IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 1248/15**

In the matter between:

SWAZILAND AIRLINK	Applicant
And	
NONHLANHLA SHONGWE N.O.	1st Respondent
STAWU O.B.O. MALIZO SIKITI	2nd Respondent
CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)	3rd Respondent

Neutral Citation: *Swaziland Airlink (Pty) v Nonhlanhla Shongwe N.O. & 2 Others (1248/2015) [2019] SZHC 195 (17th October 2019)*

CORAM: **N.M. MASEKO J**

FOR THE APPLICANT: **MR. V. DLAMINI**

FOR THE RESPONDENT: **MR. K. SIMELANE**

HEARD: **14th February, 2018**

DELIVERED: **17th October, 2019**

Preamble: *Labour Law – Disciplinary Proceedings – whether its fair or unfair for the Chairperson of a disciplinary of hearing to allocate an accused employee a very short period of time to arrange for representation –*

whether accused employee has a right to representation by a representative of his/her choice – whether an accused employee has a right to be afforded adequate time to prepare for his/her trial.

[1] On the 13th August 2015, the Applicant launched Review Proceedings for an order in the following terms:-

1. Reviewing and/or correcting and/or setting aside the Arbitration Award issued by the 1st Respondent dated 29th June 2015 under CMAC Case NO. SWMZ 682/2013;

2. Ordering and directing the 1st Respondent to dispatch and file the record of the arbitration within the time determined by the above Honourable Court.

3. Cost of suit in the event of opposition.

4. Further and/or alternative relief.

[2] In these proceedings the Founding Affidavit of Teddy Mavuso the General Manager of Swaziland Airlink was used in support of the Application.

[3] On the 19th August 2015 the 2nd Respondent filed its Notice of Intention to Oppose the Application, and proceeded to file its Answering Affidavit deposed to by Malizo Sikiti.

[4] The Applicant filed its Replying Affidavit on the 15th January 2016.

[5] The 3rd Respondent attempted to file the Transcribed Record of Proceedings on the 9th December 2015, however it is common cause that a proper Transcribed Record of Proceedings was filed a bit later than the 9th December 2015.

[6] The Book of Pleadings was filed in Court on the 19th January 2016 and thereafter the parties filed their Heads of Arguments and Bundles of Authorities respectively. I must applaud the conduct of both Counsel for their comprehensive Heads and Bundles of Authorities and the good spirit of co-operation exhibited in this case between Counsel on both sides.

HISTORY OF THE MATTER

[7] It is common cause that the 2nd Respondent was employed by the Applicant around June 1999 as a Supervisor Passenger Handling. He was employed in that capacity until 10th August 2012 when he was dismissed after a disciplinary hearing found him guilty of three counts of misconduct. The sanction of the first count was a written warning and the second and third counts the sanction was dismissal.

[8] After the disciplinary hearing and verdict thereof, the 2nd Respondent appealed to the Airline Management unsuccessfully against the conviction and dismissal in August 2012.

[9] The 2nd Respondent thereafter reported the matter to the 3rd Respondent and again the dispute was not resolved which resulted in a Certificate of Unresolved Disputed being issued. With the consent of the parties the matter was referred to Arbitration before the 1st Respondent. The Arbitration Proceedings commenced on the 10th March 2014 and on the 29th June 2015 the 1st Respondent granted an Arbitration Award in favour of the 2nd Respondent and ordered the Applicant to pay a sum of E207 897-99 for unfair dismissal and related claims.

[10] It is this Arbitration Award granted by the 1st Respondent that is the subject matter of review proceedings before this Court.

THE INDUSTRIAL RELATIONS ACT 1/2000 AS AMENDED

[11] It is common cause that orders and decisions of the Industrial Court and or Arbitrator are reviewable, corrected and can be set aside by this Court. This is provided for in terms of Section 19 (5) of the Industrial Relations Act NO. 1 of 2000 as Amended as follows: –

'A decision or order of the Court or Arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law.'

