main application, was an injunction. The purpose of that injunction was to maintain the status quo (as at the time of the chairperson's ruling) - until the n1ain application was determined.

27.2 An injunction is defined as:

"A court order forbidding a person, a group of persons or organization from performing acts that might be injurious to property or the rights of other persons or organisations."

(Underlining added)

BARKER Fetal: SOUTH AFRICAN LABOUR GLOSSARY, Juta, 1996 (ISBN 0 7021 3631 X) page 73.

27.3 *"Temporary ... Injunctions [are} usually used to prevent threatened injury, maintain the status quo, or preserve the subject matter of the litigation during trial'*

GIFIS S: LAW DICTIONARY, 3rd edition, BARONS,

(ISBN O -8120-4628-5) page 238.

27.4 At the risk of repeating ourselves, this Court declares that the Industrial Court has power to order injunctive relief. The Industrial Court has jurisdiction therefore to grant an order for a temporary stay of a disciplinary hearing - pending finalization of a 1natter that has been brought before Court for determination. The chairperson (at a disciplinary hearing), has no power to grant

injunctive relief. The Appellants therefore followed a correct procedure when they applied for injunctive relief before the Industrial Court.

27.5 The legal position as stated above is supported in the case of TREVOR SHONGWE VS MACHAWE SITHOLE N.O. AND ANOTHER SZICA case no 8/2020, wherein the Industrial Court of Appeal expressed itself as follows:

"... *an applicant may apply to the Industrial Court as first port of call for a stay of the disciplinary proceedings* ... "

(At page 25)

This Court aligns itself with the legal principle as pronounced in the TREVOR SHONGWE case. The Court reiterates that the Appellants' fifth ground of appeal, is upheld.

28. NO PROSPECT OF CONCURRENT JURISDICTION

The Industrial Court mentioned further, in its reasons for dismissing the application that was before it, that its objective was to *'ensure that the two processes do not run concurrently.'*

28.1 The prospect that 2 (two) processes could run concun-ently - did not arise in the circumstances of the case that was before the Industrial Court. The Appellants (as Applicants) did not file an application for a temporary stay of a disciplinary hearing before the chairperson. The Appellants had filed their application before the Industrial Court only. The chairperson could not therefore exercise jurisdiction in an application that was not before her. It was only the Industrial Court that had power to grant the relief that was prayed for in the application.

28.2 Therefore, before the Industrial Court there was no prospect of 2 (two) processes running concurrently. Clearly the Industrial Court had made an error of law in failing to exercise jurisdiction in a matter where it had jurisdiction.

29. EXPOUNDED RELIEF

The Appellants expounded the ainended grounds of appeal by adding the following relief:

"(i) Setting aside whatever adverse decision that may have been taken by the pt and 2nd Respondents against the 2nd and 3rd Appellants in their internal disciplinary hearing.

(ii) *Ordedng that the disciplinary hearing commences de nova with the 2nd and 3rd Appellants being represented by the pt Appellant at such proceedings.*

(iii) *Costs of Appeal against the 1st Respondent."*

29.1 There is neither allegation nor evidence on record that after the Industrial Comi ruling of the 28th October 2020, certain adverse decision was taken by 1st and 2nd Respondents against the 2nd and 3rd Appellants at or consequent to - a disciplinary hearing. The Appellants' prayer will have to be determined by the Industrial Court as a Court of first instance.

29.2 The question whether or not the 2nd and 3rd Appellants are entitled to be represented by a union official - at the disciplinary hearing, would be determined by the Industrial Comi when the main application is heard - together with the fourth and seventh ground of appeal. The first and second

grounds of appeal have been dealt with as one since their contents are interrelated.

29.3 The proposed relief by the Appellants that the present Court should order that the disciplinary hearing should commence *de nova,* is not among the prayers in the notice of motion that the Appellants filed at the Industrial Court. That prayer would have to be included in the notice of motion and affidavit, in order for the Industrial Court to make a determination on it, as a Court of first instance.

29.4 The general rule is that costs follow the event. The Industrial Court of appeal has a discretion on the issue of costs. Consequently this Court awards the 2nd and 3rd Appellants costs of this appeal.

30. Wherefore the following order is issued:

30.1 The appeal is successful.

30.2 The order of the Industrial Court that dis1nissed the Appellants' application is set aside.

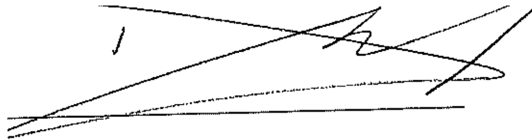
30.3 The order of the Industrial Court should read as follows:

30.3.1 Prayers 1, 2, 2.1 and 2.2 ofthenotice of motion are granted.

30.3.2 The 1natter is postponed to a date to be arranged by Court for hearing the main application on a date to be arranged with the representatives of the parties and subject to the Court regulating the filing of such further papers as may be necessary - in readiness for argmnent.

30.4 The 1st Respondent is liable to pay the costs of appeal.

30.5 The matter 1nay proceed before another Court for continuation as the merits of the application have not been heard.



D. MAZIBUKO

JUDGE - INDUSTRIAL COURT OF APPEAL

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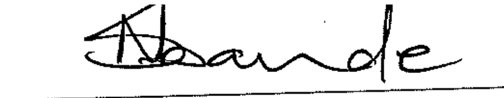
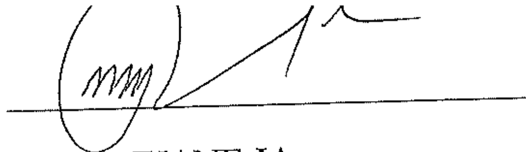


S. NSIBANDE JP

I agree



N. NK NYANE JA

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