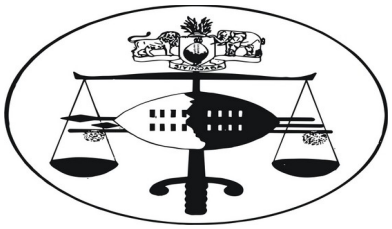

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 182/13

In the matter between:

JEFFREY JELE **Applicant**

And

MALOMA COLLIERY LIMITED **1st Respondent**

LEONARD NXUMALO **2nd Respondent**

MBAZIMA MAVODZE **3rd Respondent**

LINDA SIKHOSANA **4th Respondent**

STEVEN RESS **5th Respondent**

Neutral citation: *Jeffrey Jele v Maloma Colliery Limited & Four Others (182/13) [2013]* SZIC 20 (JUNE 19 2013**)**

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu Nominated Members of the Court)

Heard : **12 June 2013**

Judgment delivered: **19 June 2013**

Summary:

The Applicant instituted urgent application to review the decision of the disciplinary hearing Chairman dismissing an application to recuse himself from chairing the disciplinary hearing.

Held---Review proceedings are ostensibly directed towards the decision making process rather than the decision itself.

Held---The Court can only interfere or review the decision of the disciplinary hearing Chairman if it is shown that he misdirected himself in certain aspect or if his decision is grossly unreasonable

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JUDGMENT
19.06.13

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[1] This is an application on Notice of Motion instituted by the Applicant against the Respondents under a certificate of urgency.

[2] The Applicant is employed by the 1st Respondent as a Mine Overseer. He reports to the Mine Manager. He is presently under suspension with full pay following

certain charges that were preferred against him after a forensic investigation was carried out at the workplace. He is currently undergoing a disciplinary process.

[3] The 1st Respondent is a public company involved in coal mining industry having its principal place of business at Maloma in the Lubombo District

[4] The 2nd Respondent is Leonard Nxumalo, an adult male employed by the Swaziland Water Services Corporation having its principal place of business at Ezulwini in the Hhohho District.

[5] The 3rd Respondent is Mbazima Mavodze, an adult male legal practitioner admitted as an Advocate in Johannesburg in the Republic of South Africa.

[6] The 4th Respondent is Linda Sikhosana, an adult male attorney of Johannesburg in the Republic of South Africa.

[7] The 5th Respondent is Steven Ress an adult male Advocate of Johannesburg in the Republic of South Africa.

[8] The 2nd Respondent is the Chairman of the disciplinary hearing being conducted against the Applicant. The 3rd Respondent is an Assessor/Observer. The 4th and

5th Respondents are Initiators. All these panel members are not employees of the 1st Respondent.

[9] The Applicant was of the view that the involvement of these panel members in the disciplinary hearing is contrary to the provisions of the disciplinary procedures of the 1st Respondent. The Applicant accordingly applied for the recusal of all the panel members on the basis that their appointments were in violation of the 1st Respondent's disciplinary procedures. The Chairman dismissed the application. The Applicant accordingly instituted the present application on an urgent basis for an order in the following terms;

"1. Dispensing with form, service and time limits as prescribed by this Honourable Court and hearing this matter as a matter of urgency.

2. That a rule nisi do issue operating with interim and immediate effect calling upon the Respondents to show cause on a date to be fixed by the court why prayers 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.8, and 2.9 herein below should not be made final orders of court.

2.1 Pending finalization of this application, the ongoing disciplinary hearing in the 1st Respondent's workplace which is conducted against the Applicant be stayed.

2.2 That the chairman of the ongoing disciplinary hearing and particularly the 2nd Respondent herein be removed from being chairman of the disciplinary hearing of the Applicant.

2.3 Likewise the 3rd Respondent be removed as the assistant of the Chairman or observer from the Disciplinary hearing.

2.4 The Initiators, 4th and 5th Respondents be removed from the disciplinary hearing.

2.5 Directing the 1st Respondent to appoint a new chairman and initiator of the hearing in accordance with the Disciplinary Code and to start the disciplinary hearing de novo.

2.6 The disciplinary hearing thus far be set aside.

2.7 Alternatively directing and compelling the 1st and 2nd Respondents to furnish the Applicant with a written decision why the 2nd Respondent held he should not be removed together with the initiators within 3 days from granting of the Court Order herein.

2.7.1 The Applicant be granted leave to supplement the founding affidavit if necessary.

2.8 The 1st respondent be compelled to pay the legal fees of the Respondents' attorney during the disciplinary hearing so long as it has appointed external people to conduct the hearing.

