IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

Case No. 04/2019

In the matter between:

MAX BONGINKHOSI MKHONTA	Applicant
and	
ROYAL SWAZILAND SUGAR CORPORATION LTD	1st Respondent
ADVOCATE THANDO NTSONKOTA	2nd Respondent

Neutral Citation: Max Bonginkhosi Mkhonta vs Royal Swaziland Sugar Corporation and Advocate Thando Ntsonkota (04/2019) SZIC 08 [2019]

Coram: **L. Msimango – Acting Judge**
(Sitting with M.P. Dlamini and M.T.E. Mthethwa – Nominated Members of the Court)

Heard: 01st February 2019

Delivered: 28th February 2019

SUMMARY: Applicant brought an urgent application seeking to interdict an ongoing disciplinary hearing against him, on the basis that the appointment of the Chairperson was irregular and that the Chairperson failed to adhere to the disciplinary code entered into by the employer and the employees.

JUDGEMENT

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[1] The Applicant is an adult male of Simunye and employed by the 1st Respondent as Group Human Resources Manager.

[2] The 1st Respondent is the Royal Swaziland Sugar Corporation, a public company established in accordance with the company laws of the Kingdom of Eswatini and having its principal place of business at Simunye.

[3] The 2nd Respondent is Thando Ntsonkota, an adult male Advocate from Johannesburg, appointed to be the Chairperson of the disciplinary hearing against the Applicant.

[4] The Applicant has brought an urgent application to Court, seeking an order as follows:-

(a) Dispensing with the normal forms, time limits and service relating to the manner of instituting of proceedings and that the matter be heard as one of urgency.

(b) That the Applicant's non-compliance with the forms, time limits and service be condoned.

(c) That pending finalization of the application the Respondents be restrained and interdicted from proceeding with the Applicant's ongoing disciplinary hearing.

(d) That the matter be heard in camera or in Chambers.

(e) That the 2nd Respondent's ruling of the 11th January 2019 be reviewed and set aside.

(f) That the 2nd Respondent be removed from acting as Chairperson in the ongoing disciplinary hearing.

(g) That the 1st Respondent be and is hereby ordered to appoint a new Chairperson of the ongoing disciplinary hearing of the Applicant.

(h) That the disciplinary hearing of the Applicant begin **denovo** under a new Chairperson to be appointed under prayer (f) above.

(i) Costs of the application on the scale as between Attorney and own client against the Respondents.

(j) Further and/or alternative relief.

[5] The Applicant avers that on the 19th November 2018, pursuant to a complaint submitted to the Managing Director's office by a subordinate in his department, which was then followed by an investigation by the Employer's Internal Audit Department, the Applicant was called by the Managing Director, who informed him that the investigation had been concluded and that the Company had sufficient basis to charge the Applicant with misconduct. The Managing Director further verbally advised the Applicant that the Company would seek to use external parties to chair and initiate the enquiry, and further, that the Applicant would be allowed external representation.

[6] The Applicant duly noted the information and requested to be furnished with the copy of the complaint lodged by the subordinate employee as well as the copy of the Internal Audit Report in order to enable Applicant fully appreciate the nature and particulars of the charges. The verbal request was

subsequently followed up by an email, which request the Applicant avers was not responded to by the Managing Director. A copy of the email is annexure "MB1" on the book of pleadings.

[7] It was Applicant's submission that the Managing Director declined the request for documentation and/or information indicating that the charges had provided sufficient particularity and that evidence with request to the charges will be read and presented at the hearing, and that the Applicant would also have the opportunity to respond to that evidence as well as to test it.

[8] It was Applicant's submission that at the commencement of the proceedings, his representative raised a number of preliminary issues which were raised in **limine**, and they are as follows:-

8.1 The initiator of the disciplinary hearing was Mr. Zweli Shabangu an Attorney from Magagula Hlophe Attorneys. At the inception of the disciplinary hearing, the Chairperson introduced himself and indicated that he had been instructed to preside over the disciplinary hearing by Magagula Hlophe Attorneys. It is Applicant's argument that in terms

of the disciplinary code, the Employer appoints the Chairperson of the enquiry, however, in this instance, the Chairperson indicated that he had been instructed by Magagula Hlophe Attorneys, more significantly Magagula Hlophe Attorneys are also initiating the enquiry on behalf of the Employer. Hence, it is improper for a disciplinary Chairperson to be appointed by an external firm of Attorneys who are also the initiators. An application for the Chairperson's recusal was made by the Applicant, the application was dismissed by the Chairman.

8.2 Another preliminary issue was that, the Employee Relations Manual, which is a Collective Agreement signed between the Employer and Employee Representative Organisation contemplates that a Human Resources or Employee Representative would be present at a disciplinary hearing to assist and guide the parties. The Applicant argued that the non-attendance of a Human Resources/Employee Relations Representative was irregular, a violation of the disciplinary procedure and may render the enquiry procedurally unfair. It was argued further that the prejudice arising from this anomaly would be that there would be no one in the enquiry to assist the parties on the interpretation and application of the disciplinary code, to ensure that

decisions made in the enquiry are consistent with those applied to all employees.

8.3 It was again brought to the attention of the Chairperson that some of the charges refer to a period exceeding 6 months, and in terms of the Employee Relations Manual are time barred and cannot be prosecuted unless the Employer applies for condonation demonstrating to the Chairperson that exceptional circumstances exist to condone the prosecution of these charges.

8.4 It was further indicated to the Chairperson that the charges lacked particularity and sufficient information to create clarity and certainty about the conduct that allegedly contravened the employer's rules and to enable the Applicant to prepare a defence and make an informed plea. Furthermore, it was indicated to the Chairperson that some charges were a repeat, arose out of the same conduct and relied on the same facts to a point of effectively trying the Applicant numerous times for the same single alleged conduct and thus constituted an impermissible splitting of charges.

[9] The Applicant argued that, in dealing with the preliminary issues, the Chairperson did not give due attention and consideration to the submissions

made before him. He elected to deliver his ruling within a very short period (approximately two minutes) following submissions, this then gave the impression that he already had pre-determined the decision.

[10] In the second place, the Applicant argued that the Chairperson demonstrated an undue preference towards expediency, seeking to have the preliminary issues dealt with hastily to the measure that he would not make time to sufficiently appreciate the pertinence of adhering to the Employee Relations Manual to ensure procedural fairness and comply with Applicant's conditions of service and also provide cogent reasons for his deviation from the manual.

[11] In response to the Applicant's application the 1st Respondent raised the following points of law:-

FAILURE TO EXHAUST INTERNAL REMEDIES

The 1st Respondent argued that the Applicant has prematurely brought the application without exhausting internal remedies available to him, arguing that clause 1.4.3 of the 1st Respondent's Industrial Relations Manual, which deals with Appeal's procedure, enables an employee who may due to

substantive and/or procedural reasons be dissatisfied with the outcome of a disciplinary hearing to appeal to higher authority. Hence, if the Applicant is dissatisfied with any decision made by the Chairperson of the disciplinary enquiry, he has a right of Appeal to the next level of authority, being the Board of Directors, for the reason that Applicant is an Executive Manager who reports to the 1st Respondent's Managing Director, and that the charges against the Applicant were preferred by the Managing Director. In the premises, the Applicant has failed to exhaust internal remedies available to him, accordingly the application is prematurely brought before Court and should be dismissed.

[12] FAILURE TO ESTABLISH EXCEPTIONAL CIRCUMSTANCES

In this regard the 1st Respondent argued that it is a well established principle of law that, as a general rule Superior Courts decline to interfere by way of appeal or review in unterminated proceedings in inferior Courts. Further that, the Court will do so in exceptional circumstances justifying a departure from the general rule. The 1st Respondent went on to argue that the Applicant in his founding and replying affidavits dismally failed to meet the requirements for the Court's intervention in unterminated proceedings, nor is

the Applicant able to show that if there are exceptional circumstances, he would not be able to attain justice otherwise.

[13] In response the Applicant argued that the Appeal's procedure referred to by the 1st Respondent concerns the outcome of a hearing as a whole, whereas the Applicant is concerned with the manner in which the Chairperson is handling the hearing, and that is, his failure to follow the procedure as laid down by the disciplinary code.

[14] With regards to lack of exceptional circumstances the Applicant argued that there are exceptional circumstances that warrant the intervention of the Honourable Court in the ongoing disciplinary hearing, on the basis that there has been a flagrant breach of the disciplinary code by the Chairperson. The disciplinary code is one that was negotiated between the Employer and Employees, and it forms part of the terms and conditions of employment that are binding between the parties. Therefore, it separates itself and stands out as one of the rare cases in which the Court must intervene. Failure to do so, will result to grave injustice happening. The manner in which the disciplinary hearing is being conducted will ultimately result to a skewed outcome.