ISSUE FOR DETERMINATION

[12] The Applicant has instituted these proceedings in the main to review and/or correct and/or set aside the Arbitration Award granted by the 1st Respondent on the 29th June 2015 under **CMAC CASE NO. 682/2013.**

THE APPLICANT'S CASE

[13] As stated earlier, the Applicant's case is premised upon the Founding Affidavit of Mr. Teddy Mavuso, the General Manager of the Applicant. There are four Annexures herein marked A, B, C and D respectively.

[14] Annexure A is the Notice to Attend Inquiry hereinafter referred to as the Charge Sheet and it contains three counts. Attached to the Charge Sheet is the Human Resources Manual issued in January 2005 and the effective date being the 1st January 2005.

[15] For ease of reference the Charge Sheet reads as follows:

'<u>Nature of complaint</u>

Count 1: ***Gross negligence in that you failed to perform your duties with proper care as required in that you did not follow the company's set procedures for the dispatch of flights by allowing SA 8015 on the 1st June 2012 and SA 8013 on the 8th June 2012 to dispatch without flight documents on board which is the process caused a delay on the next flights and therefore consequently brought the company's name into disrepute and exposed the company to heavy penalties.***

Count 2: ***Gross negligence in that you failed to execute your duties in accordance with procedures and in the process caused flights SA 8991 on the 16th June and flight SA 8997 on the 17th June 2012 to be delayed by about 25 minutes, which delays culminated in passengers missing their connection at OR Tambo International Airport, an act that resulted in huge accommodation costs and consequently put the company's name into disrepute.***

Count 3: ***Gross negligence in that on the 15th June 2012 you allowed passenger Motondo Jonathan to travel to Oslo with an invalid visa and in the process exposing Swaziland Airlink to heavy penalties and bringing the company's name into disrepute.'***

[16] The Charge Sheet further stated that the complainant was Teddy Mavuso and the date of hearing was the 11th July 2012 at 08.45AM at the Airlink Swaziland Boardroom.

[17] As I indicated earlier that Annexure A – the Charge Sheet has an annexure itself being the Human Resources Manual which was signed by the 2nd Respondent on the 9th July 2012 wherein he (2nd Respondent) declared as follows:

> ***'I confirm that I have been advised of the following:-***
>
> ***(1) I am entitled to be assisted at the disciplinary inquiry by a fellow employee only. No outside representative will be allowed.***
> ***(2) I am entitled to have an interpreter, if requested.***
> ***(3) I am entitled to have the opportunity to confer with my representative at reasonable times before, during and after the enquiry.***
> ***(4) I am entitled personally or through my representative, to question the complainant and witnesses during the inquiry.***
> ***(5) I am entitled to furnish evidence and to enquire on the question of whether the misconduct occurred.***
> ***(6) I am entitled to furnish evidence and to argue in mitigation of disciplinary action.***
> ***(7) I have been advised that I may call upon witnesses during the enquiry. The names of the witnesses must be given to management within reasonable time in order to ensure the availability of such witnesses.***
> ***(8) I have been advised that should I refuse/fail to attend the inquiry, the inquiry may be held in my absence.***
> ***(9) I have been advised that I am entitled to lodge an appeal against the decision of the disciplinary inquiry within three working days of the decision. The appeal must be lodged with the Chairperson of the disciplinary enquiry and must motivate full the grounds of such appeal and whether such appeal is in respect of the decision and/or sentence of the***

disciplinary inquiry. Any appeal will be heard as soon as possible of such notice being given.'

[18] Annexure B comprises the Record of Proceedings of the Disciplinary Hearing.

[19] Annexure C comprises the Record of Proceedings (Arbitration) before the 1st Respondent.

[20] Annexure D is the Notice of Appeal containing the grounds of Appeal filed by the 2nd Respondent and dated the 13th August 2013.

[21] I have no doubt in my mind that the 2nd Respondent fully understood the Human Resources Manual which contains the declaration and confirmation which he signed on the 9th July 2012 wherein in paragraph 9 thereof – an appeal is to be filed within three working days of the decision. Indeed the Disciplinary Hearing verdict was delivered on the 10th August 2012 and the Appeal was duly lodged on the 13th August 2012.

