IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 851/2019

In the matter between:

Phesheya Nkambule	**Applicant**
and	
Nedbank (Swaziland) Ltd	**1st Respondent**
Floyd Selomo N.O.	**2nd Respondent**

Neutral citation: *Phesheya Nkambule v Nedbank (Swaziland) Ltd and Another* (851/2019) *[2019] SZHC 235* (09 *December 2019)*

Coram : T. L. Dlamini J

Heard : 5th June 2019

Delivered : 9th December 2019

Summary: *Civil procedure – Review powers of the Industrial Court – Judgment of the Alfred Maia case considered by a full bench of the Supreme Court and set aside.*

Applicant is an employee of the first respondent – He was called upon to appear before a disciplinary hearing to answer for charges preferred against him by his employer – At commencement of the disciplinary hearing, the applicant raised preliminary issues which required the chairperson to first make a ruling on – The preliminary issues were dismissed after hearing submissions – The applicant thereafter filed before this court a review application seeking to set aside the decision of the chairperson – He further sought an order upholding the preliminary issues he raised – This was to result, if granted, to an order directing the first respondent to furnish to the applicant certain documents – These documents were said to be confidential and containing private information pertaining to other employees, and also pertained operational weaknesses of the first respondent – The order was to also result in disqualifying the Chief Executive Officer of the first respondent from testifying as a witness at the disciplinary hearing, amongst other orders.

The respondents raised points in limine at the hearing before this court – Among the points raised is that this court's jurisdiction is ousted by s.151(3)(a) of the Constitution of Eswatini, 2005, and that only the Industrial Court is vested with the jurisdiction to determine this matter – The judgments in the Alfred Maia and Sayinile Nxumalo cases were said to be placing emphasis on the requirement to comply with Part VIII of the Industrial Relations Act of 2000 as amended – It was submitted that these judgments do not say that the Industrial Court does not have the jurisdiction to review industrial relations related decisions.

Held: *That in terms of the latest judgment of a full bench of the Supreme Court, the Industrial Court has the exclusive jurisdiction over all labour related disputes, and that this jurisdiction includes the power to decide even alleged violations of the rules of natural justice relating to labour disputes – The point in limine therefore is upheld and the application is dismissed with costs.*

JUDGMENT

The parties

[1] The applicant is an employee of the 1st Respondent, an institution that operates as a bank in the Kingdom of Eswatini. He holds the position of Head of Retail. The 1st respondent is the employer of the applicant and

operates under the style Nedbank (Eswatini) Ltd. The 2nd respondent, according to the papers filed before court, is an attorney based in the Republic of South Africa. He is the Chairperson of a disciplinary hearing wherein the applicant faces charges preferred against him by his employer.

Background

[2] The applicant was invited to appear before a disciplinary hearing on April 2019 to answer charges preferred against him by the 1st respondent (employer). He was slapped with 10 charges. At commencement of the hearing, the charges had been reduced from 10 to 8. The charges, according to the charge sheet, *inter alia* related to the following conduct:

- **Authorizing the payment of fabricated invoices, with knowledge that the services paid for were not rendered;**
- **That the invoices were a misrepresentation of work done and that the Applicant benefitted financially from the misrepresentation;**
- **Conducting oneself in a manner that is unbecoming of an employee of the Applicant's level of seniority by using a fellow employee's bank account for own personal use, hence constituting a breach of anti-money laundering principles and policies as the validation of the source and purpose of the funds is concealed through the third party account;**
- **That between 2016 – 2018 while the Applicant was Chief Financial Officer (CFO) and Chairperson of the Procurement Committee, he failed to ensure that the Committee carried out its duties as prescribed in the Procurement Committee Charter in relation to other service providers; and**
- **Authorizing expense claims of an employee when he was not his line manager.**

[3] At commencement of the hearing on 15 April 2019, the applicant raised preliminary issues that required the chairperson to first make a ruling before proceeding with the hearing. Below are the issues he raised:

- To be furnished with a copy of the disciplinary code which sets out the applicant's rights and procedure to be adopted during the hearing;
- To be furnished with the work permits of the chairperson and the initiator since they are foreigners;
- That Ms. Fikile Nkosi be not allowed to be a witness because she preferred the charges and is ultimately the person to adopt any recommendations to be made by the Chairperson of the hearing;
- To be furnished with a Forensic Investigation Report whose contents were relied upon when preferring the charges; and
- That charges 1 and 6 are a duplication of one charge, and should therefore be reduced to one instead of two charges.

