IN THE HIGH COURT OF ESWATINI

RULING

HELD AT MBABANE **CIVIL CASE NO: 1242/2019**

In the matter between:

PHESHEYA NKAMBULE APPLICANT

And

NEDBANK (SWAZILAND) LTD 1ST RESPONDENT

MUSA SIBANDZE N.O. 2ND RESPONDENT

Neutral Citation: *Phesheya Nkambule v Nedbank (Swaziland) Ltd & Another (1242/2019) [2019] SZHC 162 (16 August 2019)*

CORAM: **NM MASEKO J**

FOR APPLICANT: **MR. MLK NDLANGAMANDLA**

(MLK NDLANGAMANDLA ATTORNEYS)

FOR THE RESPONDENTS: **MR. Z.D. JELE**

(ROBINSON BERTRAM ATTORNEYS)

DATE HEARD: **02 AUGUST 2019**

DATE DELIVERD: **16TH AUGUST 2019**

Preamble:

Civil Procedure – Review Proceedings – Whether this Court has jurisdiction to review employer's disciplinary proceedings of an employee where the matter has not gone through the procedures as provided for in Part VIII of the Industrial Relations Act – Whether this Court has the power as per Section 32 and 33 of the Constitution to exercise its review jurisdiction in labour matters

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RULING

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[1] On the 1st August 2019, the Applicant launched motion proceedings on urgency and seeking the following relief.

1. Dispensing with the usual forms and procedures as relating to time limits and service of Court documents, that the matter be heard as one of urgency.

2. Condoning the Applicant's non-compliance with the Rules of this Court as relate to service and time limits.

3. That a Rule Nisi do hereby issue calling upon the 1st Respondent to show cause on a date to be determined by the Honorable Court why an order in the following terms should not be made final:

   3.1 Staying the disciplinary hearing currently set to proceed on Friday 2nd August 2019, pending the final determination of this application on Review of the Ruling of the 2nd Respondent dated 31st August 2019.

3.2 Directing the 1st Respondent to produce a transcript of the disciplinary hearing proceedings of the 30th July 2019.

3.3 Reviewing and Setting aside the Ruling of the 2nd Respondent of the 31st July 2019 and substituting same with the following orders;

3.3.1 Declaring the charges preferred against the Applicant on the 11th July 2019 as time barred and being of no force and or effect from the date of judgment of this Honourable Court;

3.3.2 Declaring the new disciplinary process and or second disciplinary hearing initiated by the 1st Respondent by a letter of initiation dated the 11th July 2019 null and void and of no force and effect;

ALTERNATIVELY

3.3.3 The 1st Respondent is removed from being the chairperson of the disciplinary hearing and the disciplinary hearing is then to commence de novo as of the date of judgment of this Honourable Court;

3.3.4 Compelling the 1st Respondent to furnish the Application with Further Particulars requested in the letter dated 24th July 2019.

4. Prayers 1, 2, and 3 to operate with immediate interim effect pending finalization of this matter.

5. Costs of the Application in the event it is opposed.

6. Further and or alternative relief.

[2] The Founding Affidavit of the Applicant and Annexures thereto were filed in support of this application.

BRIEF HISTORY

[3] It is necessary that I outline a brief history of these proceedings before I deal with the points *in limine* as raised by the Respondents' attorneys and which points wee argued by Counsel on both sides on the 2nd August 2019 at 07.00am.

[4] It is common cause that the Applicant is an employee of the 1st Respondent and currently on suspension without pay pending finalization of two separate disciplinary proceedings as instituted by the 1st Respondent against the Applicant.

[5] It is also common cause that, it is the second disciplinary proceedings chaired by the Second Respondent that is the genesis of these proceedings.

[6] These second disciplinary proceedings were due to proceed on the 2nd August 2019 when the Applicant filed these proceedings to review and set aside amongst other prayers – the Ruling of 2nd Respondent of the 31st July 2019.

[7] I will not at this stage go into detail on the 2nd Respondent's Ruling of the 31st July 2019, save to mention that it is Annexure C in these proceedings.

