IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 722/2017

In the matter between:

SWAZILAND ELECTRICITY COMPANY

and

MBONGISENI DLAMINI	**1ST RESPONDENT**
GCINA MASEKO	**2ND RESPONDENT**
THABISO SIMELANE	**3RD RESPONDENT**
SIMON M. DLAMINI	**4TH RESPONDENT**
SWAZILAND ELECTRICITY SUPPLY MAINTENANCE AND ALLIED WORKERS UNION	**5TH RESPONDENT**
JUSTICE NKOSINATH NKONYANE N.O.	**6TH RESPONDENT**
GILBERT NDZINISA N.O.	**7TH RESPONDENT**
SIMON MVUBU N.O.	**8TH RESPONDENT**

Neutral Citation	:	Swaziland Electricity Company vs Mbongiseni Dlamini and 7 Others (722/2017) [2017] SZHC 271 (30 APRIL2018)
Coram	:	MABUZA – PJ
Heard	:	7 NOVEMBER 2017
Delivered	:	30 APRIL 2018

SUMMARY

Civil Law - **Application for review and setting aside of judgment and order of Industrial Court.**

Civil Procedure - **Industrial Court has no jurisdiction to entertain issue of sanction of dismissal of employee without that employee having adhered to the peremptory provisions of Part III of the Industrial Relations Act.**

Civil Procedure - **Estoppel – That employer waived right to substitute sanction because of delay – Issue not raised in pleadings – Applicant not given opportunity to plead thereto – Industrial Court committed reviewable error – Application granted - Each party to pay its own costs.**

JUDGMENT

MABUZA -PJ

[1] The Applicant seeks an order in the following terms:

(a) Reviewing and setting aside the judgment and order delivered by the Industrial Court on 17 May 2017 under case No. 138/2017;

(b) Substituting that order with an order dismissing the application that came before the Industrial Court under that case number;

(c) Ordering the 1st to 4th Respondents and (only in the event of opposition)

the other Respondents to pay the costs of the application jointly and severally;

(d) Further and/or alternative relief.

The parties

[2] The Applicant is Swaziland Electricity Company Limited, a company duly incorporated and registered in accordance with the company laws of the Kingdom of Swaziland and having its principal place of business at Eluvatsini House, Mhlambanyatsi Road, Mbabane, Hhohho Region.

[3] The 1st Respondent is Mbongiseni Dlamini, an adult male of Mbabane who was employed by the Applicant in the position of Electrician in the Distribution Department.

[4] The 2nd Respondent is Gcina Maseko, an adult male of Manzini who was employed by the Applicant in the position of Electrician in the Distribution Department.

[5] The 3rd Respondent is Thabiso Simelane, an adult male of Manzini who was previously employed by the Applicant in the position of Technician.

[6] The 4th Respondent is Simon Dlamini, and adult male of Mahlangatja who was previously employed by the Applicant in the position of Electrician.

[7] The 5th Respondent is the Swaziland Electricity Supply Maintenance and Allied Workers Union, a trade union duly established in accordance with the provisions of the Industrial Relations Act and recognized by the Applicant as the collective bargaining agent for unionisable employees, c/o 1st Avenue, Matsapha.

[8] The 6th Respondent is Justice Nkonyane N.O. cited in his capacity as the Judge of the Industrial Court, who presided over the urgent application brought by the 1st to the 5th Respondents against the Applicant under Industrial Court Case No. 138/2017.

[9] The 7th and 8th Respondents are Members of the Court that sat with the Presiding Judge when determining the application before the Industrial Court.

[10] No costs order is sought against the 6th, 7th and 8th Respondents, unless they oppose the relief sought herein, in which event, the Applicant will ask for the costs occasioned by such opposition.

The grounds of review

[11] The grounds of review are as follows:

(a) The Industrial Court did not have jurisdiction to deal with an Application that effectively sought to set aside a termination of services without there having been an adherence to the peremptory provisions of Part VIII of the Industrial Relations Act.