[4] After hearing submissions on the above mentioned issues, the Chairperson *ex tempore* dismissed all the preliminary issues raised. Reasons were to be furnished on the 18 April 2019, according to the applicant. That was however not the case as same were furnished on the 16 May 2019 following an urgent application that applicant filed before the Industrial Court seeking an order compelling the 2nd respondent to furnish the reasons.

The application

[5] The applicant, having considered the reasons for dismissal of the preliminary issues he raised, filed an application for review before this court under a certificate of urgency. The prayers sought were, *inter alia*, the following:

(a) Staying the disciplinary hearing scheduled for 22 May 2019 pending a final determination of a review of the 2nd Respondent's Ruling;

(b) Reviewing and setting aside the 2nd Respondent's Ruling and substituting it with the following orders:

(i) That the disciplinary policy and /or code used to prefer the charges and convene the hearing be furnished to the Applicant forthwith and before recommencement of the hearing;

(ii) That the Forensic Investigation Report relied upon to prefer the charges be furnished to the Applicant forthwith and before recommencement of the hearing;

(iii) That charges 1 and 6 be amended to one charge as they are a duplication of each other;

(iv) That Ms. Fikile Nkosi be disqualified from giving evidence as a witness in the disciplinary hearing; and

(v) That the disciplinary hearing be ordered to commence *de novo* upon full compliance with the orders being sought.

Applicant's case

[6] The applicant contends that the Ruling of the Chairperson is without justified reasons in law, and that the Chairperson arrived at the decision to dismiss the preliminary issues arbitrarily and capriciously. He also contends that the reasons are grossly unreasonable such that they warrant the inference that the Chairperson failed to properly apply his mind to the issues before him. On the issue of the disciplinary policy, the Chairperson relied on the initiator's submission that everything is contained in a pack that was furnished to the applicant. He never took time to peruse the so called pack in order to make an informed decision, hence he failed to apply his mind to the issue he was called upon to decide.

[7] Regarding the issue of being furnished with the Investigation Forensic Report, the applicant contends that the Chairperson concurred with the initiator without considering the law on furnishing further particulars in order to enable him to adequately prepare for his defence. He also did not take into account that the initiator and the witnesses are privy to the details and contents of the report.

[8] With regard to the participation of Ms. Fikile Nkosi as a witness at the hearing, he contends that Ms Nkosi will be the ultimate person to determine his fate at the bank. She therefore is inappropriate to participate in the proceedings as her neutrality will be compromised. Lastly, he contends that the Chairperson did not even consider that charges 1 and 6 are a duplication but simply stated that the employer has to prove each and every charge.

Respondents' case

[9] Before dealing with the merits of the application, the respondents raised points *in limine*. The first point relates to jurisdiction. It was submitted that the issues for determination are of a labour nature and therefore fall within the ambit and jurisdiction of the Industrial Court which has exclusive jurisdiction on such matters. The second point is that the application does not meet the requirements of urgency as stipulated by the Rules of Court. The third point is that the applicant has guised an appeal as a review as he is challenging the actual decision and not the decision making process. The fourth point is that the court cannot interfere in incomplete disciplinary

proceedings and the applicant has not made a case for compelling or exceptional circumstances warranting the court's intervention.

Issues for determination

[10] Where points *in limine* (points of law) are raised, the court is required to first make a determination and ruling on them before dealing with the merits of the matter. This is so because points of law are capable of disposing of the entire matter. I will now proceed to do so, and the point of law on jurisdiction deserves the first consideration since it also determines if the court is empowered to make a decision on the issues placed before it.

Jurisdiction

[11] It was submitted on behalf of the respondents that the issues before court are a labour dispute and the Industrial Court has exclusive jurisdiction to hear and decide the application. Mr. Jele who represented the respondents argued that the applicant approached this court on the basis that the Industrial Court does not have powers of review. This contention, he submitted, is predicated on the decisions of the cases of **Alfred Maia v The Chairman of the Civil Service Commission & 2 Others (1070/2015) [2016] SZHC 25 (17 February 2016)** and **The Attorney General v Sayinile Nxumalo (14/2018) [2018] SZICA 06 (23 October 2018)**.

[12] Mr. Jele argued that the above two judgments are being misconstrued as they do not say that the Industrial Court does not have the power to review industrial relations matters. He submitted that the judgments point out clearly that the process required first is compliance with **Part VIII of the Industrial Relations Act of 2000 as amended (IRA)**. Part VIII of the IRA

makes provisions for dispute resolution procedures. It requires that a dispute be first reported to the Conciliation, Mediation and Arbitration Commission (CMAC) before it may be submitted to the Industrial Court for determination.