THE HEARING OF THE POINTS IN LIMINE

[8] The 2nd Respondent raised a number of points *in limine*, however on the 2nd August 2019, when the points were due to be argued by Counsel, it was agreed that only two points should be dealt with namely, the point *in limine* that this Court has no jurisdiction do deal with this matter as the issues are in essence of a labour nature and as such, fall within the ambit and jurisdiction of the Industrial Court.

[9] The second point in limine was that there is no urgency in the matter to warrant this Court to dispense with its normal business and hear this matter on urgency.

THE POINTS IN LIMINE ON JURISDICTION AND URGENCY

[10] Mr. Z.D. Jele for the Respondents argued at length that this Court does not have jurisdiction to hear this matter as the issues are labour matters which fell within the jurisdiction of the Industrial Court. He submitted that Section 8 of the Industrial Relations Act 2000 as amended read together with Section 151 (3) (a) of the Constitution of Eswatini Act NO. 1 of 2005 completely oust the jurisdiction of this Court in dealing with labour related matters.

[11] He referred me to the case of *Swaziland Breweries Limited & Another v Constantine Ginindza Civil Appeal NO. 33/2006* decided by the then Court of Appeal and now the Supreme Court of the Kingdom of Eswatini, wherein the Court per Browde AJP, Zietsman JA and Ramodibedi JA held that the High Court has no jurisdiction to hear and determine labour disputes and that such matters fall within the exclusive jurisdiction of the Industrial Court.

[12] Mr. Jele further referred me to the case of Lindsey Veloso v A.E. Wolmarans & Others Civil Trial NO. 932/1998 wherein Sapire CJ stated that,

> ***"the labour legislation, The Employment Act of 1980 and the Industrial Relations Act NO. 1 of 1996 (repealed by the Industrial Relations Act of the year 2000) provide for the remedies allowed and procedures to be followed in cases as the present"***

[13] Mr. Jele further referred to an article by HJ Erasmus, wherein His Lordship and Research Associate, Department of Private Law of the University of Stellenbosch deals at length with the subject of Judicial Review of inferior court proceedings.

[14] Mr. Jele further submitted that this Court does not have jurisdiction to deal with labour disputes in particular disciplinary hearings that are being conducted by private companies on their employees.

[15] Mr. Jele further referred to the case of *Swaziland Revenue Authority & Others v Presiding Judge of the Industrial Court of Appeal, Gugu Fakudze and Another Case NO. 1742/17* which was decided by the full bench of the High Court.

[16] On the point on urgency, Mr. Jele submitted that the timeliness set by the Applicant for the Respondents to answer to the Application were most unreasonable and actually amounted to litigation by ambush and implored this Court to dismiss the application forthwith.

[17] On the other hand Mr. MLK Ndlangamandla submitted that this Court has jurisdiction to deal with this matter. He argued that the Industrial Court has no jurisdiction to review disciplinary proceedings between an employer and employee, and that an employee who is aggrieved only has the High Court to resort to as he/she cannot approach the Magistrate's Court for adjudication of these matters.

[18] Mr. Ndlangamandla referred me to the case of *Phumelele Dlamini vs National Emergency Response Council on HIV/AID and Another* decided by the Industrial Court per my brother His Lordship Nkonyane J on the 29th May 2019, where he stated in no uncertain terms, that owing to numerous decisions by the High Court and the Industrial Court of Appeal that the Industrial Court did not have jurisdiction to review the employer's decision of terminating an employee's employment, he was enjoined to uphold the point that the Industrial Court did not have jurisdiction to deal with such reviews, hence he dismissed the Application with costs.

[19] Mr. Ndlangamandla further referred me to the case of *Sifiso Mavuso v Ntombifuthi Simelane N.O. and Swaziland Revenue Authority Case NO. 288/18* where His Lordship Nkonyane J again upheld the point of law raised by the Respondents that the Industrial Court did not have jurisdiction to review the decision of the employer.