(b) The Industrial Court committed an error of law, when it found that it had jurisdiction to set aside a termination of employees' services an order reinstatement of employees without having conducted an enquiry as envisaged in Section 16 of the Industrial Relations Act.

(c) The Court misdirected itself and acted unfairly, when it held that there was a requirement in terms of Article 10.1 of the Disciplinary Code that the Applicant unreasonably delayed to substitute the decision of the disciplinary hearing chairperson.

(d) The Court ignored relevant considerations and placed reliance on irrelevant considerations, when it found that the Applicant had become estopped from exercising its right to substitute the decision of the chairperson. This was not the case pleaded by the Respondent and there was no evidence tendered in support of this conclusion.

(e) The Court was obliged to exercise its powers in accordance with the tenets of the law by placing due weight on the evidence and submissions presented. The Court ignored the evidence and submissions presented on behalf of the Applicants.

[12] This Application is opposed by the 1st to 5th Respondents.

Background facts

[13] The matter has its genesis in disciplinary proceedings that were instituted against the 1st to the 4th Respondents by the Applicant. The disciplinary proceedings pertained to various acts of negligence and/or failure to implement operational safety rules and procedures which in respect of the 1st to the 3rd Respondents, gave rise to industrial accidents where three people died. The 1st to the 3rd Respondents pleaded guilty to the offences that they faced. With respect to the 4th Respondent, he was charged with dishonesty which had elements of fraud. Likewise he also pleaded guilty.

[14] The disciplinary hearings which were chaired by different fellow employees were held during the month of January and February 2017. The initiators were also fellow employees. This was in accordance with the applicable disciplinary code and procedure. The 1st to 4th Respondents were found

guilty of the charges and the following sanctions were issued in respect of each of them:

1st Respondent	–	final written warning
2nd Respondent	–	final written warning
3rd Respondent	–	three (3) months suspension without pay plus final written warning.
4th Respondent	-	one (1) month suspension without pay and a final written warning

[15] On 30th March 2017, the Applicant being dissatisfied with the sanctions and acting through its General Manager, Operations wrote to the Respondents informing them that it intended to review the sanctions handed down by the chairpersons. The Respondents were also given the opportunity to make their representations on the following issues:

(a) Why the Applicant should not exercise its discretion to review and substitute the sanctions meted out by the chairpersons of the disciplinary hearings.

(b) Why the Company should not intervene in the recently concluded disciplinary proceedings

The Respondents responded to this correspondence per letters dated 5th April 2017, stating that it would be inappropriate for management to re-open the cases and review the sanctions that were imposed by the properly appointed disciplinary chairpersons. The Applicant not being persuaded by the

Respondents' objections, went ahead to review the sanctions and issued sanctions of summary dismissal per letters dated 27th April 2017.

[16] In response the 1st to 4th Respondents, made representations and in their representations challenged the right of the Applicant to substitute the sanction meted out by the disciplinary hearing chairpersons. Having considered the representations made by the 1st to the 4th Respondents, the General Manager proceeded to implement the sanctions of summary dismissals in respect of all four Respondents.

[17] The 1st to 4th Respondents being dissatisfied with their manner of dismissal launched an urgent application in the Industrial Court on the 4th May 2017 wherein they sought amongst other relief the following orders:

(a) Declaring the Applicant's act of terminating the 1st to the 4th Respondent's employment unlawful, irregular, null and void and of no effect.

(b) Interdicting the Applicant from ejecting them from houses or accommodation units provided by the Applicant to them by virtue of their employment with the Applicant.

(c) Declaring as irregular and unlawful all processes initiated by the

Applicant following and purporting to be in furtherance of already completed disciplinary hearings involving them and interdicting the Applicant from continuing with the appeal process and activities in relation to the disciplinary hearing outcomes.

(d) Staying the dismissals of the 1st to the 4th Respondents.

[18] The Industrial Court found in favour of the 1st to 4th Respondents and issued the following orders against the Applicant (Respondent then).

"(a) The Applicant's substitute dismissal decision is declared unlawful.

(b) There is no order as to costs".

