IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 1352/18**

In the matter between:

CYPRIAN MKHWANAZI **APPLICANT**

and

THE PRESIDING JUDGE OF THE INDUSTRIAL COURT	**1ST RESPONDENT**
MEMBER OF THE INDUSTRIAL COURT	**2ND RESPONDENT**
MEMBER OF THE INDUSTRIAL COURT	**3RD RESPONDENT**
MBABANE MUNICIPAL COUNCIL	**4TH RESPONDENT**
REGISTRAR OF THE INDUSTRIAL COURT	**5TH RESPONDENT**

Neutral Citation	**:**	**Cyprian Mkhwanazi and The Presiding Judge of the Industrial Court & 4 Others (1352/18) [2019] SZHC 104 (25 JUNE 2019)**
Coram	**:**	**MABUZA – PJ**
Heard	**:**	**16 APRIL 2019**
Delivered	**:**	**25 JUNE 2019**

SUMMARY

Labour Law: ***Review Rule 53 of High Court Rules – Applicant seeks review of Industrial Court decision – Applicant dismissed from employ of 4th Respondent – Industrial Court decision in favour of 4th Respondent.***

Held: ***There is no basis to review, correct or set aside – The application is dismissed with costs.***

JUDGMENT

MABUZA -PJ

[1] Serving before me is an application for review brought by the Applicant for an order in the following terms:

(a) Reviewing, correcting and setting aside the 1st Respondent's decision dated

the 19th June 2018 dismissing the Applicant's application, substituting the same with this Honourable Court's own decision.

(b) Directing the 5th Respondent to dispatch the record of proceedings under Industrial Court case number 437/09 within a period of 14 days from receipt of this application.

(c) Costs to be paid by the Respondent if the matter is opposed.

(d) Further and/or alternative relief.

Prayer (b) was complied with and falls away.

[2] The application is opposed by the 4th Respondent.

[3] The Applicant is an adult Swati male of Mbabane in the District of Hhohho, the Applicant in these review proceedings. He is an erstwhile employee of the 4th Respondent.

[4] The 1st Respondent is the Presiding Judge of the Industrial Court, the Judge who presided over the matter registered under case no. 437/09 and who issued or delivered a judgment on the 19th June 2018 in which the Applicant's claim was dismissed. Applicant seeks to review and set aside the said judgment and to substitute it with this Honourable Court's judgment.

[5] The 2nd and 3rd Respondents are members of the Industrial Court, who sat with the 1st Respondent and who concurred with the judgment of the 19th June 2018 which Applicant seeks to review herein.

[6] The 4th Respondent is the Mbabane Municipal Council, a Municipal Council established in terms of the Urban Government Act to administer the Town of Mbabane, having its place business situated in Mbabane at the Municipal

Council Building in the district of Hhohho. The 4th Respondent was the Respondent in the court *a quo.*

[7] This Court has jurisdiction to determine this application by virtue of Section 19 (5) of the Industrial Relations Act of 2000 as amended and in terms of Rule 53 of the High Court Rules.

[8] The Applicant is a former employee of the 4th Respondent. He was dismissed by the 4th Respondent by letter dated 8th December 2008 after he was found guilty of two counts of misconduct.

[9] The charges appear in the invitation to attend the disciplinary hearing as follows:

> "Charge 2 You did continue to engage a company to do business with Council (your employer) when you knew very well that you were an interested party and thus contravening section 46.1 of the Staff Standing Order of 1977 where it reads: at the time of his/her engagement with Council and throughout the course of his employment with Council an employee shall divulge to the Chief Executive Officer (CEO) any interest he or she may have in any business transaction or application with which Council is involved. No employee shall directly or indirectly conduct any business with the Council for his benefit. Any contravention of this provision shall constitute corruption, as well as code No. 12 Part 11 of the Staff Standing Orders which is the

Disciplinary Code and Procedures 1977 where it reads: Undisclosed conflict of interest or other employment for remuneration.

Charge 3 While you continued to engage Cyprus Electrical in doing business with

the Council, you were indeed driven by the interest you had in order to gain out of it and that was in violation of Code No. 18. Part 11 of the Staff Standing Orders 1977 read together with Section 36 (b) of the Employment Act of 1980 as amended, where it reads: **Dishonesty, forgery bribery, misappropriation, corruption and undue influence or benefit."**

[10] The Applicant did not accept the dismissal and he reported the matter to the Conciliation, Mediation and Arbitration Commission (CMAC) as a dispute. The dispute could not be resolved by conciliation, and the Applicant instituted legal proceedings in the Industrial Court in terms of section 85 (2) of the Industrial Relations Act No. 1 of 2000 as amended as read together with Rule 7 of the Industrial Court Rules of 2007 for the determination of the unresolved dispute.