[20] Mr. Ndlangamandla further referred this Court to the judgments of *Alfred Maia v The Chairman of Civil Service Commission & Two Others Case NO. 1075/2015 (HC)* and that of the *Attorney General v Sayinile Nxumalo Case NO. 14/2018 (ICA).*

[21] I must state that both cases, Alfred Maia decided by a full bench of the High Court and Sayinile Nxumalo decided by the Industrial Court of Appeal, held that the Industrial Court did not have jurisdiction to review the decision of the employer. These two cases together with others, are referred to by his Lordship Nkonyane J in the Sifiso Mavuso matter.

[22] Mr. Ndlangamandla submitted further that the prayers sought by Applicant in these proceeding were in the nature of an injunctive relief aimed at preventing further harm and injustice from being occasioned on the Applicant owing to the alleged unfair manner in which the 2nd Respondent was conducting the disciplinary proceedings, and

therefore that the matter had to be treated with the urgency which it deserved.

[23] He submitted further that the procedures laid down in the Industrial Relations Act in particular Part VIII thereof which empowers CMAC to deal with such issues would not be appropriate in these circumstances as it would channel the matter to the Industrial Court which has delivered the judgments referred to above and pronouncing its lack of jurisdiction in these review matters and also because of the urgency premised on the circumstances of this matter.

ANALYSIS OF THE LAW

[24] I must state that the powers of review of decisions of employers by the High Court has dominated the judicial arena for some time and there has been extensive and well-reasoned judicial pronouncements on this sensitive subject.

[25] In my analysis of the legal authorities touching on this sensitive subject, I shall firstly refer to the case of *Dumisa Zwane v Judge of the Industrial Court and 8 Others Civil Case NO. 1108/2014* decided by Her Ladyship Ota J on the 28th October 2014.

[26] The brief facts of this matter are that the Applicant Dumisa Zwane, had amongst other prayers, sought to interdict his employer – 4th Respondent being the Ezulwini Municipality from proceeding with his disciplinary proceedings pending finalization of review proceedings instituted before the High Court.

[27] The complaints or grounds for review of the Ezulwini Municipality disciplinary proceedings against the Applicant were that the disciplinary process was tainted by the Chief Executive's involvement in initiating the charges, giving evidence, appointing a chairperson and further awaiting to implement the decision of the chairperson.

[28] In order to demonstrate that the High Court has jurisdiction to hear and determine review proceedings of the employer, Her Ladyship Ota J dismissed the application by the Applicant Dumisa Zwane because he (Zwane) failed to show exceptional circumstances disabling the chairperson of the disciplinary proceedings from making a decision on the legality of the said charges.

[29] At paragraphs 39-40, Ota J stated as follows:

> '***[39] There is no doubt that <u>the Court can intervene in the process of a disciplinary enquiry</u>. It is however the judicial position, that the constitutional protection of***

employment entrenched in Section 32 (4) of the Constitution Act 2005, which protects employees from the ills stipulated therein, did not deprive employees of their common law right to discipline an employer using fair means and according to law. The Attitude of the Courts thus, is not to intervene in employees internal disciplinary proceedings until they have run their course, except where compelling and exceptional circumstances exist warranting such interference (my emphasis)

[40] The chairperson of a disciplinary enquiry and in whose hands lies the final decision, has quasi – judicial functions. He is by law presumed to be an independent and impartial umpire and to have the competence to determine any question in relation to the disciplinary enquiry, including the legality of the charges, until the contrary is proved. Since the question of the legality of the charges lies with the chairperson after the evidence has been led, the Court will only intervene on the issue of the charges, in the face of compelling factors disabling the chairperson from adjudicating, such as mala fides, bias etc". (my emphasis)

[30] It is clear therefore from the judgment of Ota J that this Court has jurisdiction to deal with review of employer's decisions where the constitutional rights of employees per Section 32 (4) of Act NO. 1 2005 is under threat. For ease of reference I shall reproduce the said section as framed in the Constitution as follows:

"32 (4) Parliament shall enact laws to:

(a) provide for the right of persons to work under satisfactory, safe and healthy conditions;

(b) ensure equal payment for equal work without discrimination;

(c) ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay as well as remuneration for public holidays; and

(d) protect employees from victimization and unfair dismissal or treatment.'

