# IN THE HIGH COURT OF ESWATINI

Held at Mbabane Case No.:1777/2019

In the matter between

**LONDILE MALAMBE** **APPLICANT**

**AND**

**MUNICIPAL COUNCIL OF MBABANE** **1ST RESPONDENT**

**NHLANHLA VILAKATI N.O.** **2ND RESPONDENT**

**Neutral Citation:** *Londile Malambe* Vs *Municipal Council of Mbabane (1777/2019) [2020] SZHC 25 ( 24th February 2020)*

**Coram:** Hlophe J.

**For the Applicant**: Mr M.L. Ndlangamandla

**For the Respondents:** Mr Z.D. Jele

**Date Heard:** 6th November 2019

**Date Judgement Delivered:** 24th February 2020

***Summary***

***Application – Review proceedings – Whether the High Court has original jurisdiction to hear and determine review applications challenging a decision by an employer against his employee – Whether courts have power to interfere in incomplete disciplinary proceedings – Circumstances under which a court may interfere in incomplete disciplinary proceedings pending before an employment structure established to hear and determine disciplinary matters – Whether any grounds for review have been established to allow a review of the decision complained of.***

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## JUDGMENT

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[1] The Applicant instituted these proceedings seeking primarily an order of this court reviewing, correcting and setting aside a decision of the Second Respondent taken by the latter in his capacity as the Chairperson of a Disciplinary Inquiry established by the First Respondent for the purpose of hearing and determining the guilt or otherwise of the Applicant as an employee of the First Respondent with regards certain disciplinary charges preferred against the said Applicant.

[2] Otherwise the Applicant and the Second Respondent are both employees of the First Respondent who however occupy different positions in the structure of the latter's establishment with the Applicant employed as a driver, which is an apparently junior position to that of the Second Respondent who occupiers a senior managerial position as the Director Finance.

[3] Although the decision being challenged by the Applicant has not been attached to the papers, it is not in dispute that it dismissed a point raised in limine by the Applicant during the hearing of the charges he faced, which was to the effect that the said charges were time barred in the sense that they had been instituted after the lapse of a period of more than six months from the date of the incident giving rise to them.

[4] It is common cause that soon after dismissing the point in limine referred to, the applicant instituted the current proceedings seeking an order inter alia reviewing, correcting and setting aside the decision dismissing the said point raised in limine. There was further sought an order declaring the charges preferred against the applicant as being time barred and thus being void ab

initio. There was sought as well several other ancilliary orders such as those ordering the furnishing to the applicant of certain further documents including the reasons for the decision being challenged.

[5] Although there was sought as well an order staying the disciplinary proceedings then intended, this order was not insisted upon when the matter was eventually heard in court. The proceedings were strictly speaking never stayed therefore. It had also transpired during the hearing that it was not being seriously contended that this Court had no power to review a decision of an employer acting as such.

[6] Several allegations were made to justify the orders sought which included contentions to the effect that the disciplinary process complained of was a sham process and that it amounted to an unfair labour practice. This was allegedly because in applicant's view, the proceedings should have been interdicted or disallowed for being time barred. Owing to the view, I have taken of the matter, it is not necessary for me to set out in detail herein what these contentions were including how the Respondent had pleaded to them.

It suffices for me to record that this is a matter which in my view should end with the determination of the points in limine raised by the Respondents.

[7] These points are the following:-

(i) The contention that this court, as the High Court, has no jurisdiction to hear and determine the review of a decision made by the employer acting qua employer as it is the Industrial Court that has exclusive jurisdiction to hear and determine such a matter.

(ii) Even if it were to be contended that this court does have jurisdiction to hear a matter like the present one, it cannot as a matter of judicial policy or practice, interfere in incomplete disciplinary proceedings particularly in a matter like the present one, where no exceptional circumstances entitling it to so act have been established by the applicant.

(ii) Further, on the assumption that it did have the jurisdiction to hear the matter, it was contended by the Respondents that the applicant had not set out the legal grounds justifying the review of the decision in question by the Second Respondent. In the

contrary it was contended that although the relief sought by the applicant was a review, the case he made was one contending that the decision reached by the said Respondent was wrong as opposed to it being allegedly attended by certain spelt out irregularities, which is what would found a review in law as opposed to an appeal which is about the correctness of the decision under challenge. I will now have to deal with the points raised one after the other.