[22] I must mention at this stage that it is common cause that the 2nd Respondent received the Charge Sheet (Annexure A) and the Human Resources Manual on the 6th July 2012, however he only signed for

these on the 9th July 2012. The hearing was due to proceed on the 11th July 2012 and it did proceed as scheduled.

[24] It is common cause that the 2nd Respondent was dismissed as a result of the charges of gross negligence that had been preferred against him after a recommendation had been made by the Chairperson of the Disciplinary Proceedings dated the 1st August 2012.

[25] Upon his dismissal from employment, the 2nd Respondent was not content with his dismissal and through his Union STAWU, the 3rd Respondent, he reported a dispute to CMAC. It is common cause that there was no resolution of the dispute hence a Certificate of Unresolved Dispute was issued. Thereafter by agreement, the parties requested that the matter be referred to arbitration, wherein the 1st Respondent was then appointed to arbitrate the dispute.

[26] During the arbitration proceedings, the 2nd Respondent's case was premised around substantive fairness and procedural fairness.

[27] It is the contention of the Applicant that the 1st Respondent misdirected herself –

(i) in finding that there was no negligence proved by the Applicant on the part of the 2nd Respondent in respect of

the second count to which the 2nd Respondent pleaded guilty;

(ii) in finding that the Applicant failed to call the Chairperson of the disciplinary hearing to testify before the 1st Respondent;

(iii) in finding that a plea of guilty does not justify summary dismissal where no viva voce evidence was led to prove the charge;

(iv) in finding that the Chairperson of the disciplinary hearing failed to exercise his discretion judiciously in refusing outside representation to the 2nd Respondent;

(v) in that the 1st Respondent committed an error of law in disregarding the plea of guilty entered by the 2nd Respondent on the second count and finding that evidence ought to have been led to prove the charge despite the plea of guilty; alternatively, that the 1st Respondent misdirected herself in finding that the plea of guilty entered by the 2nd Respondent in the hearing was unsubstantiated.

[28] It is the further contention of the Applicant that the 1st Respondent made a misconception of her function and/or discretion in making the following findings:

(i) that there was no negligence proved by the Applicant in respect of count two;

(ii) that it was unreasonable of the Chairperson to refuse the postponement for purposes of allowing the 2nd Respondent to get representation from South Africa;

(iii) that the Applicant made a concession that a passenger may be allowed to travel on a visa that is not cleared;

(iv) that the alleged concession made by the Applicant mitigated the severity of the offence charged;

(v) that she failed to consider that the 2nd Respondent did not dispute that on the 16th and 17th June 2012 there were flight delays of about 25 minutes and 27 minutes respectively;

(vi) that she failed to consider that the 2nd Respondent did concede as per paragraph 16 at page 55 of the Book of Pleadings that it was his duty to check in passenger's documentation and passengers' luggage and thereafter closing the flight, printing out the general declaration, passenger manifest and cargo manifest;

(viii) that the Applicant's witness made a concession that a passenger can be allowed to travel without a valid visa;

(ix) that the Applicant's witness or representative argued that it was an option available to the 2nd Respondent to get representation from South Africa.

[29] It is the contention of the Applicant further that the 1st Respondent's award is so grossly unreasonable as to warrant the interference in that she failed to properly apply her mind to the facts and evidence presented before her.

THE 2ND RESPONDENT'S CASE

[30] It is the contention of the 2nd Respondent that in arbitration proceedings, the 1st Respondent was not called upon to review the disciplinary or appeal hearing processes but was legally enjoined to hear the matter *de novo*.

[31 2nd Respondent testified during the proceedings before 1st Respondent that he never pleaded guilty to Count 2 during the disciplinary hearing and that the Applicant should have led the evidence of the Chairperson on the aspect, which evidence the Applicant did not lead.