Hence the review sought by the Applicant from this Court.

[19] ***The first ground of review is that the Industrial Court did not have jurisdiction to deal with an Application that effectively sought to set aside a termination of services without there having been an adherence to the peremptory provisions of Part VIII of the Industrial Relations Act.***

[20] The application by the Respondents before the Industrial Court sought an order setting aside the termination of the 1st to 4th Respondents' services on the bases of procedural unfairness. The Respondents contended that the Applicant's decision terminating their services was unlawful on the basis

that the employer could not substitute a decision of a chairperson in a disciplinary hearing, and that the Applicant's act of terminating their employment was unlawful, irregular, null and void and of no effect (prayer). Further declaring as irregular and unlawful all processes initiated by the employer.

[21] Applicant's contention is that the Industrial Court had no jurisdiction to hear the application for review brought by the Respondents and that the Industrial Court had no jurisdiction to set aside a dismissal decision unless and until the peremptory procedures set out in Part VIII of the Industrial Relations Act have been complied with. And that the Respondents ought to have followed the dispute resolution set out therein, namely, refer the matter to CMAC for mediation failing that, to arbitration. The Applicants relied on the cases of **Charles Ndlovu v Swaziland Posts and Telecommunications Corporation & Another,** Case No. 599/2015**; Gcina Dlamini v Nercha & Another,** Case No. 164/2016 (IC) and **Swaziland Poultry Processors v The presiding Judge of the Industrial Court,** Case No. 382/2014 (HC).

[22] The response by the Respondents is that the general principle of the law in relation to requirements of Part VIII of the Industrial Relations Act is not

denied. However they submit that there is an exception to this general rule namely where there are exceptional circumstances, the urgent intervention of the Industrial Court is warranted. That in this case the termination was not final as the concerned Respondents had been given a right of appeal through the irregular and grossly unjust procedure specially created by the Applicant. And that this sham of a process was still on-going making it perfectly in order for the Industrial Court to intervene, there being exceptional and peculiar circumstances that justify the waiver of the provisions of Part VIII.

[23] In its judgment *in casu* dated 17th May 2017, the Industrial Court upheld in essence the contention that in appropriate circumstances, an employer does have the right to intervene and interfere with the decision of a disciplinary hearing chairperson, where the employer is of the view that the decision is egregious in nature and/or will result in unfairness and/or cannot be sustained.

[24] The Industrial Court reckoned that the cases relied on by the Applicants were distinguishable from the present case in that in *casu* the gist of the Respondents case is whether or not the Applicant has power to review the decision of the chairperson in circumstances where that is not expressly

provided for in the Recognition and Procedural Agreement. And specifically on the issue of jurisdiction the judgment at paragraph 21 reads:

> **"The Court having come to the conclusion that the Respondent is estopped from exercising the substitution right because it unreasonably delayed in the circumstances of this case, the enquiry should end there. The dismissals followed or were as the result of the processes that the Court has found to be improper or unlawful. Because of the position that the Court has taken, there is therefore no need for the Court to now venture into the enquiry of the lawfulness or otherwise of the dismissals as they automatically fall away".**

[25] I agree with the Applicant that the Industrial Court did not clearly indicate from where it derived its jurisdiction to hear the matter nor have the Respondents (Applicants then) clearly stated from where the Court derived its jurisdiction to entertain the matter. The Court in my view ought to have redirected the Respondents to follow and exhaust the procedures set out in Part VIII of the Industrial Relations Act.

[26] Mr. Hlophe for the Respondents does not make the situation any clearer. His argument is that in this case the Industrial Court rightly waived the Provisions of Part VIII of the Act and the enquiry of evaluating the procedural and substantive fairness of the dismissals by reason that, the Applicant adopted an improper process, one that is not provided for in the

Disciplinary procedure. And that the process is improper as in terms of Article 13 of the Collective Agreement between the parties all discipline is to be administered in accordance with the Disciplinary Procedure.

[27] In the present matter, the Respondents did not follow the peremptory requirements of Part VIII of the Industrial Relations Act, and accordingly the Court did not have jurisdiction to deal with the termination of the Respondents' services. The Industrial Court does not sit as a court of review of an employer's decision to terminate the services of an employee. It must conduct its own enquiry into the lawfulness, fairness and appropriateness of the termination, only once there has been compliance with the peremptory requirements of Part VIII of the Industrial Relations Act.

[28] The Industrial Court both in terms of the Industrial Relations Act and its own rules, did not have jurisdiction to entertain the matter. By assuming jurisdiction that it did not have, the court *a quo* committed an error of law which gave rise to a reviewable irregularity. It assumed powers that had been specifically excluded by the enabling statute. The Industrial Court as a creature of statute, does not have original jurisdiction, but can only act within the confines of the Industrial Relations Act.

[29] It is trite, that the Industrial Court cannot make a pronouncement on the validity or otherwise of a dismissal, unless and until the peremptory procedures set out in Part VIII of the Industrial Relations Act have been complied with. This position has been upheld in a number of cases both at the Industrial Court as well as the High Court. The cases of **Charles Ndlovu v Swaziland Posts and Telecommunications Corporation and Another** Industrial Court case No. 164/2016; **Gcina Dlamini v Nercha and Another** Industrial Court case No. 668/2008 are some of the cases that have dealt with this principle in the Industrial Court.

[30] In a review application similar to the present one, i.e. where the Industrial Court declared a dismissal to be invalid without having complied with the peremptory requirements of Part VIII and without the Court having conducted its own enquiry into the facts and circumstances giving rise to the dismissal as enjoined by both the Employment and the Industrial Relations Act, the High Court set aside the decision of the Industrial Court and reaffirmed the principles outlined above. See: **Swaziland Poultry Processors v the Presiding Judge of the Industrial Court High Court** Case No. 382/2014 per Mlangeni J. In that matter the Court stated:

> **"To set aside a decision that has led to the dismissal of an employee there must be a finding that the dismissal is unfairly substantively, or otherwise. The statutory process for that purpose is the Industrial Relations Act 2000 as amended. It appears to me that this procedure can neither be circumvented or abridged. The matter must be reported as a dispute dealt with by the appropriate structures before it gets to the Industrial Court as an unresolved dispute".**

[31] In **Gcina Dlamini** case quoted above and at paragraphs 13 and 14, the Court stated:

> **"Once the employer has exercised it prerogative to terminate the services of an employee, the contract of employment comes to an end. The Industrial Court has the power and jurisdiction thereafter to award compensation for unfair dismissal, whether the fairness is substantive or procedural or to restore the employment contrary by making an order for reinstatement or re-engagement. The Court must however, take into consideration all the circumstances of the dismissal, and may not simply set aside the dismissal on the basis of a review of the disciplinary hearing. A private sector employee who wishes to seek redress for his/her dismissal must ordinarily comply with the dispute reporting procedures prescribed by Part VIII of the Industrial Relations Act"**

[32] Accordingly therefore the Industrial Court ought to have upheld the preliminary point of law raised by the Applicant relating to the jurisdiction of the Court and directed that the Respondents should report a dispute in

terms of the procedure prescribed by Part VIII of the Industrial Relations Act.

[33] It is settled law that even if the Industrial Court were to come to the *prima facie* conclusion that the employer did not have the right to substitute the decision, the Respondents are still obliged to follow the dispute procedures in terms of Part VIII.

[34] In both the cases of **Mashaba** and **Ndlovu** cited above, the Industrial Court was being required to set aside a termination on the basis of invalidity. In both matters, the Industrial Court upheld the point of law. In the **Kenneth Mashaba** decision, the Industrial Court at paragraph 16 stated:

> **"16 Every employee who is challenging his dismissal is capable of accusing the employer of some illegality, irregularity or invalidity in the manner the dismissal was carried out. Whether the attack on the dismissal is based on an allegation that the employer grounded his decision on –**
>
> **16.1 a wrong principle of law, or**
> **16.2 a wrong conclusion on the facts; or**
> **16.3 a breach of procedure, or**
> **16.4 a breach of policy, or**
> **16.5 a breach of a disciplinary code, or**
> **16.6 a breach of the contract of employment.**

It is still a claim for unfair dismissal. The phrase: unfair dismissal – is a collective term that incorporates an illegal, irregular and invalid dismissal. A claim for unfair dismissal does not become urgent simply because it is premised on a technical point – which would overturn the dismissal, if it successfully argued".

[35] The Industrial Court in my view committed an error of law, when it assumed jurisdiction that it can in certain circumstances, set aside a dismissal purely because of some technicality or another. This conclusion was fundamentally flawed and went against the grain of established and now trite principles relating to dismissal.

[36] Where a subordinate court has committed a mistake or an error of law, in circumstances where such error gives rise to the court assuming jurisdiction over a matter that it did not have jurisdiction, then the competent relief is that of review. See: **Hira and Another v Booysen and Another** 1992 (4) SA 69 A.

[37] I uphold this ground of review, namely that the court *a quo* had no jurisdiction to entertain this matter.

[38] ***The second ground of review is*** that ***The Industrial Court committed an error of law, when it found that it had jurisdiction to set aside a termination of employees' services and order reinstatement of employees without having conducted an enquiry as envisaged in Section 16 of the Industrial Relations Act.***

[39] The argument presented by the Applicant herein is that the Industrial Court committed an error of law, when it found that it had the requisite jurisdiction to set aside a termination of the Respondents services and effectively order their reinstatement. That the Industrial Court can only order a setting aside of a termination, once it has conducted its own enquiry on the validity and the appropriateness of the sanction of dismissal. This simply means that the court must first and foremost establish whether, there was a valid reason for the termination of the employees' services (substantive fairness) and furthermore, whether the employer acted fairly when terminating the employee's services (procedural fairness). In addition, the court must then enquire whether taking into account all the circumstances, it was fair to terminate the services of the employee (fairness).

[40] In the present matter, the court did not conduct an enquiry as set out above, and as envisaged by both substantive and procedural law. Accordingly the court could not in the absence of such enquiry, make a determination of the lawfulness and/or validity of the termination of services.

[41] In response to the Applicant's argument the Respondents state that the Industrial Court had the necessary jurisdiction and did not commit an error of law in declaring the decision as unlawful, unjust and unfair. And that the process through which the unlawful substitution was being effected is not contained in the Disciplinary code and Procedure. The Applicant enjoys no power of substitution since in terms of Articles 8.12 and 8.13 of the Disciplinary Code a disciplinary hearing chairperson is given powers to issue a sanction, and that in such circumstances the Applicant did not have a right or discretion to substitute.

[42] That the Applicant had allocated unto itself powers that it did not have at the expense of justice and fairness, and that therefore, the Court had jurisdiction to declare the decision unlawful.

[43] In terms of the competent relief that the Industrial Court may grant, its powers are circumscribed in terms of Section 16 of the Industrial Relations Act. Section 16 (2) (d) provides that the court cannot order an employer to reinstate or re-engage an employee if the reason for the finding that the dismissal is unfair is because the employer did not follow fair procedure.

[44] In the present matter, the finding by the Court pertained to a procedural unfairness, in that the Court held that the Applicant had unreasonably delayed in substituting the decision of the chairpersons. Put differently, the Court did not hold that the Applicant was not entitled to substitute the decision, in fact, it found that the Applicant did have the power to do so and illustrated this power by citing and relying on several decided cases. Furthermore, the Court did not find that the sanction of dismissal was inappropriate or that it did not accord with the offence committed. In fact, it found that the sanction would have been appropriate if it had been effected within reasonable time.

[45] It is clear to me that the Court committed an error of law, when it ordered the reinstatement of the Respondents without having conducted an enquiry

in terms of Section 16 (a) (b) and (c) of the Industrial Relations Act. I accordingly uphold this ground of review.