[15] The principle remains though, that the Court will not lightly interfere with an employer's prerogative to discipline, even dismiss staff. However, there is an exception as set out in the **WALHAUS VS ADDITIONAL MAGISTRATE, JOHANNESBURG CASE 1959 (3) S.A. 113 (A)**, where the Court held that:-

> "By virtue of its inherent powers to restrain legalities in the inferior Courts, the Supreme Court may, in proper cases, grant relief by way of review, interdict or mandamus against a decision of a Magistrate's Court even before conviction. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power , for each a case must depend upon its circumstances… and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained…"

[16] The Court stated further that, the intervention of the Court, though in the nature of a review, is based upon the Court's power to restrain illegalities and promote fairness and equity in labour relations. An unfair procedural decision which has so pervasive and fatal an effect upon all phases of the disciplinary proceedings qualifies as one of those rare cases where grave injustice might result if the decision is allowed to stand.

[17] In his reasons for failure to follow the disciplinary code, the Chairperson had this to say:-

"It is trite that a disciplinary code serves as a guideline and does not constitute inflexible rules from which there can be no departure in appropriate circumstances. To demonstrate that the provisions of the manual are flexible, clause 2.9.3 of the manual provides that "the employee representative" shall be an employee of RSSC nominated by the employee to represent him at the disciplinary hearing. Inspite of the mandatory expression of clause 2.9.3, the employee has nominated a non employee to represent him at the hearing. This is because the employee understands that the manual is not to be inflexibly applied".

[18] The Chairperson's justification for his failure to follow the disciplinary code and procedure does not suffice; for the reason that it was the Managing Director who advised the Applicant that since external parties were to chair and initiate the enquiry therefore the Applicant was also to use external representation.

[19] The Court is of the view that the employer cannot by pass the disciplinary code if it suits him. This makes no sense of a disciplinary code which employees are required to follow and then gives freedom to the employer to act at its will. The disciplinary code is a collective agreement; hence, it is binding on the parties, further more there are no acceptable grounds or justification shown by the 1st Respondent why it could not strictly comply with its own disciplinary code.

[20] In the case of **RIEKERT VS CCMA AND OTHERS 2006, 4 BLLR**, the Court had this to say:-

> "I do not believe that, the fact that there is clear case law to the effect that disciplinary codes are guidelines, can under any circumstance be understood by employers as meaning that they may chop and change the disciplinary procedures they have themselves set as and when they wish. Employers and employees are entitled to comply with the prescribed rules of the game as far as disciplinary enquiries go. When an employer does not comply with aspects of its own disciplinary procedures, there must be good reason shown for its failure to comply with its own set of rules".

[21] The Court went further to state that:-

> "In the event the employer determines that there are circumstances which require a process that deviates from such disciplinary code and procedure, it must have compelling and good reasons to do so. The employee should be advised that whilst the disciplinary code makes provision for certain steps and procedures, the employer believes that there are compelling circumstances and reasons why in the particular instance the employer does not intend to follow the disciplinary code, and allow the employee an opportunity to comment and advance reasons why he/she does not believe that there should be a deviance from such disciplinary code and procedure".

[22] Taking into consideration the decisions made in the above cited cases, the Court finds that the Chairperson acted completely contrary to the dictates of the disciplinary code. He cannot unilaterally abrogate to himself the right to deviate from the disciplinary code, furthermore, he failed to explicitly justify his failure to follow the disciplinary code. In the circumstances the points of law raised by the 1st Respondent are hereby dismissed.

THE MERITS

[23] ABSENCE OF AN EMPLOYEE REPRESENTATIVE FROM THE DISCIPLINARY HEARING:-

The Applicant submitted that at the commencement of the hearing his representative raised the point that the composition of the hearing was irregular, in that there was no person fulfilling the role of the Employee Relations Representative as per clause 2.9.2 of the Employee Relations Manual.

[24] It was Applicant's submission further that, the Chairperson argued that there was no prejudice to be suffered by the Applicant, if the disciplinary enquiry commenced and proceeded without the HR Representative in attendance. His reasoning was based on the fact that the Applicant was represented by two labour Consultants, who, judging from the nature of the objections raised on behalf of the Applicant, are experienced and competent, and will competently offer representation to the Applicant during the disciplinary hearing, thus there will be no actual prejudice to be suffered by the Applicant. Furthermore, the Applicant in his capacity as the Group Human

Resources Manager, he is the ultimate custodian of the policies and procedures and as such in a better position to interprete the procedures and policies that may be applicable.