**I. <u>This Court has no Jurisdiction to hear and determine a labour matter.</u>**

[8] In terms of both the Constitution and the Industrial Relations Act 2000, the High Court has no jurisdiction to hear a matter in which the Industrial Court has exclusive jurisdiction. Such matters include those in which a decision made by an employer acting in that capacity is sought to be reviewed even before it is attended by The Industrial Court. A matter where the decision of an employer qua employer is being reviewed is therefore exclusively reserved for the Industrial Court which by extension excludes the High

Court. This position is captured as follows in Section 151 (3) (a) of the Constitution of this country:-

> "*Notwithstanding the provisions of subsection (1), the High Court –*
>
> *(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;"*

[9] The exclusivity of the jurisdiction of the Industrial Court to hear and determine labour matters is found in Section 8(1) of the Industrial Relations Act 2000; which provides as follows:-

> *"8(1) The court (the Industrial Court) shall, subject to Sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmens compensation Act or any other legislation which extends jurisdiction to this Court or in respect of any matter which may arise at common law*

*between an employer and an employee in the cause of employment or between an employer or employer's association, a trade union, a staff association, a federation and a member thereof."*

[10] On the authority of the two pieces of legislation, it becomes apparent that the High Court has no original power to hear and determine labour matters of any nature. In so far as the applicant seeks to review the decision of an employer over his employee, it should be apparent that he is asking this court to hear and determine a labour matter which is exclusively reserved for the Industrial Court.

[11] In **Swaziland Breweries And Another V Constantine Ginindza Civil Appeal Case No. 33/2006**, the Supreme Court concluded that the High Court has no jurisdiction to review a decision of the Employer. In the ssaid matter the employee (Ginindza) instituted application proceedings before the High Court contending among other things that the decision of his employer terminating his employment be reviewed, corrected and set aside on the grounds that the said termination of his employment was wrongly made by

the Second Appellant who merely had power to recommend to his employer. He had further contended that no witness had been called to give evidence and that the Second Appellant acted as a witness and judge at the same time.

[12] In deciding the matter, the then Court of Appeal (the Supreme Court today) concluded that it had no jurisdiction to review a decision by an employer dismissing his employee. At paragraph 15 of the **Swaziland Breweries Judgement (Supra)**, the Supreme Court had the following to say which captures the correct position in my view:-

> "*In the context of the Legislative Scheme and object of the Act as fully set out above, I am satisfied that the intention of the Legislature was to confer exclusive original jurisdiction on the Industrial Court in matters provided for under the Act. Put differently, all such matters must first go to the Industrial Court. It is only after the latter Court has made a decision or order in the matter that an aggrieved party may approach the High Court for review on common law grounds. It follows that by launching his review application in the High Court before the Industrial Court had made a decision or order in the*

*matter, the respondent chose the wrong forum" (Emphasis added)*

[13] The point to note here is that since the only Court accorded exclusive jurisdiction over labour matters by the Legislature is the Industrial Court, then the High Court has no original jurisdiction to review decisions of an employer taken qua employer. It can only entertain a review over matters that have already been heard by the Industrial Court or an arbitrator in terms of Section 19 (5) of the Industrial Relations Act 2000. That section is couched in the following terms:

*"(5) 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."*

[14] Often the propriety of the High Court to review the decision of a parastal as an employer is confused with the power of the same court to review decisions of a parastatal made in a different capacity such as when the parastatal exercises administrative power. Whilst this court has no power to review the decision of an employer where he acted in exercise of his power

as an employer (such as in dismissing an employee), it has power to review the decision of a parastatal made by it in exercise of public or administrative power. The decision exercised by the parastatal qua employer is exclusively reserved for the jurisdiction of the Industrial Court. On the other hand the decision of a parastatal in exercise of its administrative power is reviewable by this Court as it is not a decision taken by it in its capacity as an employer. See in this regard **Alfred Maia V. The Chairman of the Civil Service Commission and Two Others Case No: 1070/2016** as well as **Chirwa V Transnet LTD And Others 2008 (4) SA 367 at Paragraph 142**.