[46] ***The third ground of review is that the Court misdirected itself and acted unfairly, when it held that there was a requirement in terms of Article 10.1 of the Disciplinary Code that the Applicant <u>unreasonably delayed</u> to substitute the decision of the disciplinary hearing chairperson.***

[47] The core reasoning of the learned judge in the Industrial Court in reaching the decision it came to herein is captured in the judgment as follows:

> **"18. In *casu,* even though the Court has expressed itself in favour of the principle of substitution, the present case is however, distinguishable. In *casu,* the employee, in terms of Article 10.1, is given seven working days within which to appeal. Taking the seven working days period as a working rule, the Court is of the view that the Respondent should have also exercised its right to review the decisions promptly within that period. The employer in the present case took a long time to intervene and review the decisions of the chairpersons in circumstances where unfairness and prejudice would occasion the Applicants if the Court were not to intervene and declare the course of action adopted by the Respondent as being unlawful".**

"19. The seven working days period stated in Article 10.1 was agreed upon by the parties as being sufficient period for the employee to consider the judgment or sanction and thereafter make up his mind whether to file an appeal or not. There is therefore nothing wrong in principle or common sense that this period should be a guideline to measure the reasonableness of the delay by the Respondent to review the sanctions. Taking the seven working days enshrined in Article 10.1 as a reasonable period within which the dismissed employee could lodge an appeal, it is the Court's conclusion that the Respondent unduly delayed and acted outside what the parties consider to be a reasonable period within which to challenge the decision of a chairperson".

[48] Equally Mr. Hlophe's argument goes thus:

"10. An employer's right of substitution is not absolute. It cannot for instance be exercised where the employer chooses to implement a sanction and then springs up after an unreasonably long delay, to alter the sanction. Exercising the right in such circumstance s causes prejudice and injustice to the affected employee. The Applicants rights of substitution must be exercised as soon as the decision is issued that is to say prior to implementing it. Implementation of the decision signifies that the employer is satisfied with the same. Time is of the essence in exercising the right of substitution as already stated this right is not without limits".

[49] The Applicant's argument is that the Industrial Court misdirected itself in holding that the Applicant had unreasonably delayed in reviewing the decision of the chairpersons and this delay meant that they were estopped from exercising their right of substitution. The Applicant argues that this having not been pleaded, the Court denied the Applicant a fair hearing because it was not accorded an opportunity to place before Court the evidentiary material that would have called upon the Court to make a determination on whether or not the time lag was unreasonable.

[50] In this respect I agree that the Court failed to apply its mind to the matter that was before it, but arrived a decision in a capricious manner, thereby committing a reviewable irregularity. The disciplinary code does not specify a time frame within which the right of review of the chairman's decision could be exercised. Accordingly therefore the matter had to be determined in accordance with common law principles.

[51] At common law, the right of review must be exercised within a reasonable time. The courts have time and again set out guidelines to determining what constitutes a reasonable time. Instructive in this regard is the case of **Radebe v The Government of South Africa and Others** 1995 (3) 787. In

that matter, though the Court was dealing with a review of court proceedings, it set out certain fundamental principles. At page 798 it stated:

> **"… the court has first to determine whether a reasonable time has elapsed prior to the institution of the proceedings, or, to put it differently, whether there had been an unreasonable delay on the part of the Applicant (Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad, 1978 (1) SA 13 (A) at 42 A: Setsokosane Busdiens (Edms) Bpk v Voorstter, Nasionale Vervoerkommissie, en 'n Ander, 1986 (2) SA 57 (A) at 86 B – D.**
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> **In deciding whether a reasonable time has elapsed, a Court does not exercise a discretion. The enquiry is a factual one, that is whether the period which has elapsed was, in the light of all the relevant circumstances, reasonable or unreasonable (Wolgroeriers Afslaers) case, supra, at 42 C-2; Setsokosane's case, supra at 86 (E)**
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> **If the court were to arrive at the conclusion that there has been an unreasonable delay, the court exercises a discretion as to whether the unreasonable delay should be condoned.**
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> **What a reasonable time is, is of course dependent upon the circumstances of each case …**
>
> **When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate**

an acceptable compromise before resorting to litigation (Scott and Others v Hanekom and Others, 1980 (3) SA 1182 (C) at 1192; to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.