3. Further it be held that in the event no manager of Applicant is suitable to chair the hearing the parties engage each other in consultation and agree

on the alternative pool from which the 1st Respondent may draw a chairman.

4. Costs of this application.

5. Further and/or alternative relief as the court may deem appropriate."

[10] The Applicant's application is opposed by the Respondents. An Answering Affidavit was filed deposed thereto by Jacobus Du Plessis, the Mine Manager and the current Acting Chief Operations Officer. The Applicant filed a document that was referred to as a supplementary founding affidavit and also filed the replying affidavit. The Applicant later filed a Notice of Application seeking an order that the court admits the Collective Agreement between the parties. The 1st Respondent in response filed an answering affidavit opposing the filing of the Collective Agreement on the basis that the application was filed after the completion of arguments for the admission of further evidence and that the document was not applicable to the Applicant because he was not a member of the union at the 1st Respondent's workplace.

[11] There is no doubt judging from the number of applications and counter-applications that things were happening so fast. The court therefore has an onerous duty to winnow out the chaff of the nomenclature and to consider only the substance.

[12] The 1st Respondent in its Answering Affidavit raised two points of law namely; that,

9.1 The Applicant has failed to establish the threshold required for the grant of an interdict.

9.2 The court has no right to intervene in incomplete disciplinary proceedings.

9.3 No primary facts have been set out to justify that the court should review and set aside the decision of the disciplinary tribunal.

[13] The parties having filed all the necessary papers before the court, and the matter having been argued before the court in its entirety, the court will accordingly consider both the points of law and the merits of the case simultaneously and issue a final judgement.

[14] Both parties filed comprehensive heads of argument for which the court will record its appreciation.

[15] The Applicant's main objection before the Chairman was that the panel was not properly constituted and that it was in violation of the 1st Respondent's Disciplinary Code. His arguments were that;

15.1 He was supposed to be suspended by the Head of Department, the Mine Manager and not by Musa Magagula, who is a Board member. This was in conflict with Article 15 of the Disciplinary code.

15.2 In terms of the Disciplinary Code, Article 9.4, he should be represented by a fellow employee, and not an attorney.

15.3 The role of 3rd Respondent is not provided for in the Disciplinary Code.

15.4 Nothing bars the Mine Manager from being an initiator and also a witness.

[16] The Chairperson made an *ex tempore* ruling dismissing the Applicant's objections. The Chairman pointed out however that he was going to issue a written ruling on the following day. From the papers before the court, it seems that the Applicant instituted the present application before he had seen the

written ruling of the Chairperson hence he stated in paragraph 28.1 of the Founding Affidavit that;

"28.1 I am prejudiced in making my case for the review of his decision but I could safely say that his reason for rejecting my application showed biasness, failure to apply his mind to the matter at hand and taking into account irrelevant facts.

28.1 I beg leave to file a supplementary affidavit in the event he files his written ruling."

[17] The written ruling of the Chairperson is annexed to the 1st Respondent's Answering Affidavit and it is dated 24/05/13. According to the written ruling, the Chairperson found that;

17.1 It was established by the 1st Respondent that exceptional circumstances existed at the workplace warranting the deviation from the normal disciplinary procedures in that;

17.1.1 In terms of the organogram and hierarchy of Maloma the highest Executive Officer is the Chief Operations Officer (COO) who was suspended on 18th September 2012 and is

also due to appear in a disciplinary hearing. Due to his absence, the Board had to intervene.

17.1.2 The deviation from the Disciplinary Code was done in the interest of fairness to both parties.

17.1.3 The Applicant's immediate supervisor, the Mine Manager is a potential witness in the disciplinary proceedings.

17.1.4 The Applicant is facing serious charges of misconduct. The departure from the Disciplinary Code to allow his legal representation is to the benefit of the Applicant.

17.1.5 There is no evidence proving any undue influence of the Chairperson by the Board. There is further no substance in the speculations that the Chairperson will be biased in presiding over this hearing.

[18] Presently the disciplinary hearing is on hold as it was postponed until 20th June 2013. There is therefore no need for the court to make an order staying the disciplinary hearing in terms of prayer 2.1.

ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE:-

[19] **The collective Bargaining agreement:-**

On 12th June 2013 the Applicant filed the notice of application for an order admitting the Collective Bargaining Agreement as part of the Applicant's case. The Applicant's attorney was asked by the court as to the relevancy of this document. The Applicant's attorney responded by saying that it was relevant in as far as it seeks only to prove that there was a Collective Bargaining Agreement at the workplace contrary to the Respondents' attorney's submissions that there was no such document.