[15] It was agreed during the hearing of this matter that this court had been approached to review the decision there complained of, which is that of an employer acting in that capacity, because of a misunderstanding of the Judgement of this court in **Alfred Maia V The Chairman of the Civil Service Commission and Two Others Case No. 1070/2016**. It was clarified that the erroneous understanding of the Maia Judgement was that when this court came to the conclusion that the Industrial court had no jurisdiction to review the decision of an employer in that capacity dismissing an employer, it was somehow implying that the power to review such a decision was to be exercised by the High Court therefore. Nothing can be

further from the truth. What the court meant in the **Maia Judgement (Supra)** was that the Industrial Court has no original power to review a decision of an employer dismissing an employee without that matter having first been reported to and been dealt with by the Commission For Conciliation Mediation and Arbitration (CMAC) in terms of Part VIII of the Industrial Relations Act 2000. It did not imply that if the Industrial Court had no power to review a decision by an employer simply because it had not been conciliated upon, then the High Court somehow assumes such jurisdiction or power. Both counsel agreed during the hearing of this matter that this was not the position.

[16] It is clear therefore that this Court has no jurisdiction to review the decision under challenge before this Court and the point in limine raised by the Respondents in this regard ought to be upheld.

**II. <u>Court cannot interfere in incomplete Disciplinary proceedings except where there are exceptional circumstances allowing such.</u>**

[17] This point develops from the premise that this court as the High Court has no jurisdiction to hear a matter where the Industrial Court has exclusive

jurisdiction. It usually arises in matters pending before a structure established by an employer to deal with the discipline of employees. In that sense the employee would seek to have this court interfere in an incomplete disciplinary process. The Industrial court has always expressed itself in such situations by saying that it has no power to interfere in incomplete disciplinary processes except where there are exceptional circumstances. This principle is therefore raised before this court in that context. In a nutshell it means that in a matter where this court had jurisdiction to hear a labour matter (if that was possible), it would not do so where it is being called upon to interfere in incomplete disciplinary proceedings, except where there are exceptional circumstances.

[18] I was referred in this regard to the South African case of **Stephen Ngobeni V Prasa Cres And Others Case No 514/2016**, where Judge Andre Van Niekerk emphasized the principle concerned in the following words:-

> *"14. The urgent roll in this court has become increasingly and regrettably populated by applications in which intervention is sought, in one way or another, in workplace disciplinary hearings. The present application is a prime example, and is*

*exacerbated by the preceding application to review and set aside Advocate Cassim's ruling on recusal. To grant the applicant the final relief he now seeks would obviously put an end to that component of the review, as well as the referral to the CCMA. All of this is indicative of an attempt to use this court and its processes to frustrate the workplace proceedings already under way. The abuse goes further – what the applicant effectively seeks to do is to bypass the statutory dispute resolution structures in the form of the CCMA and bargaining councils. One of the primary functions of these structures is to determine the substantive and procedural fairness of unfair dismissal disputes. Applicants who move applications on an urgent basis in this court for orders that effectively constitute findings of procedural unfairness, bypass and undermine the statutory dispute resolution system. The court's proper role is one of supervision over the statutory dispute resolution bodies; it is not a court of first instance in respect of a conduct of a disciplinary hearing, nor is its function to micro – manage discipline in work places. In my*

*view, the applicant has no clear right to the relief that he seeks and the application stands to fail for that reason."*

I agree fully with these words which capture the position as it prevails in this jurisdiction as well.

[19] The point was more clarified further in Paragraph 18 of the same Judgement when the court said the following with regards the Court's intervention in incomplete disciplinary proceedings:-

"*18.Litigants should be warned that it is not often that this court will intervene in incomplete workplace disciplinary hearings and that similar abuses of the right to urgent relief that this court affords in appropriate circumstances, will be met with punitive orders of costs, including orders to the effect that the legal representatives concerned should forfeit their fees in respect of the application."*

[20] Whilst agreeing with the excerpts from the South African case of **Stephen Ngobeni V Prasa Cres (Supra)** as set out above, it is important to also

record that there are instances where the intervention by the Court in incomplete disciplinary proceedings would be allowed. This would be in those matters where the basis for the intervention are so well articulated such that there are established exceptional circumstances in the matter necessitating the intervention. The case in point in this regard is **Sazikazi Mabuza Vs Standard Bank, Industrial Court Case No.311/2007**. There the court set out the position in the following words.

> "*The attitude of the courts has long been that it is inappropriate to intervene in employer's internal disciplinary proceedings, until they have run their course except in exceptional circumstances." (Emphasis added).*

[21] I have also been referred in this regard to the South African case of **Jiba V Minister for Justice And Constitutional Development And Others (2010) 13 TLJ 112** where the position is expressed in the following words:-

> "*Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings*

*made during the course of a disciplinary inquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on an allegation of unfair dismissal and if necessary by this court in review proceedings under Section 145."*

[22] I agree fully with the foregoing observations and I consequently conclude that the point raised in limine to the effect that this court has no power to intervene in disciplinary proceedings except where there has been established exceptional circumstances, should be upheld on account of the applicant having failed to make a case why this court should intervene and what the exceptional circumstances necessitating the intervention are.