[32] The 2nd Respondent contends that the 1st Respondent rightfully and judiciously held that it was unfair for Applicant to terminate his

employment in the circumstances where there was glaring procedural unfairness and substantive unfairness. The Respondent states as follows at paragraphs 7-9 of the Answering:-

> ***"(7) The Applicant's allegation that I attended the hearing without a representative solely at my own volition is denied. I aver that I had no choice but to attend the hearing on my own because the only other Supervisor who could lawfully represent me was away on leave hence there was no other person available within the Applicant's establishment in Swaziland who could represent me. All the other employees available were junior to me in their employment positions."***
>
> ***"(8) Furthermore I do reiterate that after my application for a postponement of the disciplinary hearing, in order to secure representation from South African Air-link, was refused by the Chairperson of the hearing, I had no alternative but to settle for a junior officer namely Busisiwe Fakudze to be my representative. I further intend to emphasize that the appointment of the junior officer as my representative was merely a formality in that she did not know of my duties and as a result was incapacitated in representing me, to the extent that she did not present and or contribute anything on my behalf and she was just an observer."***
>
> ***"(9)" I further aver that had I been allowed the outside representative at the hearing per my initial request, that person would have been in a position to fully and adequately represent me at the disciplinary hearing."***

[33] It is my considered view that this matter stands to be decided primarily on the procedural fairness aspect of whether the

Chairperson exercised his discretion judiciously when he afforded the 2nd Respondent twenty (20) minutes within which to secure his representative on the 11th July 2012 when the disciplinary proceedings commenced. This is the crucial question that I must decide.

THE DUTIES OF AN ARBITRATOR

[34] The process of arbitration of disputes is sanctioned by The Industrial Relations Act NO. 1/2000 as Amended. Section 80 (3) provides as follows:

> (3) Where a dispute remains unresolved after conciliation, the Commission shall arbitrate the dispute, if
>
> (a) this Act requires arbitration
>
> (b) this Act permits arbitration and the parties to the dispute have requested that the dispute be resolved through arbitration; or
>
> (c) the parties to the dispute in respect of which the Industrial Court has jurisdiction consent to arbitration under the auspices of the Commission.

[35] In terms of the Code of Good Practice as contained in The Industrial Relations Act, arbitration is defined as a process for resolving disputes

in which a person independent of the parties determines the dispute for them.

[36] The process of arbitration involves a hearing at which the parties present evidence and arguments, and the arbitrator's decision is provided with reasons in a written award.

THE ARBITRATION

[37] I must state at this stage that having gone through the award granted by the 1st Respondent, I am impressed with the manner in which she dealt with the issues of substantive fairness as well as procedural fairness. The 1st Respondent's analysis of the evidence and in particular these two aspects was in my view very thorough and fair and well supported by legal athorities.

[38] I am therefore of the considered view that the attack on the award and her findings in this matter does not have merit. I will demonstrate herein below why I am of the considered view that she was spot on in her approach to the matter.

[39] It is common cause that from the day the disciplinary proceedings commenced, one concern stood out from the 2nd Respondent, and that is, his right to representation by a representative of his choice and inadequate time given to prepare for his disciplinary hearing.

[40] This aspect of procedural fairness stands out because it is the cornerstone of the right to be afforded a fair hearing, be it that, a person appears before a disciplinary hearing, tribunal, quasi-judicial bodies, and statutory bodies right up to the Courts of law. A person is guaranteed the right to a fair hearing when he/she is afforded adequate time to prepare for his/her defence and when he/she is afforded adequate time to obtain legal representation. I am alive to the fact that in *casu* it was not legal representation *per se*, these being disciplinary proceedings wherein a co-worker of the same employment position or a co-worker with a higher status is the one appropriate to have represented the 2nd Respondent.

REPRESENTATION OF 2ND RESPONDENT BEFORE THE DISCIPLINARY PROCEEDINGS

[41] For convenience, I will repeat as stated earlier that the 2nd Respondent was served with the Charge Sheet on the 6th July 2012 and the disciplinary proceedings were due to proceed on the 11th July 2012.

[42] On the 11th July 2012 when the proceedings commenced the 2nd Respondent applied for a postponement of the hearing and indicated that –

(i) He was not given sufficient time to prepare for his case, and

(ii) he needed a colleague to represent him, preferably from South African Airways who is also going to testify about his performance in the company, and;

(iii) he requested to be provided with his job description.

[43] I must say that the 1st Respondent sufficiently dealt with these procedural and substantive issues in her award, and there is not even the slightest room to interfere with her award by means of a review.