[25] Clause 2.9.2 of the Employee Relations Policy Manual provides as follows with regards to the IR / HR REPRESENTATIVE:-

(a) Is the custodian of Company policies and procedures and personal records of employees.
(b) Assists all parties in the interpretation of the policies and procedures and advises any party upon request at any time during the course of the hearing.
(c) May re-direct any party that operates in contravention of the codes, policies and procedures of the Company.
(d) Ensures consistent application of the rules.

[26] The disciplinary code applies to all staff, and is there to ensure fairness and consistency in the treatment of employees. The non-attendance of a Human Resources Representative was irregular and a violation of the disciplinary procedure which may render the enquiry procedurally unfair. The Courts have placed so high a value on procedural fairness that in many cases employees are granted compensation or even re-instated because of lack of proper procedures.

[27] The prejudice arising from the non-attendance of the Human Resources Officer is that there would be no one in the enquiry to assist the parties on

the interpretation and application of the disciplinary code, to ensure that decisions made at the enquiry are consistent with those applied to all employees irrespective of their status, and that the accused is treated like all other employees.

[28] In the case of **SAMW Obo ABRAHAMS & OTHERS VS CITY OF CAPE TOWN [2008] 7 BLLR** – where Municipal Police Officers were summoned to a collective disciplinary enquiry to face charges arising out of their alleged participation in the blockading of a free way. The Municipality proposed to use an abridged procedure in terms of which the matter would be decided on documents only, without any witnesses being called. The Union took the point at the commencement of the hearing that the employer was bound by the SALGA Disciplinary Code, which did not provide for an abridged procedure. When the presiding officer dismissed that objection, the Union launched an urgent application to interdict the proceedings. The Court held that the Municipality was bound by its disciplinary code, and that the employees were entitled to insist that it be followed. The Municipality was further ordered not to proceed with the disciplinary action unless it followed the code.

[29] Furthermore it must be noted that clause 14.3 of the Applicant's Employment Contract read together with clause 21 of the Disciplinary Code provide that the Applicant will be subject to the Disciplinary Code and

Grievance procedure as revised from time to time. No amendment, variations, term or condition not recorded, shall be of any force or effect unless reduced to writing and signed by both parties.

[30] The effect of these clauses is that the Applicant is subject to the terms of the disciplinary code and therefore its provisions in respect of the HR Representative.

[31] As a result thereof the Applicant is entitled to insist on a properly constituted disciplinary panel. Where the disciplinary process is governed by an agreed disciplinary code, the employee is again entitled to demand strict compliance with the provisions of the code. There would be no point in the signing of a disciplinary code if that code can be disregarded by any of the parties as and when it wishes to.

[32] This principle was emphasized by the Court in the case of **DENEL [PTY] LTD VS VOSTER (2004) 25 ILJ 659 SCA**, where it was held that:-

(a) The disciplinary code as incorporated into the contract of employment is binding between the employer and employee.

(b) Neither the employer nor employee is at liberty to disregard the obligations imposed in the code since those obligations have a contractual effect.

(c) Where there is a breach of the code, the innocent party is entitled to enforce compliance by Court order, if necessary.

REQUEST FOR FURTHER PARTICULARS

[33] The Applicant submitted that the second preliminary issue raised was a request for further particulars and access to evidence, which was to assist the Applicant in the rebuttal of the charges. The Applicant mentioned further that he had initially made a request for the further particulars in an email sent to the Managing Director on the 19th November 2018, this request was followed up with a memorandum on the 3rd December 2018, however, the Applicant was not furnished with the further particulars.

[34] At the hearing a formal request for further particulars was again made by the Applicant's Representative. The primary basis for the request was that the charges did not have adequate detail and precision with respect to events and dates, nor did they have supporting documentation which was to enable the Applicant to appreciate the true character of the allegations, more fundamentally, the Applicant was not given access to documents that were pertinent to his defence.

[35] This preliminary point was dismissed by the Chairperson and the case of **ELIZABETH AVRIL HOME FOR THE MENTALLY HANDICAPPED VS CCMA & OTHERS [2006] 9 BLLR 833 [LC]** was cited to justify the dismissal of the request. In this case the Court held that disciplinary charges do not have to be drafted with the particularity of a criminal indictment. To the extent possible, a charge must give the employee particularity sufficient to put him to his defence. The Chairperson added his own emphasis to mention that this information usually include the name of the offence and a brief description of the facts underlying the

charge. In his view the allegations relating to the charges were sufficient to enable the Applicant to plead and put up a defence, bearing in mind the principle of the case.

[36] It is an accepted principle that an accused employee needs sufficient opportunity to prepare in order for the disciplinary hearing to be fair. The employee's right to sufficient opportunity to prepare has three facets, and they are as follows:-

(i) The right to sufficient time to prepare a defence, the rule of thumb is that preparation time should be at least one full working day. However, depending on the number and complexity of charges and on obstacles that may exist, this preparation period may need to be extended with reason.

(ii) The right to fully understand the charges; sufficient details are to be given to the employee to make preparation realistically possible.

(iii) The right to documentation: the employer should provide the accused employee with the documents it intends to use in the hearing as well as other relevant documents requested by the employee.

[37] The same sentiments were expressed in the case of **OLIVER VS STELLENBOSCH UNIVERSITY** (Contemporary Labour Law Volume 14. No.9, APIRL 2005) where a forensic investigation report implicated Oliver in certain irregularities at the University. He was given notice of a disciplinary hearing and the right to be represented by an external representative. Six days before the hearing was due to begin the employee

requested documents he needed for the hearing and gave notice that he would be requesting further clarity on the charges. The application for the required documentation and for the postponement were not granted as the University believed that the employee had been given all the documents he needed, the employee was also not given further clarity on the charges. As a result, he applied to the High Court for an order requiring the employer to provide the requested documentation and further particulars of the charges. The Court ruled that, it was presumptuous of the employer to decide what documents the employee would need, and the employer was to provide the documents and the further particulars required by the employee.

[38] The Employee Relations Policy Manual specifically clause 2.6.3.1 also mentions that:- "there must be clear description of the alleged misconduct". In our view this clause simply means that, the charges must be drafted in a way that makes it impossible for there to be any doubt about the meaning thereof.

[39] Therefore, the employee's right to prepare for a disciplinary hearing is highly revered. It serves no useful purpose to unnecessarily withhold information / or documents from an employee. An employer will not benefit from providing an employee with vague or general charges, rather this will result in the employee being prevented from understanding the specific charges against him, meaning he will be unable to prepare a proper defence, and the employer's actions will be deemed unfair. Charges against employees in disciplinary proceedings must be formulated clearly and in a

manner both useful to the employee to prepare the defence and to the employer to prosecute the charges as levelled against the employee.

[40] In the case of **NUMSA Obo MASINA VS COBRA WATERTECH (2009 2 BALR 140)**. The employee requested clarity on the charges preferred against him in advance of his disciplinary hearing. However, the employer refused to provide clarity. It was held that although disciplinary hearings are not required to conform to the procedures of criminal trials, accused employees are at least entitled to be informed of the charges against them. Due to the scantiness of the information concerning the charges that had been preferred against the accused employee, the Commissioner ruled that the employee's dismissal was procedurally unfair.

[41] In this regard the argument by the Chairperson that the standard for a disciplinary charge sheet cannot be the same as for one in a criminal trial does not hold any water. Nothing precludes an employee, who alleges that the charges against him or her are vague or imprecise, to request the employer to provide him with further particulars in respect of those charges.

[42] In the case of **VAN WYK VS DIRECTOR OF EDUCATION & ANOTHER 1974 (1) S.A. 396**, the Court expressed its sentiments to the effect that:-

"Factual information, as to the nature of an allegation against an accused person is necessary in a criminal trial, and there is no reason in principle, why the position should be different in an enquiry before a disciplinary body

particularly one which has the power to make findings of far – reaching consequences … it should be sufficient for an employee to know the case he is expected to meet, anything short of that would be unfair.

SPLITTING OF CHARGES

[43] The Applicant submitted that it was indicated to the Chairperson that some charges were a repeat, arose out of the same single conduct and relied on the same facts to a point of effectively trying the Applicant numerous times for the same single alleged conduct and thus constituted an impermissible splitting of charges.

[44] The Chairperson again ruled against this objection for the reason that the Applicant's representative was not articulate in the exact nature of the objection, and further that it will be open for the employee after evidence has been led to argue for the impermissible splitting of charges.

[45] It is a rule of practice that splitting of charges should be avoided. The underlying ratio for this rule is to prevent multiple convictions arising from culpable facts which constitute one offence only. See in this regard the case of **S.V. GROBLER & ANOTHER 1966 (1) S.A**. Where it was held that:- "in the application of the rule common sense and fairness should prevail, if several types of misconduct all derived from a single action, it would be more appropriate to regard it as a single disciplinary complaint".

[46] The possible prejudice due to the unfair splitting of charges may result in the following:-

(a) A sanction may be handed down on multiple charges, resulting in a more severe sanction than in an instance of a single charge.

(b) The scope of the charges becomes too wide, which may cause the accused employee to be prejudiced at the disciplinary hearing.