[13] Mr. Ndlangamandla on the other hand, who appeared on behalf of the applicant, contends that the Industrial Court lacks review powers. This contention, as correctly pointed out by Mr. Jele, is predicated on the **Alfred Maia** and **Sayinile Nxumalo (supra)** judgments.

[14] To give credence to his contention, on the 21 August 2019 Mr. Ndlangamandla filed a recently issued judgment of this court delivered on 16 August 2019 in which the court made a ruling that it has jurisdiction to review an employer's disciplinary proceedings where the matter has not gone through the procedures provided under Part VIII of the IRA. This was in the case of **Phesheya Nkambule v Nedbank (Swaziland) Ltd & Another (1242/2019) [2019] SZHC 162 (16 August 2019)**.

[15] On the 24 October 2019, in the civil appeal case of **Ministry of Tourism and Environmental Affairs & Another vs Stephen Zuke & Another (96/2017) [2019] SZSC 37 (24 October 2019)**, a full bench of the Supreme Court considered the judgment of the **Alfred Maia (supra)** case and delivered a judgment that settles and puts to finality the different views expressed by the parties' attorneys concerning the powers of review of the Industrial Court.

[16] In the **Ministry of Tourism and Environmental Affairs & Another (supra)** case, the matter commenced at the Industrial Court where Stephen Zuke was the applicant. First respondent was the Swaziland Environmental Authority, while 2nd and 3rd respondents were the Minister of Tourism and Environmental Affairs and the Attorney General respectively. The issue in dispute was the non-renewal of Mr. Zuke's contract of employment.

[17] The applicant (Mr. Zuke) sought an order reviewing and setting aside the decision of the 2nd respondent not to renew his contract of employment. The basis of the application was that the 2nd respondent had no right in terms of **s.8(1) of the Public Enterprises (Control and Monitoring) Act 8 of 1989** to take that decision unilaterally, and that the 2nd respondent did not afford him a hearing in contravention of **s.33 of the Constitution of the Kingdom of Eswatini**.

[18] The application was opposed by the 2nd respondent through the office of the Attorney General. A point of law challenging the jurisdiction of the Industrial Court to hear the review application was raised.

[19] In its judgment, the Industrial Court upheld the point of law and reference was made by it to the **Alfred Maia (supra)** judgment. The issue of the unilateral decision of the 2nd respondent of not renewing the applicant's contract of employment without affording him the right to be heard in contravention of section 33 of the Constitution was referred to the High Court for determination as contemplated by **s.35(3) of the Constitution**.

[20] A full bench of this court was accordingly constituted which determined the review application and granted the orders that culminated in the appeal and sitting of a full bench of the Supreme Court.

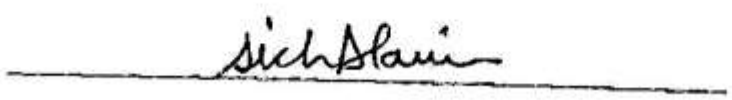
[21] In its judgment, the Supreme Court held as quoted below:

> **"[37] …<u>The time has come for the judgment in the Alfred Maia case to be set aside as having been wrongly decided.</u> When he Industrial Court determines a labour dispute between an employer and employee it does so within the ambit of its jurisdiction in terms of section 8 of the Industrial Relations Act. This does not constitute review proceedings. <u>In determining whether the dispute falls under section 8 of the Industrial Relations Act, the test is whether the dispute between the parties arises solely from a contract of employment between an employer and employee during the course of employment</u>."** (own emphasis)

[22] The Supreme Court also held that the ***"Industrial Court has the necessary jurisdiction and competence to deal with a dispute arising from the failure by an employer to observe the rules of natural justice."*** **(See: paragraph 49)**. For this reason, it states in paragraph [30] of its judgment that the full bench of this court misdirected itself in pronouncing judgment beyond the alleged constitutional issue referred by the Industrial Court under section 35(3) of the Constitution.

[23] For the foregoing reasons, the Supreme Court set aside the order of the High Court full bench and substituted it for, amongst others, an order referring the matter back to the Industrial Court to deal with the substance of the labour dispute in accordance with s.35(4) of the Constitution.

[24] The judgment of the Supreme Court is binding to all Courts of the Kingdom. This court therefore lacks the necessary jurisdiction to determine this application as it arises from the contract of employment between the applicant and 1st respondent. The point of law on jurisdiction is accordingly upheld and the application is dismissed with costs.



T.L. DLAMINI J

JUDGE OF THE HIGH COURT

For Applicant : Mr. M. Ndlangamandla

For Respondents : Mr Z. Jele