IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 51/09**

In the matter between:

CINDY DLUDLU **APPLICANT**

And

SWAZILAND STANDARDS AUTHORITY **RESPONDENT**

CORAM:

NKOSINATHI NKONYANE DAN **JUDGE**
MANGO PHUMELELE THWALA **MEMBER**
MEMBER

FOR APPLICANT FOR RESPONDENT **M. SIBANDZE S.B. SHONGWE**

JUDGEMENT 07.04.09

[1] The applicant is currently on suspension on full pay pending a disciplinary hearing process instituted against her by the respondent.

[2] The applicant is the Chief Financial Officer of the respondent. The respondent is a Category A public enterprise. Its functions and operations are therefore under the supervision of the Public Enterprises Unit in terms of the Public Enterprises (Control and Monitoring) Act No.8 of 1989.

[3] The applicant received charges together with an invitation to attend the disciplinary hearing which was to proceed on 2nd February 2009. The applicant thereafter filed an urgent application in this court under

[4] On 9th

appear

case No.51/2009 seeking an order that the respondent be interdicted from proceeding with the disciplinary hearing pending compliance by the respondent with clause 10.3.1.4 of its Industrial Relations Procedure. The court in its judgement delivered on 16.02.09 accordingly made an order interdicting the respondent from proceeding with the disciplinary hearing against the applicant pending compliance with clause 10.3.1.4 of its own policies and procedures.

March 2009 the applicant again received an invitation to before a disciplinary hearing to face the charges initially preferred against her together with some added charges.

[5] The a pplicant instructed her attorneys to write to the

respondent and bring to its attention that it was not proper for it

to haul the applicant to a disciplinary hearing without first

complying with clause 10.3.1.4 of its own internal policies as

per the order of the court.

The applicant has thus instituted the present application on an urgent basis and is seeking an order in the following terms;

"1. Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.

2. That a rule nisi be issued with immediate and interim effect, calling upon the respondent to show cause on a date to be appointed by the

above Honourable Court, why an order in the following terms should not be made final:-

3. That the respondent be and hereby restrained, and interdicted from proceeding with the disciplinary hearing against the applicant set to proceed on the 24th and 25th March 2009.

4. Setting aside the charges laid against the applicant on the 09th March 2009 and the Disciplinary Proceeding set to proceed on the 24th and 25th March 2009 as irregular and not in compliance with the respondent's Industrial Relations Procedure.

5. That the prayer 2.1 above operates with immediate and interim effect pending finalization of this application.

6. Costs be awarded against the respondents on the scale as between Attorney and own client.

7. Further and/or alternative relief."

[7] The applicant's argument before the court is simply that the charges are irregular and should be set aside because the respondent has not complied with the provisions of clause 10.3.1.4 of its policies and procedures.

[8] The respondent's argument is that it has complied with the court order and the provisions of clause 10.3.1.4 of its policies and procedures.

[9] The evidence before the court shows that the respondent's Council's term of office expired on 31st January 2009. The Council's functions are, inter alia, to administer, manage and control the affairs of the respondent. Three members of the Council form part of an executive committee that assists the Director in the day to day operations of

the respondent as per section 5(4)(a) of the Standards and Quality Act No. 10 of 2003 which establishes the respondent. It is clear therefore that the Council should be in place all the time. Further, in terms of Section 8(3) of this Act, the Council may delegate any of its powers or functions to the director subject to the approval of the Minister. This Act further provides under Section 12(1) that the Chief Financial Officer shall be appointed in terms of Section 8(2) of the Public Enterprises (Monitoring and Control) Act of 1989 and the Chief Financial Officer shall be answerable to the Director.

[10] Having outlined the relevant provisions of the Standards and Quality Act, the court will now deal with the clause 10.3.1.4 of the respondent's policies and procedures. This clause provides that;

"Disciplinary action which results in the dismissal of an employee, summary or otherwise, shall be instituted only under the written authority of the Council, Director, or Head of Department in accordance with the disciplinary procedure.

In the case of misconduct by either the Director or the Chief Financial Officer, the Council shall initiate and facilitate the hearing with the Public Enterprises Unit."

[11] The court had opportunity to deal with the interpretation of this clause in case No. 51/2009. The applicant argued in that case that the court should interpret the clause to mean that the respondent's council should act together with the Public Enterprises Unit ("PEU") when initiating and facilitating the disciplinary hearing. The respondent argued that the clause should be interpreted to mean that the respondent's council should act with the knowledge of the PEU. The court interpreted the clause to mean that the respondent's council should act in consultation with the P.E.U. taking into account

the provisions of section 8(2) of the **Public Enterprises (Control and Monitoring) Act, 1989.**

[12] The court found in case No. 51/2009 that there had been no consultation hence its judgement that the respondent should comply with clause 10.3.1.4. The question that the court must answer in the present proceedings is whether the respondent has complied with the court order, that is, has the respondent complied with the provisions of clause 10.3.1.4. The second question that the court must answer is whether the charges against the applicant were properly initiated in view of the fact that presently there is no council its term having expired on 31st January 2009.

[13] The respondent says it has complied with the court order. In paragraph 4.4 of its answering affidavit, the deponent, Dr. Lomkhosi Mkhonta stated that the Principal Secretary of the Ministry of Commerce, Industry & Trade granted her all the authority to engage in a consultative process with the PEU with regard to disciplining the applicant in the absence of the council by letter dated 17th February 2009, annexure "SWASA 3" hereto.