When considering whether the time taken to prepare the necessary papers was reasonable or unreasonable, allowances have to be made for the differences in skill and ability between various attorneys and advocates".

[52] It is apparent from the foregoing that in order to make a determination on whether or not there has been an unreasonable delay, the court conducts a factual enquiry. It looks into the facts set out by the Applicant as well as those by the Respondent and makes a determination based on those facts. In the present matter, there were no such facts that had been pleaded and therefore the court was not in a position to make a determination on this matter. The authorities are also clear, that where there has been a lengthy delay but the reviewing party, can proffer a cogent reason, then the courts can condone the delay in the exercise of the review powers.

[53] I find therefore that the decision of the Court that the Applicant delayed in instituting the review of the chairpersons decision was unreasonable and

reviewable on that ground. I am fortified therein by the following authorities. In the matter of **Standard Bank of Swaziland v Thembi Dlamini** High Court case No. 3420/2000, the High Court conducted an extensive analysis of the law relating to review and the question of reasonableness. The court citing the works of Professor Lawrence `Baxter Administrative Law at page 496 stated:

> **"When one is called on to judge whether a decision is unreasonable, the decision might be viewed from various perspectives. For convenience these have been grouped into three categories, and it is under these heads that principles relating to abuse of discretion will be expounded".**

The learned author goes on to list and briefly discuss the categories as being (i) the basis of the decision (ii) Purpose and motive and (iii) Effect of the decision. In so far as these categories are concerned the learned author has this to say:

> **"(i) Basis - if a decision is entirely without foundation it is generally accepted to be one to which no reasonable person could have come. Here there is some overlapping between dialectical and substantive unreasonableness, since there are indications that, while the courts will set aside administrative decisions which are supported by nothing at all, they will also set aside decisions which are complete <u>non sequitors</u> of the evidence available. Decisions will also be set aside where considerations that are deemed relevant have not been taken into account, or where irrelevant considerations have**

been used to support the decision. (ii) <u>Purpose</u> and motive – It is considered to be unacceptable for a public authority to use its powers dishonestly. Equally unreasonable, though possibly less reprehension, is the use of powers for purposes that are not completed by the enabling legislation. (iii) Effect – Reasonable people do not advocate decisions which would lend to harsh, arbitrary, unjust or uncertain consequences. The courts will review administrative acts, particularly subordinate legislation, in light of their effects and, should these be found to be unreasonable, the action will be set aside. These are not rigid categories; the way in which the challenge of unreasonableness is characterized will often depend on the terminology one uses or perspective one adopts. A perusal of the relevant dicta will reveal a welter of inconsistent terminology, as judge refer to 'mala fides', 'improper purposes', 'improper motives', 'ulterior purpose', 'ulterior motives', 'improper considerations'. The reason for this, it is suggested, is that these terms all represent conceptions of the common term of unreasonableness".

[54] Furthermore to hold that an employer must exercise his right of review within the same time that is accorded for the right of appeal, is irrational. For example, if one looks at the right of review from the Industrial Court to the High Court, there is no timeline that is prescribed by statute. However, in respect of an appeal, there is a statutory timeline of three months. The principle being that review proceedings are always governed by the principle of reasonable time.

[55] Where a decision is said to be irrational, then the High Court has power to interfere and review and set aside that decision. The principle of

irrationality was set out in the case of **Democratic Alliance v President of the Republic of South Africa and Others** Constitutional case No. 2013 (1) SA 248 CC where the Court stated:

> **"There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality thus renders the final decision irrational".**

It is submitted that these principles apply equally to decisions by a court as they do to executive decisions.

[56] In light of the foregoing I must therefore uphold this ground of review.