[31] In the landmark case of Alfred Maia vs The Chairman of the Civil Service Commission and Two Others Case No. 1070/15 2016 SZHC my brother His Lordship NJ Hlophe J, sitting together with my sister Her Ladyship QM Mabuza J (as she then was) and my brother His Lordship MR Fakudze J (both concurring) stated the following at paragraph 36:

> ***'I only need to clarify that the judgment referred to hereinabove, was actually based on the 1980 Industrial Relations Act which has since been succeeded by two successive Acts, namely the Industrial Relations Act, 1996 and the Industrial Relations Act 2000. Whilst all these Acts embraced the process of conciliation with the dispute only having to be dealt with by the Industrial Court, if it could not be successfully conciliated upon, and upon a certificate of a unresolved dispute to that effect issuing, it is apparent that with the first two Acts, the conciliation had to be by the Labour Commissioner unlike in the current one (that is the 2000 Act) where it has to be by CMAC as established in terms of Section 62 to 65 of the current Act. This distinction however does not detract from the fact that in all the Acts in question, a dispute would only get to be dealt with by the Industrial Court if it could not firstly be resolved by CMAC.'***

[32] At paragraph 37-38 of the same judgment the learned Justice states the following:

> ***'[37] This position of the Industrial Court's policy was further underscored by Rule 3 (2) of the Industrial Court Rules which provides as follows:***
>
> > ***"The Court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VIII of the Act."***
>
> ***[38] This Court is therefore convinced that the reference to Section 65 of the Industrial Court as the one upon which the jurisdiction of the Industrial Court is premised upon in terms of Section 8 (1) of the current Act, is more than anything underscoring the Policy of the Industrial Court referred to in the foregoing paragraphs which is primarily that the Court can only entertain a dispute between an employer and an employee after such a dispute shall have been conciliated upon without same getting resolved so as to result in a certificate of an unresolved dispute being issued. <u>This Court has not been given a justification nor a legal basis for any matter having to serve before the said Court without it fully adhering to this statutory and policy requirement.</u>*** (my emphasis)

[33] At paragraph 54 of the judgment, the Honourable Court stated as follows:

> ***'It has to be clarified that the decision by the Legislature not to accord the Industrial Court review powers should be assumed to have been carefully thought out and it does not render that Court ineffective in any way in matters that fall within its***

jurisdiction. I say so because the procedure for the hearing of matters that have run the full conciliation procedure by the Industrial Court does not render the said Court ineffective at all. <u>The normal procedure for the enforcement of employer/employee disputes before the Industrial Court, does recognize the procedural aspects of any decision taken by the employer to the extent such an aspect could be enforced independently and outside of the same decision in a befitting matter. There is therefore no doubt that the extending of the Industrial Court's jurisdiction to include the power to review the employer's decision under the guise that not to review such decisions would partially divest it of its jurisdictions was in my humble view a clear misdirection. I have no hesitation to say that the Industrial Court does not require the review jurisdiction or power for it to be effective. In reality there is no labour matter that is not satisfactorily dealt with because the Industrial Court has no review jurisdiction.'</u> (my emphasis)

[34] Further, the Industrial Court of Appeal in the case of the *Attorney General v Sayinile Nxumalo Case NO. 14/2018* per my brother TL Dlamini AJA sitting with my brothers N Hlophe AJA and TM Mlangeni (both concurring) stated as follows at paragraphs 51-52:

'***[51] <u>Having carefully considered and examined the applicable law, it is the finding of this Court that the Jurisdiction of the Industrial Court extends only to matters that have gone via the dispute resolution procedures provided for under Part VIII of the IRA (reported to CMAC). When determining these matters, the power includes making a determination of the substantive and procedural fairness of the decision being considered.</u>*** (my emphasis)