[20] The document in question is a Collective Bargaining Agreement between the 1st Respondent and the Union operating at the 1st Respondent's workplace known as the Mining, Quarrying and Allied Workers Union of Swaziland (MQAWUS). The document specifically states in Article 3.1 thereof that the Agreement applies to the Union members. There was no evidence before the court nor was it suggested that the Applicant is a member of the Union. The agreement also specifically provides in Article 3.1 (there are two Articles 3.1) that the Agreement shall not apply to employees who may be designated as Managerial and employees who fall under the definition of Staff in the Industrial Relations Act of 2000 as amended.

The Applicant signed the document as a witness for the 1st Respondent in his capacity as the Mine Overseer.

[21] The Agreement is therefore not applicable to the Applicant as there is no evidence before the court that he forms part of the unionisable employees of the 1st Respondent. The Agreement specifically excludes managerial and staff employees. Consequently, the Applicant cannot claim that he had the right to be consulted by the 1st Respondent on the decision to outsource the disciplinary hearing. Even if the Applicant was a member of the Union, where the Code specifies that a particular manager may chair the hearing the Court has made it clear in previous decisions that whether it is permissible to appoint an outsider where the Code specifies otherwise depends on the circumstances of each case.

See: Khula Enterprise Finance Ltd v Madinane & Others (2004) 25 ILJ 535 (LC).

[22] **Replying Affidavit:-**

In terms of prayer 2.7.1 of the Notice of Motion, the Applicant sought leave to supplement the Founding affidavit. The Applicant's attorney specifically stated in court they were seeking the indulgence because they had not seen the written ruling and that they did not have the opportunity to see the transcript. It was on that basis that the court granted the prayer. That this was the understanding in

court is also supported by paragraph 28.1 of the Founding Affidavit where the Applicant stated that;

> *"28.1 I beg leave to file a supplementary affidavit in the event he files his written ruling."*

The indulgence by the court was therefore clearly not granted in order to give the Applicant an opportunity to state new evidence or grounds for his application. In Motion proceedings the principle is that the Applicant must raise the issues that he seeks to rely on in the Founding Affidavit. The Applicant's case cannot be allowed to be supplemented in reply.

See: **Hart v. Pinetown Drive Inn Cinema (Pty) Ltd**
1972 (1) S.A. 464.

Director of Hospital Services v. Mistry
1979 (1) S.A. 626 (A).

[23] The Court is alive to the provisions of **Section 11 of the Industrial relations Act No.1 of 2000** as amended, which provide that the Industrial Court shall not be strictly bound by the rules of evidence or procedure which apply in

civil proceedings and may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice.

[24] This provision of the law is not however a licence for the Industrial Court to trample upon trite principles of the law relating to pleadings. The Applicant specifically stated in court why he would need to a file Supplementary Affidavit. It follows therefore that anything beyond the purpose for which the court granted the indulgence to the Applicant will be out of line as it will be prejudicial to the Respondents and is likely to result in a miscarriage of justice and should not be allowed by the court. The court will therefore consider only those issues that emanate from the written ruling of the Chairperson and disregard those issues that seek to augment the Applicant's cause of action.

[25] **The Applicant's case:**

The Applicant's case before the court is twofold; namely, in terms of paragraphs 20-28.1 he is seeking the removal of the 2nd – 5th Respondents from the panel of the disciplinary hearing. The second part is seeking the removal of the Chairman on the basis of "Failure to act independent". This is contained in paragraphs 29-36 of the Founding Affidavit. The first part in which he is seeking the removal of the 2nd -5th Respondents is that their

appointments were not in terms of the Disciplinary Code or Procedure in place at the 1st Respondent's workplace. Clause 9.12 of the Disciplinary Code provides as follows:-

" a) The following persons should attend an enquiry:-

- *The Chairperson*
- *The Complainant*
- *The employee*
- *The employee's representative*
- *The Human Resources Practitioner*
- *The scribe appointed by the Chairperson, being a person he/she deems to be competent to perform such function, if required.*
- *The witness (es)."*

The Applicant accordingly applied for the recusal of the 2nd Respondent and 3rd Respondent as they did not form part of the persons listed above. The Applicant also stated that since the Chairperson was appointed by Musa Magagula, a member of the Board, and because of the presence of the 3rd Respondent, he was not going to get a fair hearing.

[26] The Applicant however did not state why he thought he was not going to get a fair hearing.

[27] Further, in paragraph 26, the Applicant stated that he also objected to the presence of the 4th and 5th Respondents. The 4th and 5th Respondents are initiators in the disciplinary hearing. The Applicant stated that the initiator should be his immediate supervisor, the Mine Manager and that the Chairperson could be the other Heads of Department. The Applicant stated that he was unnecessarily put out of pocket by the hiring of the three legal practitioners from South Africa.