(c) The multitude of charges creates confusion as to the nature of the employee's alleged misconduct.

(d) The proliferation of charges created a situation where it acts as a type of "catch all" approach, the object is to find out what happened, not to catch the individual. See the case of **NTSHANGASE VS SPECIALITY METALS CC (1998) 3 BLLR LC**.

[47] In support of the Chairperson's refusal to uphold the objection on the splitting of charges, the 1st Respondent argued that the charges were different, but relied on the fact that they all emanated from misconduct, however on different occasions.

[48] The Court is of the view that the way the charges are formulated, indicate that they relate to the same misconduct. Charges 2 and 3 arise out of a single incident which it is alleged took place on the 30th October 2018 and not different incidents, these charges rely on the same facts. Again charges 2.1 – 2.6 and 4 refer to the same incident in their reference to behavior or conduct, they suffer the same defect. In the circumstances it is unfair to the Applicant for the 1st Respondent to split the charges.

PRESCRIPTION OF SOME OF THE CHARGES

[49] The Applicant argued that another objection that was raised at the hearing is that of prescribed charges, namely charges 1.3, 1.4, 3.2 and depending on the clarity that would have been provided in respect of charge 2.3 and 4, they would also suffer the same effect. The Applicant argued further that, clause 2.6.1.3 of the Employment Relations Manual provides that:-

> "Unless exceptional circumstances exist to justify the delay beyond 6 months, any alleged misconduct not processed within six (6) months of the alleged date of commission of the offense shall be deemed time-barred and will not be prosecuted".

[50] Again the Chairperson refused to uphold this objection and submitted that the answer to the objection is found in clause 4.1 of the sexual harassment policy dealing with complaints relating specifically to sexual harassment, and the clause provides as follows:-

> 4.1.1 Employees are encouraged to report incidents as soon as possible or in any event not later than 120 days after occurrence. Complaints lodged outside this period may only be entertained in very exceptional circumstances at the discretion of the General Manager.

[51] The Chairperson argued that therefore it cannot be correct for the employee/Applicant to advance the argument that the Company is time barred from proceeding with charges 1.3 and 4, as it is clear from clause 4.1

that, if exceptional circumstances are shown to exist, thus charges 1.3 and 4 can still be pursued against the employee.

[52] The Chairperson argued further that, Mr. Shabangu, the initiator in his submission indicated that the Company intended to lead evidence of the existence of exceptional circumstances which will allow the Company to pursue the charges against the employee. At the end of the evidence, if there are no exceptional circumstances, the employee will have the opportunity to argue that exceptional circumstances have not been shown to exist and therefore the charges should not have been pursued against him.

[53] Clause 2.2.1 of the Prevention and Control of All Forms of HARASSMENT IN THE WORK PLACE, provides that: "Sexual harassment constitutes a serious misconduct. Accordingly, all matters brought to the attention of management will be duly investigated and processed in accordance with the Company's Disciplinary Code and Procedures.

(i) Clause 2.6.1.2 goes on to provide that:-

"Unless exceptional circumstances exist to justify the delay, the disciplinary process must commence as soon as possible after the initiator established that there is a case to be answered, and in any event, within three (3) weeks. The ruling of exceptional circumstances must be made before the commencement of the disciplinary hearing.

(ii) Then, Clause 2.6.1.3 provides that:-

> "Unless exceptional circumstances exist to justify the delay beyond 6 months, any alleged misconduct not processed within six (6) months of the alleged date of alleged misconduct not processed within six (6) months of the alleged date of commission of the offence shall be deemed time-barred and will not be prosecuted.

[54] The Employee Relations Manual at page 43, provides that, "Management will have to make an application for a ruling by the presiding officer in respect of condonation in cases where offenses were allegedly committed more than six months before the charges were issued".

[55] That being the case, this means that an application for condonation shall be presented to the Chairperson at the commencement of the enquiry demonstrating exceptional circumstances warranting condonation. The defect in this case was that no condonation application was brought to the Chairperson by the initiator. His ruling therefore entertained time barred charges that have not been properly condoned and no submissions were made as to the exceptional circumstances warranting the condonation, taking into account that Charges 1.3 and 1.4 are recorded to have happened over a period of about 3 years.