[52] <u>A consideration of the procedural aspect is effectively a review of the decision. This is the only kind of review that the Industrial Court can embark upon. It must be in respect of a matter that has gone via the CMAC route where it is conciliated upon and a certificate of unresolved dispute issued thereafter.'</u> (my emphasis)

[35] It is common cause that the major complaint raised by the Applicant in *casu* falls within the ambit of Section 324 (d) and Section 33 (1) of the Constitution of the Kingdom of Eswatini. It follows naturally that any question of an alleged transgression touching on these provisions falls squarely to be dealt with by this Court through its revisional jurisdiction as conferred by Section 151 (1) (c) (d) and Section 152 of the Constitution which provides as follows:

'151 (1) The High Court has –

(a) ----------

(b) ----------

(c) such revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland.

(d) such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland'.

Section 152 of the Constitution states as follows:

'(152) The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing

or securing the enforcement of its review or supervisory powers.'

[36] In *casu* it is these two Sections of the Constitution herein referred to in the foregoing paragraphs that empowers this Court to exercise its revisional or supervisory jurisdiction. The facts in *casu* touch upon the fundamental principles of natural justice, and it is these alleged ills which this Court is empowered to deal with, of course subject to the qualification that these alleged ills complained of have not been subject to Part VIII of the Industrial Relations Act 2000.

[37] As regards the point *in limine* on urgency, I am of the considered view that this matter falls within the range of urgency. I say this because the ruling of the Second Respondent complained of was delivered on the 31st July 2019. The Founding Affidavit was deposed to on the 31st July 2019 and the Application was served on the Respondents on the 1st August 2019 and enrolled before the urgent motion Court roll of the 1st August 2019 at 14.30hrs.

[38] This to me justifies the matter being brought on urgency because the 2nd Respondent was due to proceed with the disciplinary proceedings at 08.15hrs on the 2nd August 2019. These circumstances are urgent by their nature and such urgency cannot be said to be self-created.

The Applicant did not wait until the 11th hour to institute these proceedings but instead started working on the matter as at the 31st July 2019 as stated above herein. The issue of urgency was dealt with by my brother Mamba J in the case of *Frederick Mapanzene v Standard Bank Swaziland Limited in re Standard Bank Swaziland Limited v Kapson Investments (Pty) Ltd and 3 Others High Court Case NO. 415/2016* where he stated the following:

> ***'However, having said all the above in favour of the Applicant, I do not believe that a litigant is entitled to wait as the Applicant has done before taking up his complaint with the Court. A litigant is not expected to wait for ages and then take up his matter with the Court at the eleventh hour. This is exactly what the Applicant has done in this case. Whilst I accept that the courts must hear all matters brought before it, the urgency procedure must not be abused in undeserving cases. Bringing matters on an urgent basis where such urgency is unwarranted not only causes prejudice to the other party but to the roll of the Court and the administration of justice in general – where the Court has to put aside, or hold its normal business for the day in order to attend to matters brought on a certificate of urgency, the grounds for such urgency must be clearly and adequately explained and justified. A litigant, who waits inordinately long and only goes to Court on the last minute does so at his own peril. This is what the Applicant has done in this case.'***

[39] I find the sentiments of my brother Mamba J very instructive in so far as the issue of urgency is concerned. I am of the considered view that in *casu* sufficient urgency exist for the matter to be dealt with as such

and there is no shred of evidence that the procedure of urgency is being abused in these proceedings.

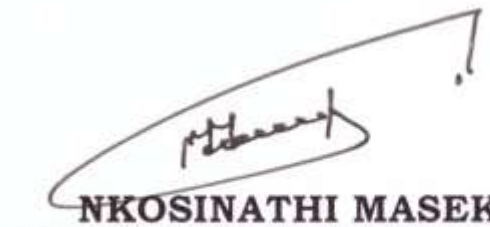
[40] In the circumstances I hereby grant the following order:

1. The point *in limine* on Jurisdiction is dismissed.

2. The point *in limine* on Urgency is dismissed.

3. Each party to pay its own costs

4. The matter is to proceed in the merits.



NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT