IN THE INDUSTRIAL COURT OF ESWATINI

Case No. 205/2020 [E]

In the matter between:

PHESHEYA NKAMBULE Applicant

And

NEDBANK (SWAZILAND) LTD 1st Respondent

MUSA SIBANDZE N.O 2nd Respondent

Neutral citation: Phesheya Nkambule v Nedbank (Swaziland) Ltd and Another (205/2020 (E)) [2020] SZIC 79 (29 June 2020)

Coram: **S. NSIBANDE J.P.**

(Sitting with N.R. Manana and M.P. Dlamini Nominated Members of the Court)

Date Heard: 15 June 2020

Date Delivered: 29 June 2020

RULING

[1] The Applicant approached the Court on a certificate of urgency for an order in the following terms:-

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

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

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

3.1 Staying the continuation of the disciplinary hearing which is scheduled to commence on the 11th June 2020;

3.2 Reviewing and setting aside the ruling of the 2nd Respondent of the 31st July 2019 and substituting same with the following orders:

3.2.1 Declaring the charges preferred against the Applicant on 11th July 2019 and being of no force and or effect from the date of judgement of this Honourable Court;

3.2.2 Declaring the second disciplinary hearing initiated by the 1st Respondent null and void and of no force or effect;

ALTERNATIVELY

3.2.3 Removing the 1st Respondent from being the chairperson of the disciplinary hearing or directing the disciplinary hearing to commence de novo as of the date of the judgment of this Honourable Court;

3.2.4 Compelling the 2nd Respondent to furnish the Applicant with the further particulars requested in the letter dated 24th July 2019.

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

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

5. Further and/or alternative relief."

[2] The matter first came before Court on 4th June 2020 when the points of law raised by the Respondent were argued. We delivered our ruling on the points on 6th June 2020 and directed that the matter be argued on the merits on 15th June 2020. When the matter was argued, the Applicant abandoned prayers 3.2.1, 3.2.3 and 3.2.4 and the result was that the Applicant now sought to review the second Respondent's ruling on the basis that he had failed to apply his mind in coming to the decision that there is nothing unlawful about an employee being subject to concurrent disciplinary hearings. The Applicant therefore sought an order reviewing and setting aside the ruling of the second Respondent of 21st July 2019

and substituting same with an order declaring the second disciplinary hearing initiated by the first Respondent null and void and of no force or effect.

[3] It is common cause that the Applicant was suspended in December 2018 charged and called to a disciplinary hearing in February 2019. It is common cause that this hearing has not been finalised and that it is ongoing and that the last hearing at the time this application was launched had been on 28th May 2020.

[4] It is common cause also that on 11th July 2019, the Applicant received new charges and an invitation to a new and separate disciplinary hearing. This hearing was to be held on 30th July 2019. The Applicant raised preliminary objections at this hearing and the chairman of the hearing dismissed same in a written ruling dated 31st July 2019. The Applicant then approached the High Court to review the decision of the 2nd Respondent. On the 6th May 2020 the application for a review was dismissed by the High Court on the ground of lack of jurisdiction. The Applicant then turned to this Court for relief.

[5] The Applicant grounds his review on two pillars. Firstly, that the second Respondent failed to apply his mind by failing to invoke the doctrine of

election. Secondly, that the second Respondent failed to apply his mind by failing to invoke a long established procedure of not starting a new hearing and instituting new charges whilst another hearing was proceeding.

[6] The Applicant's attorney submitted that second Respondent failed to take into account that the first charge sheet could have been amended to include the charges set out in the second charge sheet in respect of which the second disciplinary hearing has been called. He submitted that the Applicant had been interviewed in January 2019 regarding the allegations contained in the second charge sheet and in respect of which the second hearing has been instituted, thus the employer could have included these charges in the initial charge sheet. It was submitted that the charges constituting both hearings are based on dishonesty and that being so there was no reason why the initial charge sheet could not be amende0d to include these new charges. The applicant submitted having raised this issue at the hearing, the second respondent failed to consider it at all in his ruling and that this in itself constituted a ground for review.