[44] The 2nd Respondent stated that he was given Charge Sheet on Friday 6th July 2012 and that it was impossible for him to prepare for his defence during the weekend due to the short notice.

[45] The application for the postponement was opposed by the Prosecutor Mr. Sandile Chipunza on the grounds that the 2nd Respondent was given enough time to prepare.

[46] It must be noted that the 2nd Respondent's application for a postponement was dismissed and he was given twenty (20) minutes to arrange for a colleague to represent him.

[47] I must state that the unfolding situation was a nightmare for 2nd Respondent, because the other supervisor in the other shift was on leave at the time, and he was forced to engage a colleague who was junior in position than himself. It is common cause that the colleague was a spectator as she honestly could not defend someone senior to her in these proceedings. The time allocated for 2nd Respondent to organise his representation was too short in the circumstances. No matter what the situation may be or how strong the facts and merits against an accused employee may be, twenty (20) minutes is too little for any accused employer to arrange for representation before any disciplinary proceedings.

[48] The right of an accused employee to be represented by a representative of his/her choice before disciplinary proceedings in the workplace is sacrosanct. In *casu* the 2nd Respondent was not asking to be represented by a lawyer, instead, he was asking to be afforded an opportunity to be represented by a colleague from SAA, more particularly because the Prosecutor Mr. Chipunza himself was the South African Airlink's Human Resources Manager and based at the South African Airlink Headquarters in Johannesburg.

ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE

[49] I agree entirely with the 1st Respondent when she stated as follows at paragraph 118 of the Award and I quote:

> ***'118. The Applicant was not trying to evade the disciplinary process, all he wanted was that it be fairly conducted. From the evidence before me, it cannot be said that the Chairman judiciously exercised his discretion when he refused outside representation as requested by the Applicant. This in my view was procedurally unfair.'***

[50] I must state that fair representation of an accused employee by a person of his or her choice is the foundation of procedurally fair proceedings. However, where an employee is denied the right to obtain representation of his/her choice, and in the process he/she is forced to undergo disciplinary proceedings without proper representation because the employer is in a hurry for a verdict, surely this is a recipe for unfair labour practice and ultimately result to procedural unfairness, which is the case in *casu*.

[51] The point is that, once proceedings are tainted with procedural unfairness in the form of a denial for an employee's representation of his/her choice, that actually renders any recommendation that may be made at by the chairperson of any disciplinary proceedings to be the fruits of a poisoned tree. This is the injustice that should not be allowed to prevail in disciplinary proceedings. In fact this also leads to a strong perception that the Chairperson is biased.

[52] It must be borne in mind that no matter how strong the evidence may be against an employee, his or her rights to a representation of his/her choice before disciplinary proceedings remains intact, and must be observed by those chairing disciplinary proceedings to avoid any perception of bias, and/or that disciplinary proceedings are just a mere formality to get rid of employees who are no longer wanted by their employers.

[53] Chairpersons who chair these disciplinary proceedings must be open minded, fair, patient, tolerant and most importantly be impartial. Employees who appear before disciplinary proceedings must not be given the impression that they are being persecuted and/or victimised. However, this does not give accused employees' rights to make improper demands, and or to level unsubstantiated accusations on the chairpersons. Employees themselves are under a duty to arrange for their representation, defences and all other issues pertaining to their disciplinary proceedings timeously and within a reasonable time, bearing in mind that each case depends on its circumstances. Accused employees must not raise issues with the Chairperson at the 11th hour, unless of course those are issues that were not reasonably foreseeable.

[54] In *casu* the 2nd Respondent was served with the charges on the 6th July 2012, which was a Friday, and was due to appear before the

disciplinary hearing on the 11th July 2012. It must be borne in mind that the 7th and 8th July 2012 were a Saturday and Sunday respectively. Even though Mr. Teddy Mavuso stated that the 7th and 8th July 2012 were considered as working days, that is not acceptable in so far as it relates to preparation of the 2nd Respondent's trial, in particular the issue of him being represented by a person of his own choice within the parent company SAA. The time afforded to 2nd Respondent was thus too short owing to the seriousness of the charges and the sanction that they eventually attracted, in particular the dismissal from employment. It was therefore unfair to expect the 2nd Respondent to have prepared for his case on the weekend of 7th – 8th July 2012. It is common cause that during weekends people attend to their personal issues. It is for that reason that weekends and public holidays are not considered Court days.

[55] It was very easy to deal with the 2nd Respondent's request to be represented by someone from Mr. Chipunza's office, because that could easily have been arranged as Mr. Chipunza was the SAA Human Resources Manager based in Johannesburg. All that the Chairperson had to do was order the 2nd Respondent to provide Mr. Chipunza with the particulars of the employee he wished to engage to represent him. The proceedings should have been postponed for at least three (3) days for purpose of giving the 2nd Respondent the opportunity to obtain representation of his choice. The failure or refusal by the

Chairperson to grant 2nd Respondent's reasonable request resulted in procedural unfairness in the proceedings, and as stated earlier gravely tainted the proceedings and resulted in an injustice.

[56] In the case of **RUDOLF GRAHAM v MANANGA COLLEGE AND ANOTHER (94/2007) [2007] SZIC 17 (30 APRIL 2007)** P.R. Dunseith JP, as he then was, stated the following:-

> ***'The importance of fair procedure in disciplinary enquiries was emphasized in THWALA v ABC SHOE STORE (1987) 8 ILJ 714 (IC) where the Industrial Court of South Africa held that "natural justice is a process of value in itself. It is an end in its own right ----' it is so fundamental in the context of industrial relations, said the Court, that "it should be enforced by the Court as a matter of policy, irrespective of the merits of the particular case.'***

[57] In the case of **NDODA H. SIMELANE v NATIONAL MAIZE CORPORATION CASE NO. 453/06** P.R. Dunseith JP as he then was stated the following at pages 1-2 paragraphs 1, 2 and 6;

> ***"1. An employee charged with misconduct is entitled to a fair disciplinary hearing."***
>
> ***"2. It has been the view of Labour Courts and Labour Jurists in South Africa for many years that one of the essential requirements of a fair disciplinary hearing is that the employee be afforded the right to be represented at the hearing if he/she so wishes."***
>
> ***"6. This Court confirms that it is also a requirement of fair labour practice in Swaziland that an employee is entitled***

to be assisted by a representative when defending himself/herself against charges of misconduct at a disciplinary hearing, and that the employer must expressly and timeously inform the employee of such right so as to give the employee the opportunity to arrange representation."

[58] His Lordship P.R. Dunseith formulated a guideline on what factors the Chairperson should consider in dealing with issues pertaining to external representation and legal representation. This is what the Court stated at pages 7-8 paragraphs 21-22:

> ***'21. By way of guidance, the Court indicates that the following considerations should be taken into account by the chairperson in deciding whether legal or other external representation is indispensable to ensuring a procedurally fair hearing:***
>
> ***21.1 Whether a fellow employee of equal status to the ' applicant is available to represent him;***
>
> ***21.2 If not, whether representation by a subordinate would be unreasonably degrading to the applicant and/or hamper him in the presentation of his defence;***
>
> ***21.3 Whether an employee of the organisation can satisfactorily represent the interests of the applicant in circumstances where the Chief Executive Officer is the complainant;***
>
> ***21.4 In circumstances where external representation is appropriate, whether it is reasonable to restrict the applicant's choice to an employee from another local parastatal;***

21.5 Whether the charges are sufficiently complex or legalistic as to warrant the involvement of an attorney;

21.6 Whether the charges may result in the dismissal of the applicant;

21.7 Whether the respondent will be unreasonably prejudiced if the applicant is permitted a representative of his choice, and in particular a legal representative;

22. These considerations are by no means exclusive. The parties may raise other factors, and the chairperson may exercise his discretion taking into account all issues where he may consider relevant.'

[59] I must state that the 1st Respondent did consider Ndoda Simelane's case *supra* and this is what she says at paragraphs 116-117 of her Arbitration Award;

'116. There is no indication from the Chairperson's ruling that he did take into account any of these considerations. The Applicant was a Supervisor and there was one other Supervisor who was of equal status to the Applicant, who unfortunately was on leave at the time. So there was no other staff member competent to represent him since the General Manager was the complainant.