[57] ***The fourth ground of review is that the Court ignored relevant considerations and placed reliance on irrelevant considerations, when it found that the Applicant had become estopped from exercising its right to substitute the decision of the chairperson. This was not the case pleaded***

by the Respondent and there was no evidence tendered in support of this conclusion.

[58] The Applicant argues that the court *a quo* committed an error of law, when it found that the Applicant was estopped from effecting the substitution of the disciplinary sanction. The court ***a quo,*** incorrectly applied the principles of estoppel, in that, there was never any representation by the Applicant which may have induced the Respondent to act in a particular manner.

[59] That in reaching the conclusion in respect of estoppel, the Court failed to apply its mind to the relevant issues for determination, and instead, applied incorrect legal principles with a result that it made a determination that was not supported by the facts and the law.

[60] The Respondents deny the submissions made by the Applicant and submit that by reason of the conduct of the Applicant firstly to implement the sanctions and secondly, its failure to seek a lawful manner within a reasonable time, to substitute the sanctions, the Applicant can be estopped in accordance with the principle of estoppel by conduct. A representation by conduct was therefore made by the Applicant. They further submit that the

doctrine of estoppel is part of our labour law and by applying it the Court did not take into account irrelevant considerations.

[61] I uphold this ground of review.

[62] ***The fifth ground of review is that the Court was obliged to exercise its powers in accordance with the tenets of the law by placing due weight on the evidence and submissions presented. The Court ignored the evidence and submissions presented on behalf of the Applicants.***

[63] It is the Applicant's submission that on a totality of the facts and evidence, it is evident that the Court did not apply its mind fully, properly and fairly when reaching the decision to set aside the termination of the Respondent's services. The setting aside of the termination was in the circumstances irrational having regard to the relevant legal principles, the facts and the circumstances of the matter.

[64] The Applicant's further argues that the Court at worst, ought to have directed the Respondents to exercise their right to appeal against the termination of their services in order to have a proper enquiry on the various aspects of the termination of their services.

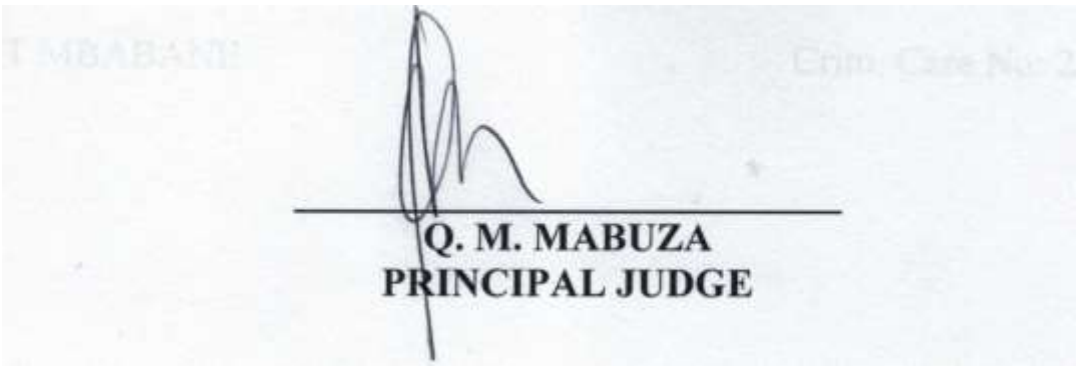
[65] The response by the Respondents is that the Court carefully analyzed all the circumstances of the case including the legal issues involved, the evidence and arguments put forth, interest of fairness and justice and that the the Court correctly found that this case is distinguishable from other cases where the exercise of an employer's right of substitution is without limitations or difficulties and is exercised in the proper manner.

[66] Equally as in the foregoing I hereby uphold this ground of review.

[67] In the circumstances:

(a) The application is hereby granted in terms of prayers (1) and (2) of the notice of motion dated 14th June 2017.

(b) Each party is ordered to pay its own costs.



Q. M. MABUZA
PRINCIPAL JUDGE

For the Applicant	:	Advocate Paul Kennedy Instructed by Mr. Z. Jele
For the Respondents	:	Mr. M. Hlophe