[7] The applicant's attorney conceded that the applicant did not raise the doctrine of election at the disciplinary hearing. He submitted however, that the second respondent being a senior attorney and an accomplished

labour law practitioner, ought to have considered the doctrine and ought to have invoked it *mero muto*. In terms of the doctrine, the first respondent, having chosen to take the applicant through the initial disciplinary hearing ought to see that hearing through and is not allowed to take another route prior to either completing that initial hearing or withdrawing it. The court was referred to the cases of **Virgil Rabie and Department of Trade and Industry and Sipho Zikode N.O Labour Court of South Africa, Johannesburg Case No: J515/18** and **SESMAWU vs Tracar Division for Swaki Investment Corporation 211/99:5(IC)** for the proposition that the action of instituting new charges against the same employee whilst the initial charge s against them had not been determined was contrary to basic cardinals of natural justice.

[8] Applicant submitted that in line with the cited cases the court ought to find that the institution of the second disciplinary hearing while the initial one was on going was an exceptional circumstance that allowed the court to intervene in the incomplete disciplinary hearing of the applicant. Mr. Ndlangamandla for applicant submitted that we should follow the **Rabie** (supra) judgement and stay the second hearing pending completion of the first hearing.

[9] The respondent's attorney's first submission was that in order for the court to intervene in an incomplete disciplinary hearing the applicant must set out exceptional circumstances that there will be a failure of justice if the court does not intervene. He submitted that the gist of the **Sazikazi Mabuza v Standard Bank of Swaziland and Another IC Case No.311/2007** as well as **Graham Rudolph v Mananga College Industrial Court Case No. 94/2007** judgements set out that it is not all unfair labour practices will result in the intervention of the court in incomplete disciplinary hearings but that the exceptional circumstance must be one that will result in a miscarriage of justice if the court does not intervene.

With regard to the case before court Mr. Jele for respondents submitted that the applicant had not set out in his founding affidavit any assertion of exceptionality of his case; that he has not said that the second disciplinary hearing failed to meet the cardinal requirements expected of a fair disciplinary hearing and thus had not set out what the miscarriage of justice might be if he were to go through the second hearing.

[10] Secondly, it was argued on behalf of the respondents that the applicant had failed to meet the required threshold for a review; that in fact this application comes about because the applicant is simply disagreeing with the second respondent's ruling. It was submitted that the applicant

had failed to display, on his papers that the second respondent had failed to execute his duties with regard to natural justice; that applicant had failed to demonstrate the denial of any right.

With regard to the doctrine of election, it was submitted that the court was not enjoined to make pronouncements on same as it was not raised at the hearing; that the second respondent could not, on his own, make a determination on this doctrine since it was not canvassed; that he cannot be reviewed on the basis of a matter that was not raised before him.

[11] Mr. Jele argued further that in any event there was no election made by the first respondent; that as the initial hearing was on going, forensic investigations confirmed that the applicant was involved in a separate and unrelated misconduct involving dishonesty of a completely different nature to the initial charges. It was the first respondent's submission that in exercising its managerial prerogative it chose to start a new hearing altogether for practical purposes. It was finally, submitted that the first respondent had not changed course midstream hence the doctrine of election does not apply to this matter. The initial hearing is still ongoing hence the first respondent cannot be said to be approbating and reprobating at the same time.

[12] The final submission was that the cases cited by the applicant had no application in this matter. The **Rabie** case(supra) was said to be distinguishable because first, it pertains to a statutory procedure in terms of the South African Labour Relations Act wherein parties agree to hold statutory pre-dismissal arbitration. We have no such procedure in terms of our legislation. The court held that having elected to proceed through that statutory process, the employer could not then seek to institute, concurrently, an in-house disciplinary process on related subject matter. Second, the court held that the statutory pre-dismissal arbitration procedure, was intended to avoid a duplication of process, hence for the employer to seek to proceed in-house in circumstances where it had become despondent with the statutory process was not permissible. Finally, the court found that once the parties agree to proceed with the statutory pre-dismissal arbitration procedure, they were bound by that agreement. It was first respondent's submission that in the present matter the second hearing is of a vastly different and unrelated matter and there is no connection between the disciplinary offences save only for the fact that they involve the applicant.

[13] With regard to the **SESMAWU** case (supra) the distinguishing factor was that the employer instituted new charges arising from the same set of facts as those of the uncompleted initial hearing. The court classified this

as trying the applicants on the same fact in instalments. It was submitted that this was not what was happening in this matter as the applicant is being tried for misconduct on a different set of facts in the second disciplinary hearing.