[56] In the case of **RIEKERK VS CCMA & OTHERS (2006) 27 ILJ 1706 (LC)**, the employer had allowed about six months to lapse before convening a disciplinary enquiry, the employer enigmatically declined to give any reason to the arbitrating commissioner. On review the Court noted that the

applicable disciplinary code required disciplinary proceedings to be instituted within a reasonable time of an offence coming to the employer's notice. This implied that the employer could not without good reason do so after a delay that was on the face of it unreasonable. Since the employer had failed to provide any reason for the delay, the dismissal was ruled procedurally unfair.

RECUSAL OF CHAIRPERSON

[57] The Applicant raised an objection to the manner in which the Chairperson of the enquiry was appointed. The reason for the objection was at the onset of the enquiry the Chairperson indicated that he had been instructed by Magagula Hlophe Attorneys, more significantly Magagula Hlophe Attorneys are also initiating the enquiry on behalf of the 1st Respondent in the matter. The Applicant argued further that, having reflected on the Chairperson's conduct during the course of the hearing, as well as his dismissive approach to the submissions made by Applicant's Representative, the apprehension of bias thus arose from the manner in which he took decisions without fully applying himself, and his haste to continue the enquiry at all costs and without giving his reasons for his rulings.

[58] The Chairperson submitted that external presiding officers who are practicing advocates do act on instructions from Attorneys who may have instructed them in the past on different instructions. Furthermore, the existence of prior relationship between the presiding officer and instructing attorneys representing the employer in a disciplinary hearing on its own, does not create a ground or basis for the recusal of the presiding officer. The

Chairperson again submitted that, the objections raised by the Applicant did not in his view raise any novel legal issues that he was unable not to immediately deal with and come to a ruling.

[59] It must be borne in mind that 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. This requires that officers presiding at a disciplinary hearing not only be impartial in fact, but also that their decisions might be influenced by extraneous factors, even if this is infact not the case.

[60] In the case of **GRAHAM RUDOLPH VS MANANGA COLLEGE & ANOTHER CASE NO. 94/2007**, the Court held that "one of the elements of a fair hearing is that the person taking the disciplinary decision should act in good faith, he should not be biased, he should enter into the proceedings with an open mind without prejudicing the issues, and he must make up his own mind on the matter without deferring to the opinion or decision or desired out- come of another person".

[61] This means that the Chairperson must be aware of some pitfalls to avoid in disciplinary proceedings in order to minimize allegations of bias in disciplinary proceedings. Mere allegation of bias will not suffice and institutional bias cannot be ruled out either. What is important, however, is

that the disciplinary Chairperson not only acts in a way which ensures that the accused gets a fair trial, but also be seen to be doing so.

[62] The Applicant has argued that the appointment of the Chairperson by the Initiator is inconsistent with the disciplinary code, plus apprehension of bias arising from the manner the Chairperson took decisions without fully applying himself, coupled with the haste to continue the enquiry at all costs and without even giving reasons for his rulings, and his propensity to favour the version of the employer through assuming powers he did not have. The Applicant thus submitted that the Chairperson is disqualified from continuing with the hearing because his appointment lacks independence and the way he conducted the enquiry revealed bias. The Court is therefore called upon to decide whether the Applicant's apprehension that he will not be afforded a fair hearing under the Chairmanship of the 2nd Respondent is reasonable and valid in the circumstances.

[63] Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand. A claim of apprehended bias requires a finding that a fair minded and reasonably informed observer might conclude that the decision maker did not approach the issue with an open mind.

[64] Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about actual views and behavior of the decision maker. Apprehended bias is assessed objectively by reference to conclusions that may be reasonably drawn about what an observer might conclude about the possible views and behavior of the decision maker.

[65] In LOCABAIL LTD VS BAYFIELD PROPERTIES LTD 1 ALLER 64 [1999] the Court explained this issue in the following terms:-

"The proof of actual bias is very difficult, because the law does not countenance the questioning of extraneous influences affecting the decision, and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists".

[66] The same sentiments were expressed by the Court in the case of BTR INDUSTRIES S.A. [PTY] LTD & OTHERS VS METAL & ALLIED WORKERS UNION & ANOTHER 1992 3 S.A., where the Court held that:-

"The test for determining bias in our common law is the existence of a reasonable suspicion of bias. Actual bias or a real likelihood of bias need not be proved. The matter is to be viewed from the standpoint of a lay person, and the test to be applied is objective".

[67] Applying the common law test, the Court has to determine whether the conduct of the Chairperson of the disciplinary enquiry; would cause a

layman in the position of the Applicant to reasonably suspect bias or lack of independence on the part of the Chairperson which precludes the likelihood of a fair hearing.

[68] The conduct complained of by the Applicant may be summarized as follows:-

(a) The manner in which the Chairperson was appointed, as he was appointed by the Initiator's law firm.