[28] The Chairperson after hearing the application for recusal of himself and the three legal practitioners, dismissed the application. The Chairperson stated in his ruling that there were appropriate and exceptional circumstances which entitled the employer to deviate from the disciplinary Code.

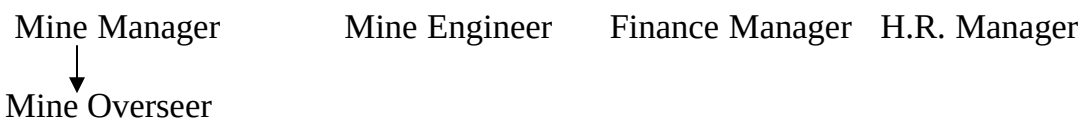
[29] **Exceptional and appropriate circumstances:-**

The next enquiry is whether indeed there were any exceptional and appropriate circumstances justifying the employer to deviate from the disciplinary Code. In the case of **Nedbank Swaziland Limited v. Swaziland Union of Financial Institutions and Allied Workers (SUFIAW) case No. 10/2012 (ICA)** the Industrial Court of Appeal stated that deviation from a disciplinary Code which is the result of elaborate consultation and negotiation between the employer and employee should

only be in exceptional and appropriate circumstances with both parties agreeing to the deviation. In the present case there was no evidence that the Applicant is a member of the Union. The Collective Agreement in this specifically states that it applies to the members of the Union. Further, *in casu*, there was no evidence that the disciplinary procedure at the 1st Respondent's workplace was a result of a series of consultations, negotiations and agreements between the 1st Respondent and the workers. Annexure "J" of the Applicant's Founding Affidavit shows that the disciplinary procedure was revised by the employer on 07.05.2012. The revision team consisted of the Human Resources Manager, Plant Superintendent, Finance Manager, Mine Overseer (The Applicant), Mine Manager, HSEC Coordinator and the Chief Operations Officer. If the document was the result of negotiations between the employer and employees, it was not going to be revised by the management alone.

[30] The evidence before the court revealed that there was no Senior Manager available to chair the disciplinary hearing. The organogram appears as follows:

Chief Operations Officer



The Chief Operations Officer was not available as he was also implicated and is also due to appear before a disciplinary hearing. The Mine Manager resigned at the commencement of the investigations. The Mine Manager, Mr. Jacobus du Plessis is currently acting as the Chief Operations Officer.

[31] The evidence further revealed that the Human Resources Manager, Mr. Gabriel Manana and Jacobus du Plessis will be witnesses for the 1st Respondent. If Mr. Jacobus du Plessis is going to be a witness, he is disqualified from chairing the disciplinary hearing. It will also not be practical for him to play two roles at the same time, that is, to be the initiator and witness.

[32] It is clear to the court therefore that there were indeed exceptional circumstances justifying the outsourcing the positions of Chairman and Initiator. In the disciplinary procedure, there is no provision for the position of assessor/observer. The reason for this is not hard to find. The person who is charged with observing the disciplinary process is the Human Resources Practitioner. There was no evidence presented before the court or the Chairman that the officer representing the Human Resources Manager is

incapable of discharging his duties. As regards the 3rd Respondent therefore, it cannot be said that there are appropriate and exceptional circumstances warranting the employer to deviate from the disciplinary procedure document. There was clearly no justification for the Chairman in arriving at the conclusion that he did as regards the 3rd Respondent. This court therefore is justified in interfering with his finding. It clearly should have been easy for the Chairman to find that the 3rd Respondent should be removed because even from the evidence his role is not clear. He is sometimes referred to as assessor/observer. He is also sometimes referred to as assistant to the Chairman. Mr. Jacobus du Plessis in the Answering Affidavit dated 12.06.2013 at paragraph 6 also conceded that the role of the 3rd Respondent was not clear. He stated that;

> "The second issue raised by the applicant, pertains to the role of Advocate Mavodze in the disciplinary hearing. Whilst I concede that there may be some confusion whether he is to assist the chairman or simply act as an observer, I submit the following:…"

[33] The Applicant also stated in paragraph 21 of the Founding Affidavit that the Code provides that the suspension of an employee shall be done by the Head of Department in terms of article 9.5 (e). That article provide that;

"When it is considered appropriate to suspend an employee, such suspension will be authorised by the Head of Department in consultation with the Human Resources Department."

It is however not the Applicant's case before the court that the suspension should be set aside because it was not authorized by the Head of Department. In any event the article provides that the suspension will be authorized by the Head of Department, and not that the suspension shall be done by the Head of Department.