117. There would have clearly been no prejudice to the employer if representation from SAA in particular was allowed, taking into account the employment status of the Applicant and the fact that the employer was being represented by the SAA's Human Resources Manager Mr. Chipunza, General Manager who was the complainant in the disciplinary hearing and Chairperson was an attorney. Since the option of securing a representative

from SAA was available as indicated by the initiator the Chairperson should have considered it.'

[60] I am in full agreement with the 1st Respondent, indeed the 2nd Respondent should have been allowed to try and secure representation from SAA through Mr. Chipunza, and it would have been very easy and it would not have taken a long time.

[61] The guiding factors that were formulated by the Industrial Court in the Ndoda Simelane case supra can never be ignored in disciplinary proceedings. These factors are fair to the employer and employee, and importantly, these factors protect the Chairperson of a hearing from being accused of bias in the proceedings.

[62] I have observed myself, as did the 1st Respondent, that the Chairperson did not consider any of the factors in the Ndoda Simelane case. It is important to point out that charges of misconduct as preferred by the General Manager Mr. Teddy Mavuso were very serious and attracted the sanction of dismissal. It was therefore the duty of the Chairperson to ensure that the application by the 2nd Respondent for representation of his choice by a co-worker at SAA was at least granted even subject to stringent but reasonable timelines. The failure by the Chairperson to do so resulted in procedural unfairness which should not be encouraged in disciplinary

proceedings. The 2nd Respondent was not asking for legal representation, which is sometimes frowned upon in some disciplinary proceedings, but he was asking to be given an opportunity to arrange for representation by a co-worker from SAA, and this was in my view a reasonable request which ought to have been granted by the Chairperson. In the circumstances the Chairperson failed to exercise his discretion judiciously.

[63] The right to a fair hearing before any adjudicating authority is a constitutional right that is to be enjoyed by any person who is due to appear before any such adjudicatory authority. The refusal to afford any person this fundamental right amounts to a violation of Section 21 (1) of The Constitution of the Kingdom of Eswatini Act NO. 1 of 2005 which provides as follows:

> ***'21.(1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.'***

[64] At page 196 **JOHN GROGAN** in his authoritive work titled ***WORKPLACE LAW 9TH EDITION JUTA,*** he states as follows:

> ***'The purpose of representation is threefold. In the first place, it gives the employee concerned moral support and helps balance the scales. Secondly, representation ensures to a limited extent that justice is seen to be done. Thirdly, legal representation***

helps to level the playing field, especially in cases in which one of the parties is less experienced or knowledgeable than the other. If an employer refuses to allow an accused employee to be represented, the proceedings and the ensuring dismissal will almost certainly be ruled unfair.

Employers should generally inform accused employees of their right to be represented. If the employee declines to appoint a representative, however, the employer is under no obligation to provide one.'

[65] I am of the considered view that an employee has a right to be represented in a disciplinary hearing by a representative of his/her choice. Where an application is made before a chairperson for such representation, the chairperson must exercise that discretion judiciously having regard to all the circumstances of that particular matter.

[66] In *casu,* it can hardly be said that the Chairperson exercised his discretion judiciously. The period of twenty (20) minutes afforded to the 2nd Respondent was in my view too short and in the circumstances unreasonable and unfair. I have no doubt in my mind that the 2nd Respondent literally represented himself against his wishes to do so in the face of charges that had a sanction of dismissal.

[67] At pages 197-198 **JOHN GROGAN** *(supra)* states as follows:

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

[68] In the Graham Rudolf case *(supra)* the Court stated as follows:

'We agree with the views expressed by Jones J in Dumbu's case (above) at 84 –

"Every hearing of a disciplinary nature must not only be a fair hearing, it must also be seen to be a fair hearing. It cannot be seen to be a fair hearing if reasonable people think that the presiding officer may be biased. Therefore, the proper approach is to apply the wider test of reasonable suspicion to its full extent in every case where bias or self-interest is the issue."'