[11] At paragraph 29 of its judgment the Industrial Court concluded as follows:

"Taking into account all the evidence led before the Court, the submissions by the parties, the legal principles applicable and also all the circumstances of this case, the Court will come to the conclusion that the Respondent was able to prove on a balance of probabilities that the termination of the Applicant's service was for a fair reason and that taking into account all the

circumstances of the case, it was reasonable to terminate the service of the Applicant. The Court will therefore make the following order:

(a) The Applicant's application is dismissed.

(b) There is no order as to costs."

[12] In the court *a quo* the Applicant sought payment of terminal benefits allegedly due to him. These are as follows:

1.1 Notice Pay in the sum of E13,328.00

1.2 Additional Notice Pay in the sum of E22,849.30

1.3 Severance allowance in the sum of E57,123.85.

1.4 Maximum compensation for Unfair Dismissal in the sum of E159946.68 making a total claim of the sum of E253,248.05.

1.5 Costs of Application.

1.6 Further and or alternative relief.

[13] He claims that he was unfairly dismissed by the 4th Respondent and that the dismissal was unfair both procedurally and substantively.

[14] The Court *a quo* heard oral evidence from the parties before reaching its conclusion at paragraph 11, supra.

[15] In the appeal case of **Takhona Dlamini v The President of the Industrial Court and Another**, appeal case number 23/1997 Tebutt JA set out the grounds of common law review in the following terms:

> "Those grounds (to review) embrace inter alia the fact that the decision in question was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose or that the Court misconceived its function or took into account irrelevant considerations or ignored relevant ones; or that the decision was so grossly unreasonable as to warrant the inference that the Court failed to apply its mind to the matter."

Procedurally Unfair

[16] The Applicant is of the view that his dismissal was unfair procedurally because the 4th Respondent, contrary to the standing orders imported a lawyer to conduct the internal disciplinary hearing against him. This importation of an outside lawyer was irregular. The Applicant does not impute any irregularity on the 1st Respondent with regard to how the 1st Respondent handled the issue of importation of a lawyer. None of the grounds set out in the case of Takhona have been attributed to the 1st Respondent.

[17] However, for the sake of completeness the 1st Respondent deals with the issue of importing a lawyer by the 4th Respondent at paragraph 27 of his judgment. This is what he says:

> **"27. It was argued that the dismissal of the Applicant was procedurally unfair because the Respondent breach the code by not appointing the line Manager to deal with the disciplinary hearing. The code is not cast in stone. Where necessary, departure is allowed depending on the circumstances of each particular case. The argument by the Applicant was not clear when he said that there was a breach of the code "by not appointing line manager to deal with the disciplinary hearing." The line manager, RW2, was appointed to deal with the disciplinary hearing. He was the initiator. It would clearly not have been proper for RW2 to preside over the disciplinary hearing as the Internal Auditor reported the findings to him, he was therefore *au fait* or privy with the facts of the case. The Court is therefore unable to come to the conclusion that the Management acted unlawfully when it exercised its discretion to appoint an outsider to chair the disciplinary hearing."**

[18] I cannot find fault with the reasoning of the 1st Respondent nor with the 4th Respondent in its endeavor to be transparent. This ground fails and I hold that the dismissal was procedurally fair.

Substantively unfair

[19] The Applicant at paragraph 8.3 of his founding affidavit concludes that paragraph by stating that **"I challenge the Court *a quo's* judgment through common law grounds for review."** This statement is amplified at paragraph 9 of his founding affidavit where he states that the 1st Respondent **"took into account irrelevant considerations and ignored relevant ones"** regarding the issue of disclosure. The Applicant does not itemize for this Court the irrelevant considerations that the 1st Respondent took into account nor does he itemize for this Court which relevant ones the Court *a quo* ignored.

[20] With regard to the issue of disclosure, the 1st Respondent dealt with that issue appropriately at paragraph 7 and 8 of the judgment. The 1st Respondent has this to say:

> **"7. The shareholders of the company are the Applicant and his wife Nelsiwe Mkhwanazi. The Applicant has 80% shares and his wife has 20% shares. From 2004 up to 2008, this company was awarded tenders to do electrical work for the Respondent. The Applicant did not disclose to the Respondent that he had interest in Cyprus Electrical (Pty) Ltd until this was discovered by the Respondent's internal auditor, Ransford Quaynor, who testified before the Court as RW3. After this information was discovered and staff reminded to comply with the Staff Standing Orders, the Applicant wrote a memorandum**

to the Respondent's Chief Executive Officer (CEO) purporting to declare his interest. This document was dated 3rd September 2008, which was a day before he received the charges on 4th September 2008.