[14] The first question to be determined by the court is whether the applicant has established that there are exceptional circumstances in this matter to justify its intervention in an incomplete disciplinary hearing. In answering this question, we have considered the applicants founding affidavit. At paragraph 13.5 the applicant states that he raised the point with second respondent that:

"the approach of the first respondent to institute a new and separate hearing on 11th July 2019 alongside another hearing which is pending and remains incomplete, is irregular and unprocedural, it has an element of victimisation and is prejudicial in that I cannot be made to appear before two tribunals at the same time."

[15] At paragraph 15 he continues to say:

"the court is enjoined to intervene in this incomplete hearing on the basis that the (second respondent's) ruling has tainted with gross unfairness and unfair labour practices such constitutes exceptional circumstances which warrants intervention by the court despite it being incomplete."

[16] It is trite that the court can intervene in incomplete disciplinary hearings where there are exceptional circumstances for it to do so. As the court stated in the **Graham Rudolph** matter (supra), a mere contention of manifest injustice does not on its own qualify the court to intervene but it must intervene where not doing so would result in a miscarriage of justice. The applicant must show the court what that exceptional circumstance is and how it will result in a miscarriage of justice. We are not convinced that the applicant in casu has done so. His complaint is not that there is a circumstance that will prevent him from being heard at the second and concurrent disciplinary enquiry but that it appears to be irregular and procedural to be taken through such a process. Even his letter of 26th July 2019 does not set out the basis of his allegation that *"it is trite that a party cannot be subjected to two separate hearings running concurrently."*

He does not set out what prejudice he stands to suffer in the exercise of his rights if the second and concurrent hearing proceeds.

[17] In the case of **Kenneth Mashaba v Central Bank of Swaziland IC Case No. 164/2016** the court pointed out that every employee challenging his dismissal is capable of raising some accusation of

irregularity or breach of procedure as the case may be. In **Sazikazi Mabuza** (supra) the exceptional circumstance that pushed the court to intervene in the incomplete hearing was the fact that if she was not allowed legal representation, she would effectively be denied the right to be heard prior to dismissal. The applicant in casu is being heard. His rights at the hearing have not been curtailed. It may be an unusual step to start a second and concurrent hearing but it seems to us that for the first respondent to do so has taken away none of applicant's rights that he has going into a disciplinary hearing. We share the sentiments expressed in **Ngobeni v PRASA [2016] ZALC JHB 225** where the court stated:

> *"One of the primary functions of (the statutory dispute resolution structures in the form of CCMA) is to determine the substantive and procedural fairness of unfair dismissal disputes. Applicants who move urgent 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) 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 workplaces."*

[18] We must align ourselves with the court particularly where it says it is not the court's function to micromanage discipline in work places. We have

not been able to find any decisions regarding an employer instituting two or more disciplinary enquiries against an employee that run concurrently. We are of the view that the **Rabie matter** (supra) cited by the applicant is not of application in this matter because the facts of the matter concern a situation where the employer and the employee had agreed to a pre-dismissal arbitration process. Nor is the **SESMAWU matter** (supra) applicable on the basis of the facts of that matter which differ materially, in our view. As submitted by the first respondent the applicant may have been charged with dishonesty but the charges in the initial hearing arise from a completely different set of facts from those in the second hearing. The charge sheets attached to applicant's founding affidavit bear this out.

[19] We share also the sentiments of the court in **Jiba v Minister of Justice and constitutional Development and 16 Others ZALC JHB Case NO. J167/09** where the court stated that: *"Urgent applications to review and set aside preliminary rulings made in the course of enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged."*

This is so because this court is also inundated with applications to set aside preliminary findings in disciplinary hearings where applicants have

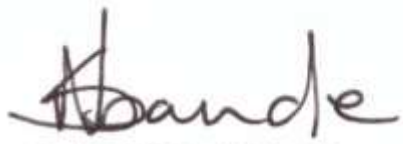
access to statutory dispute resolution mechanisms such as the Conciliation Mediation and Arbitration Commission (CMAC).

[20] In the circumstances we come to the conclusion that the applicant has not made out a case for the intervention of this court in his incomplete disciplinary hearing. We make the following order:

1. **The application is dismissed.**

2. **Each party is to pay its own costs.**

The Members agree.



S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For Applicant: Mr. MLK Ndlangamandla (MLK Ndlangamandla Attorneys)
For Respondent: Mr Z. Jele (Robinson Bertram Attorneys)