[69] In the case of **O.K. BAZAARS SWAZILAND (PTY) LTD T/A SHOPRITE v HAPPINESS DLUDLU AND 2 OTHERS (77/2012)[2013] SZSC 22 (31 May 2013)**, the Honourable Court stated as follows at paragraph 15, and I quote:

'15. At the outset it is necessary to consider the ambit of these common law grounds of review. The issue is not res nova

in this jurisdiction. The case of <u>TAKHONA DLAMINI v PRESIDENT OF THE INDUSTRIAL COURT AND ANOTHER (Swaziland Supreme Court unreported Case NO. 23/1997)</u> is the leading case on the topic and clearly binds us. Tebbut JA who delivered the judgment of the Court expressly approved the following dicta of Corbett JA in the case of <u>JOHANNESBURG STOCK EXCHANGE v WITWATERSRAND NIGEL LTD 1988 (3) SA 132 (AD) AT 152 A-E</u>:

> ***"Broadly in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the "behests of the statute and the tenets of natural justice"----such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations and ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter aforestated ---- some of these grounds tend to overlap."'***

[70] The 1st Respondent, in my view, approached this matter with an open mind and impartial attitude. It is extremely difficult to identify any of the grounds of review in her Arbitration Award as the Applicant so alleges. None of the grounds of review as clearly articulated by

Corbett JA in the Johannesburg Stock Exchange are present in 1st Respondent's Arbitration Award.

[71] It is common cause that when 2nd Respondent applied for a postponement before the Chairperson of the Disciplinary Hearing on the 11th July 2012, in order to obtain representation of his choice from SAA, such application was refused, and instead, he was given twenty (20) minutes to arrange for his representation. The 1st Respondent found this refusal of 2nd Respondent's application to be procedurally unfair. She was right in making that finding and she cannot be faulted, and certainly her arbitration award cannot be reviewable.

[72] I fully agree with the 1st Respondent, that the Chairperson's refusal to allow the 2nd Respondent to obtain representation of his choice from SAA, resulted in a failure of justice and the denial of the 2nd Respondent of his fundamental and constitutional right to a fair trial and further resulted in a gross violation of the rules of natural justice which ultimately resulted in procedural unfairness in the proceedings. It is common cause that Swazi Airlink is a subsidiary of South African Airlink.

[73] At paragraphs 124-125 of her Award, the 1st Respondent stated as follows:

> ***'124. The Labour Appeal Court held in <u>HIGHVELD DISTRICT COUNCIL v CCMA & OTHERS [2002] 12 BLLR 1158 (LAC)</u> that:***
>
> > ***"When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether the procedure was fair.***
>
> ***125. The Constitutional Court of South Africa in <u>SIDUMO v RUSTENBURG PLATINUM MINES LTD 2008 (2) BCLR I58 (CC) AT (75)</u> expressed the following:***
>
> > ***"----the CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the Commissioner's sense of fairness must prevail and not the employer's point of view."'***

[74] It is therefore my considered view that, the refusal by the Chairperson of the disciplinary hearing to afford the 2nd Respondent the opportunity to obtain representation of his choice from SAA was correctly found by the 1st Respondent to have been procedurally unfair. There is no doubt that Swaziland Airlink is a subsidiary of South African Airlink and as such it would have been easy for 2nd Respondent to secure the representation of his choice with the assistance of Mr. Chipunza. The lack of patience on the part of the Chairperson thus resulted in this procedural unfairness in the proceedings.

[75] I have no doubt in my mind that this is the end of the matter. I find it unnecessary to consider the aspect of substantive fairness or unfairness, in these circumstances where the 2nd Respondent was denied the fundamental right of *audi alteram partem*. This was a fundamental denial of justice and ultimately I find no reviewable grounds on the Arbitration Award granted by the 1st Respondent.

[76] Consequently I hereby hand down the following order:

1. The Application to review and/or correct and/or set aside the Arbitration Award issued by the 1st Respondent dated the 29 June 2015 under CMAC Case SWMZ 682/2013 is hereby dismissed.

2. The said Arbitration Award issued by the 1st Respondent dated the 29 June 2015 under CMAC Case SWMZ 682/2013 is hereby confirmed.

3. The Applicant is to pay costs on the ordinary scale.

NKOSINATHI MASEKO
JUDGE OF THE HIGH COURT