[21] After setting out the background based on the evidence led before him, he then analyzed that evidence and the law applicable from paragraph 9 of his judgment. This is what the 1st Respondent stated:

> **"12.4 It was highly unlikely that the Applicant was not aware of the Staff Standing Orders as he was the head of the Electrical Department. It was therefore highly unlikely and is clearly untenable that a person in a supervisory position and with a service record of about ten years could not be aware of the company policies.**
>
> **12.5 Assuming for a moment in favour of the Applicant that he was not aware of the Staff Standing Orders, after having been reminded by the Internal Auditor to declare, the Applicant failed to make a total or complete disclosure. He only disclose his wife's interest. Even at that, he made a false disclosure and stated that his wife has 5% shares whereas the evidence before the Court revealed that his wife has 20% shares.**
>
> **12.6 The Applicant told a lie to the Respondent when he stated that his wife has 5% shares. He made a false declaration. The Applicant also failed to disclose his personal interest of 80% shares in the company. Such distortion of facts did not amount to disclosure at all. The false declaration by the Applicant clearly cannot be regarded as a**

declaration of interest at all and envisaged by clause 46.01 of the Staff Standing Orders."

[22] I cannot fault the 1st Respondent's findings as I agree with them. The Applicant failed to make full disclosure which was dishonest of him. Clearly the 1st Respondent properly applied his mind and considered all relevant considerations when he came to the above conclusion. This ground fails.

[23] In his founding affidavit the Applicant stated that he did not benefit anything from the company known as Cyprus Electrical (Pty) Ltd. That cannot be true as at paragraph 13 and 14 of the 1st Respondent's judgment it states:

"**Dishonesty and corruption**

13. The evidence before the Court revealed that the Respondent had to submit three quotations if there was any electrical work to be done, to the insurers by the name of AON. At AON the Respondent was dealing with RW1, Thabsile Zwane who processed the claims. RW1 told the Court that she dealt with the Applicant who represented the Respondent. She said if the Applicant was not available, she liaised with his supervisor, RW2. RW1 told the Court that the practice of submitting three quotations was no longer followed. When she enquired about this from the Applicant, the Applicant told her that the other contractors had lost interest because it cost them a lot of money and time to prepare the quotations and at the end of the day not win the tender. The Applicant was therefore submitting only one quotation to the insurers, that of his company, Cyprus Electrical (Pty) Ltd."

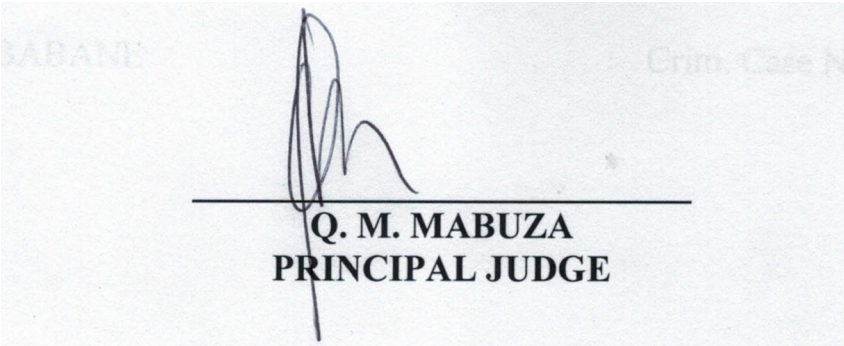
14. The person responsible for submitting the quotations to AON on behalf of the Respondent was the Applicant. Because of the explanation given by the Applicant to RW1, Cyprus Electrical (Pty) Ltd was awarded tenders without competition. Faced with this evidence of direct conflict of interest, the

Applicant told the Court that he was no longer the owner of the company and that he gave it to AW2, Sikelela Motsa."

[24] I agree with the 4th Respondents Counsel that the Applicant is in fact attempting to prosecute an appeal under the guise of a review. He is in fact attempting to bring an appeal through the back door which is prohibited in terms of the Industrial Relations Act 1/2000 as amended. And because of this I shall award costs against the Applicant.

[25] Consequently there is nothing to review, correct or to set aside concerning the 1st Respondent's judgment.

[26] In the event, the application is dismissed with costs and the judgment and order of the court *a quo* are hereby confirmed.



Q. M. MABUZA
PRINCIPAL JUDGE

For the Applicant : Mr. MLK Ndlangamandla

For the Respondent : Mr. S. Dlamini