## III. Absence of Grounds For Review

[23] It was also argued that there are no grounds for review set out by the applicant to found the reliefs sought. The applicant contended that the decision by the Second Respondent dismissing his point in limine

raised to prevent the disciplinary hearing by his employer, the First Respondent, be reviewed because according to him, the Second Respondent as Chairman had come to an incorrect decision.

[24] There is a distinction between a review and an appeal. Whereas the former is concerned with the regularity or validity of the decision, the latter is concerned only with the correctness of the decision. In so far as it is clear that the applicant's contention is that the Chairman of the disciplinary hearing came to an incorrect decision, that cannot be a matter for review but one for appeal. This would mean that the application before this court is founded on a wrong basis and can therefore not be sustained.

[25] Otherwise the applicant sought to suggest that the decision of the Chairman was unreasonable hence his call for it to be reviewed. Whereas it is correct that for a decision to be reviewed it need not be a grossly unreasonable one as even a simply unreasonable one would be reviewable where appropriate – see in this regard **Councillor Mandla Dlamini V Musa Nxumalo Court of Appeal Civil Case No.10/2002**

– and where there were no basis set out for contending that the decision was unreasonable.

[26] A matter would in law be unreasonable if there is no basis for the decision; if the decision does not meet the purpose of the law for the exercise of that power or where the decision leads to harsh arbitrary, unjust or uncertain consequences. These facets of review were covered in the following manner in **Standard Bank Swaziland Limited V Thembi Dlamini High Court Case No. 3420/2000**.

> *" Where 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;*
>
> > *(i) Basis – if a decision is entirely without foundation it is generally accepted to be one to which no reasonable person could have*

*come…decisions will also be set aside when considerations that are deemed relevant have not been taken into account, or where irrelevant considerations that are deemed relevant have not been used to support the decision.*

*(ii) Purpose and Motive – it is considered to be unacceptable for a public authority to use its powers dishonestly. Equally unreasonable, though possibly less reprehensible, is the use of power for purposes that are not contemplated by the enabling legislation. In both cases the decision and the action in consequence of it will be set aside.*

*(iii) Effect – reasonable people do not advocate decision which would lead to harsh, arbitrary or unjust or uncertain consequences. Hence it would be*

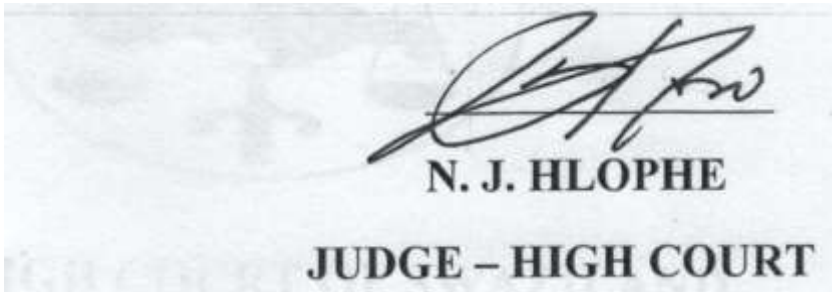
*unreasonable to act in a manner that would have such consequences..”*

[27] The Applicant has repeatedly used the epithet; “the decision was unreasonable”, without relating it to the foregoing meanings of the term “unreasonableness in law”. In fact at times it has been said that the Second Respondent failed to apply his mind but no facts supporting such a conclusion have been laid bare. It is in fact noted that such phrases are at times used to suggest that the Second Respondent came to a wrong conclusion than to an irregular one. If it is used to depict his alleged coming to a wrong decision; that is a matter for appeal and not one for review which we are here about.

[28] I have for these reasons come to the conclusion that a case has not been made for the reliefs sought and that this point in limine ought to be upheld as well.

[29] Having stated what I have above, it is clear that the applicant's case cannot succeed and it ought to be dismissed on the points in limine raised by the Respondents.

[30] Accordingly, the points in limine raised by the Respondents and referred to above are upheld with the result that the applicant's application be and is hereby dismissed with costs at the ordinary scale.



**N. J. HLOPHE**

**JUDGE – HIGH COURT**