[14] The respondent's Industrial Relations Procedure under clause 10.3.1.4 however states clearly that *"...in the case of misconduct by either the Director or the Chief Financial Officer, the Council shall initiate and facilitate the hearing with the Public Enterprises Unit"* (my emphasis).

[15] Dr. Mkhonta herself appreciated the full import of clause 10.3.1.4 when she wrote to the Principal Secretary of the Ministry of Commerce, Industry and Trade on 16th February 2009, annexure "SWASA 2" hereto. She wrote in paragraphs 5.3 and 5.4 that:

"5.3 As a result of the absence of Council, the authority is now being faced with the predicament that in the absence of the Council resolution, the Director does not have the authority to enter into a consultative process with the PEU on the matter involving the CFO.

5.4 I have highlighted the problems I am encountering to the Honourable Minister and she advised me to deal with your office as it is the one that becomes responsible for the affairs of SWASA, once the Council term expires as is the present scenario."

[16] There was no evidence before the court that the council, before its term expired, delegated any of its powers to the director in line with Section 8(3) of The Standards and Quality Act.

[17] As it was clear that the term of the council had expired, Dr. Mkhonta met with management and amended the provisions of clause 10.31.4. to read:-

"In the case of misconduct by any member of management, other than the Director, the Director shall initiate and facilitate the disciplinary hearing. In the case of misconduct by the Director the council shall initiate and facilitate the disciplinary hearing in consultation with the Public Enterprises Unit."

[18] This conduct by the respondent was clearly contemptuous of the court order and is totally unacceptable. Instead of complying with the court order, the respondent decided to amend the procedure to suit its own interest. One of the postulates of justice is that there must be certainty in law. The respondent cannot be allowed to change its disciplinary procedures without first consulting with its employees who are directly affected by the policy to fit a

particular case. Under clause 10.3.1.2 the disciplinary policy provides that;

"Management reserves the right to amend the disciplinary code and procedure from time to time in accordance with the principle of natural justice or bring into conformity with the provisions of the Employment Act or the Industrial Relations Act (2000)."

It was clearly not lawful for the respondent to amend the disciplinary code in such a way as to have a retrospective application. The conduct of the respondent was also not in conformity with the spirit of the Industrial Relations Act which has as one of its objectives the promotion of fairness and equity in labour relations.

[20] It was argued on behalf of the respondent that in terms of clause 10.4.7.3 management has the right to alter the grievance procedure. That clause provides that;

"Management reserves the right to alter, replace any portion or all of this procedure."

[21] As already pointed out in paragraph 19, it would clearly be unfair and unacceptable for any such alteration or replacement to apply retrospectively in order to fit a particular case. Such conduct offends against the postulates of justice.

[22] It was also argued on behalf of the respondent that its director has the authority on her own to discipline the applicant. The court was referred to the case of **Njabulo Kenneth Simelane v. Swaziland Investment Promotion (SIPA) case No. 511/08 (IC).** In that case the court pointed

out at paragraph 17 that;

"The Chief Executive Officer is responsible for the day to day administration of the respondent. Such responsibility usually includes the authority and power to discipline employees ..."

[23] In that case the applicant had argued that the respondent's CEO had no authority or power to discipline him. The court found that the CEO had such authority and power. There was no evidence before the court that SI PA has a similar provision to clause 10.3.1.4 of the present case. In the present case the respondent specifically provided in clause 10.3.1.4 that a disciplinary hearing against a director or chief financial officer should be initiated and facilitated by the council in consultation with the PEU. The applicant is entitled to expect that the respondent will abide by its own internal disciplinary procedures.

[24] In paragraph 5.2 of the answering affidavit Dr. Mkhonta stated that they decided to amend the procedures because it was cumbersome to implement or comply with clause 10.3.1.4. Inconvenience is not a defence for failure to comply with a court order. In any event it is not true that it is cumbersome to put the council in place. In terms of Section 6 of the Public Enterprises (Control and Monitoring) Act, 1989 the governing body of a Category A public enterprise is appointed by the Minister responsible in consultation with the Standing Committee. The Minister can appoint the council today, they

can meet on the following day and initiate the disciplinary proceedings against the applicant.

[25] Further, in terms of section 5(2)(b) of The Standards and Quality Act,

2003 a member of the council may be reappointed for one further term after the expiration of the initial period of appointment. It is also not clear to the court why was the process of putting a new council in place not initiated prior to 31st January 2009 when their term of office came to an end.

[26] The applicant also raised the issue of Dr. Mkhonta's authority to file papers in opposition of the application as there was no resolution attached to the papers. It was argued on behalf of the respondent that this was a continuing matter to case No. 51/2009 and therefore there was no need to attach any proof that Dr. Mkhonta was authorised to file papers in opposition. Granted that this is a continuing litigation between the parties, after the other party however raised the question of authority, the respondent had a duty to produce proof thereof. The respondent failed to do that.

[27] It is clear to the court therefore that the respondent has not complied with clause 10.3.1.4 of its industrial relations procedure which provides that disciplinary action against the Director or the Chief Financial Officer shall be instituted by the Council in consultation with the PEU. It has not been shown that it is impossible to put the council in place. The court was

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only told that it was cumbersome. Inconvenience cannot be allowed to take precedence over the strict requirements of the law.

[28] Taking into account all the above observations and all the circumstances of the case the court will make an order in terms of prayer 2.1 and 2.2 of the applicant's application. Because of the existing employer/employee relationship between the parties, the court exercising its discretion will not make an order as to costs.

The members agree.