(b) The manner in which the Chairperson consistently failed to apply his mind, committed errors of law not necessarily because of failure to comprehend the intricate issues that were before him, but because he deliberately leaned towards the side of the management in the manner in which he interpreted some of the clauses of the disciplinary code.

[69] At the outset it was an irregularity for the Initiator to appoint the Chairperson of the hearing. This was contrary to clause 2.9.1.1 of the code which provides that:-

"The Employee Relations office shall facilitate the appointment of an impartial Chairperson".

[70] Since the firm of Attorneys are initiators of the pending disciplinary hearing, justice and fairness requires that the initiator be restrained from appointing the Chairperson. The dual role played by the law firm is unusual, being an

initiator and also appointing the Chairperson, this is a breach of the Company's disciplinary procedure and creates a perception of bias.

[71] In the case of **DENEL [PTY] LIMITED VS VORSTER [2005] 4 BLLR 313 SCA,** the Court held that:-

"An employer's failure to compose the disciplinary committee chairing the hearing strictly in accordance with the Company's disciplinary code amounted to a breach of the employee's contract of employment. The code was incorporated in employee's contracts of employment and the employee was entitled to insist that the employer abide by its contractual undertaking to follow a certain disciplinary procedure. In such circumstances it is no answer for the employer to say the alternative procedure that it adopted was just as good".

[72] The Applicant again argued that the manner the Chairperson conducted the hearing created a perception of bias. The following conduct as spelt out in THE SOUTH AFRICAN LABOUR GUIDE: LABOUR AND EMPLOYMENT MANUAL [2018] has been considered by the Courts in allegations of bias, and it includes the following:-

(a) Disciplinary authority aligning with one party:- The disciplinary officer must not be seen to be advancing the cause of one party at the expense of the other party. This includes cases where a disciplinary authority makes submissions in support of one party.

(b) The manner in which the whole disciplinary process is conducted:-

> This is whereby the adjudicating officer handles the proceedings in a manner which shows that he/she is aligned with one party, the Courts may come to the conclusion that there was bias, whether a reasonable likelihood or actual. This would involve situations where the adjudicating officer refuses without any reasonable ground a request for a postponement to enable the accused to adequately prepare a response to the allegations against him, or any other requests made by the accused employee.

[73] Grogan J. Workplace law, 9th Edition, states that "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".

[74] Taking into consideration the arguments made by the parties and the cited authorities there in, the Court finds that the manner in which the Chairperson conducted the hearing was impartial. He failed to apply his mind to one or all of the objections raised by the Applicant. In a nutshell the following are issues where the Chairperson failed to apply his mind:-

(a) Failure to comprehend and apply his mind properly to the procedural requirements in terms of the Employee Relations Manual with regards to the presence of the Human Resources Representative in the hearing.

(b) Failure to apply his mind when he said the disciplinary code was a guideline which could be varied. This is a gross irregularity because it is a binding document with peremptory provisions and such provisions are mandatory. The disciplinary code was signed by the Company and employees. It forms part of the terms and conditions of employment. It was even registered as an order of Court.

(c) Failure to apply his mind to the request for further particulars and the issue relating to prescribed charges which is specifically regulated by clause 2.6.1.3 of the Manual.

(d) Failure to recuse himself as a result of his irregular appointment and his lack of impartiality in conducting the disciplinary hearing.

[75] The Applicant in his application had also prayed that the matter be heard in camera or in chambers. The argument was that, it was to prevent the nature of the allegations contained in the charges from being published by the media. The rationale being that the charges are still allegations, which are yet to be proven by the 1st Respondent. Furthermore, to expose the nature of the allegations to the media, will be prejudicial to both the Applicant and the complainant, further it will expose them to the Court of public opinion, even before the internal processes are exhausted. It must be mentioned, however, that the Court will not deal with this prayer as it has already been overtaken by events and is now academic.

[76] In the circumstances the Court makes the following order:-

(a) The 2nd Respondent be and is hereby removed from acting as the Chairperson in the on-going disciplinary hearing of the Applicant.

(b) The 1st Respondent be and is hereby ordered to appoint a new Chairperson of the on-going disciplinary hearing of the Applicant.

(c) The disciplinary hearing of the Applicant shall begin de novo under the Chairperson to be appointed under order (b) above.

(d) Each party to pay its own costs.

The Members agree.

For the Applicant : Mr. B.W. Magagula
(Magagula Attorneys)

For the Respondent : Mr. M. Magagula
(Magagula & Hlophe Attorneys)