[34] In the light of the evidence that there was no other Senior Manager available to chair or prosecute in the Applicant's disciplinary hearing, the court is unable to find any fault with the Chairperson's ruling that there were exceptional circumstances warranting departure from the disciplinary Code and outsourcing the disciplinary hearing.

[35] **Failure to Act Independent**

The evidence revealed that the Applicant did not have the final report of the forensic investigations by KPMG which led to the charges of misconduct being preferred against the Applicant. In paragraph 33 of the Founding Affidavit it is

stated that the Chairman adjourned the meeting in order to consult with Mr. Gabriel Manana who was outside the room as he is a witness. Because of this conduct by the Chairman, the Applicant was of the view that the Chairman is not independent.

[36] The court was referred to the case of **Graham Rudolph v. Mananga College and Leonard Nxumalo, case No.94/2007** as authority that the alleged consultation of Gabriel Manana on a matter that the Chairman had to decide showed that he was not independent.

[37] The case of **Graham Rudolph (supra)** is clearly distinguishable from the present case. In that case the issue of perceived lack of independence was raised to the Chairman who, co-incidentally, is the present Chairman in this case. In paragraph 19 of that judgment it shows the following in part;

"… Sibandze applied for the recusal of Nxumalo, stating that he was not independent as shown by his consulting with the complainant Ndzinisa in the absence of the Applicant regarding a decision he had to make."

In the present proceedings there was no application made before the Chairman to recuse himself because he consulted with Mr. Gabriel Manana in the absence of the Applicant regarding a decision that he had to make.

[38] The court therefore clearly has no jurisdiction to deal with a matter that was never brought before the Chairman who is in charge of the internal disciplinary hearing. The decision must be made by the Chairman. If the court were to entertain this issue and make a decision on it, it would be usurping the powers of the Chairman and interfering with the internal disciplinary hearing.

[39] **Allegations of biasness by the Chairman**

The Applicant also made some allegations of bias against the Chairman. These appear in paragraphs 40.2 and 41. In these paragraphs the Applicant was dealing with the question of urgency. In the Founding Affidavit however, no primary facts are set out to justify the suspicion of bias on the part of the Chairman.

[40] From the transcript, on page 14, the Applicant attorney during his submissions when he was making the application for the recusal of the Chairman stated as follows:

"… we are under the impression that you work for the board. You are sitting there as the board not as Mr. du Plessis, not as Mr. COO based on the events that we have explained. .."

Again on page 15 of the transcript the Applicant's attorney stated the following:-

"… we think your position is going to be influenced such that and indeed we have not started this hearing but we feel that Mr. Magagula, and when I refer to Mr. Magagula I refer to the board, has already influenced you by the drafting of the charges himself when he is not legally competent to draft the charges …"

On page 16, the transcript reveals the following:-

"… Mr. Mavodze has been placed next to you to push the aspirations of Mr. Magagula of the board. So that is why we are applying that you recuse yourself and let the formal procedure take place."

[40] As already stated by the court, in the Founding Affidavit of the Applicant, there are no primary facts set out from which it could be said the Applicant would be justified to have a suspicion of bias. Reading the Founding Affidavit as a whole,

it seems that the allegations of bias are based on the appointment of the Chairman by Mr. Musa Magagula, a member of the Board. It makes no difference in principle whether the Chairman was appointed by the Board or the rank of senior management. Both situations give rise to what is referred to as institutional bias.

[41] In the case of **Foster v. Chairman, Commission for Administration 1991 (4) S.A. 403 (c)** the court refers to the notion of *institutional bias* which allows a person to chair a hearing even where his connection with the institution concerned might arouse a suspicion of inevitable bias, provided that there is no proof that he is actually bias. If the reasonable suspicion test were to be applied, most, if not all managers appointed to chair internal disciplinary hearings would be disqualified on the basis of institutional bias. The Applicant is complaining of institutional bias. However, institutional bias it is the type of bias that is acceptable and inevitable in internal disciplinary hearings.

[40] The Applicant has also asked for an order compelling the 1st Respondent to pay legal fees because he has found himself having to instruct an attorney to represent him in the disciplinary hearing. The Applicant is not forced to engage an attorney.

[41] Taking into account all the evidence before the court and also all the circumstances of this case, it is clear that the Applicant has only succeeded in prayer 2.3.

[42] The court will accordingly make an order in terms of prayer 2.3, and also order that each is to pay its own costs.

The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT: **MR. E M. SIMELANE**
(MBUSO E. SIMELANE & ASSOCIATES)

FOR RESPONDENTS: **MR. Z. D. JELE**
(ROBINSON BERTRAM)