IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 8/2007

In the matter between:

LWAZI MNDZINISO **Applicant**

and

CONCILIATION MEDIATION ARBITRATION COMMISSION **Respondent**

CORAM:

P. R. DUNSEITH: **PRESIDENT**

JOSIAH YENDE: **MEMBER**

NICHOLAS MAN ANA: **MEMBER**

FOR APPLICANT: **N. J. HLOPHE**

FOR RESPONDENT: **T. MAGAGULA**

J U D G E M E N T - 25/01/07

1. The Applicant has applied to the court under a certificate of urgency for an order in the following terms:

1.1. Ordering the Respondent to pay the Applicant his full normal monthly salary for the month of January 2007 being E7721.00 together with attendant allowances;

1.2. Declaring the premature termination of Applicant's contract of employment null and void and of no force or effect pending the outcome of the appeal noted by the Applicant internally.

2. On the 8th January 2007, following a disciplinary hearing, the Respondent summarily terminated the Applicant's services and informed him of his right to appeal to the Executive Director within **3** days. The Applicant duly noted an appeal on the **11th** January 2007, and an appeal hearing was scheduled for the **16th** January 2007. According to the Applicant, the appeal hearing was not concluded on the **16th** January and was postponed sine die. He has heard nothing further from the Respondent concerning the continuation of the appeal hearing.

3. The Applicant submits that the effect of his noting an appeal was to suspend the termination of his employment, and he accordingly expected to be paid his full salary for the month of January 2007. Notwithstanding this expectation, he has only been paid for the period up to the date of his dismissal. The Applicant argues that pending the outcome of his appeal, he is still an employee of the Respondent and he is still entitled to enjoy the benefits of his contract of employment. His contract has been prematurely terminated notwithstanding the pending appeal, and the withholding of the balance of his January 2007 salary is illegal.

4. The Respondent has opposed the application and filed a notice of intention to raise a legal point in limine. The point in limine can be crisply stated as follows:

> 4.1 The Applicant has failed to establish a clear right to the relief he seeks because, as a matter of law, the noting of an internal appeal against termination of employment does not operate to suspend the termination.

5. Mr. Hlophe for the Applicant conceded when the matter was argued that the success of the application does indeed depend upon the correctness of the proposition that the noting of an internal appeal against dismissal operates to suspend the dismissal as a matter of taw.

6. Mr. Magagula for the Respondent argued forcefully that the common-law rule that the noting of an appeal suspends an order of court, applies to orders of court and does not, without more, apply to the decisions of employers or internal disciplinary tribunals. As authority he referred the court to the case of **NCHABELENG v UNIVERSITY OF VENDA &**

OTHERS (2003) 24 ILJ 585 (LC), in which the following paragraphs deal with the issue:

> *"[22] An ingenuous contention advanced by the applicant is that the dismissal visited on him on 28 May 2002 is automatically suspended because he noted an appeal against it. In this regard he relies on the common-law rule that the noting of an appeal suspends an order of court. That such is the law in respect of the orders of courts of law is clear from, inter alia, the judgment of Roux J in United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (W) at 463F. What the applicant's contention does not give due recognition to, is that this principle applies to orders of court and does not, without more, apply to the decisions of other decision-makers in society*
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> *[23] In my view it is wholly misconceived to attempt to import the doctrine of the automatic suspension of an order of a court upon the noting of an appeal, into the industrial relations environment. It should not be forgotten that a valid lawful dismissal does not incorporate as a matter of law any right to an appeal. A 'right' to appeal flows solely from the practice, endorsed in the LRA Code of Good Conduct: Dismissals,* as a *ready means by which a procedurally fair dismissal, give the equitable norms promoted under the provisions of the Labour Relations Act, may be proven. The provision of an appeal is confined to the arena of unfairness.*
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> *[24] In my view, the notion of the noting of an appeal suspending the effect of an order has no place whatsoever in the law of unfair dismissal."*

7. Grogan, in his book WORKPLACE LAW (8th Ed), supports the above views, relying on the authority of the NCHABELENG judgement:

> *"Attempts by the parties to settle their dispute after the dismissal do not have the effect of extending the date of dismissal. Nor does the noting of an internal appeal."* (Page 118)
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> *'When an employer takes a decision to dismiss after a disciplinary hearing and then affords the employee an opportunity to appeal, whether in terms of a disciplinary code or not, the date of dismissal is the time the employee was initially dismissed, not the date that the appeal is rejected."* (Page 119)
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> *"A dismissal is not 'suspended' merely because an employee notes an appeal or refers* a *dispute to the CCMA or Labour Court."* (Page **11**9)

8. The views expressed in NCHABELENG'S case and by Grogan accord with a previous judgemenrt of the South African Labour Court in the case of **SA COMMERCIAL CATERING & ALLIED WORKERS UNION v EDGARS STORES LTD & ANOTHER (1997) 18 ILJ 1064 (LC),** as appears from the following passage in the judgement of Zondo AJ at **1074:**

> *"The applicant's contention is simply that the operation of such dismissal was suspended until the outcome of the internal appeal, an argument which I find to have no foundation either in law or fact in this matter. In this regard, that would be the case only if there existed an agreement, express or implied, between the parties to the effect that, where an internal appeal against a dismissal is lodged, the dismissal is deemed to be suspended or does not operate pending the outcome of the appeal and, in the event of the dismissal being upheld, the dismissal only becomes effective from the date of the outcome of the appeal. There are employers who have such agreements with their employees....."*
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> (This judgement was overturned on appeal, but on a different point entirely - see **EDGARS STORES LTD v SA COMMERCIAL CATERING & ALLIED WORKERS UNION & ANOTHER (1998) 19 ILJ 771 (LAC))**

9. In answer to the Respondent's argument, supported by the above authorities, the Applicant's counsel referred the court to **LAWSA VOL.13 PARA.414.** Dealing with appeals of employees against disciplinary decisions, LAWSA states that "the penalty imposed by the disciplinary committee is suspended pending the outcome of the appeal." As authority for this statement, LAWSA refers to the case of **HANSEN V UNIVERSITY OF NATAL (1989)ILJ 1176(IC).**

10. In **Hansen's** case, the court was dealing with an application for 'status quo' relief under section 43 of the South African Labour Relations Act. In the course of its judgement on the merits, the Industrial Court stated the following:

> *"Without attempting to usurp the functions of the appeal court in the appeal against the dismissal of the application for a declarator, this court is prima facie of the view that, in the absence of any statutory provision, the common-law rule of practice applies, that generally the execution of a judgement is automatically suspended upon the noting of an appeal. See e.g.* ***South Cape Corporation***

(Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3)SA 534 (A).

In the court's view, on the grounds of equity, this general common-law rule of practice should also be applied in the field of labour relations, ie in dealing with appeals from disciplinary hearing findings. That being so, it would only have been fair and just for the respondent, after the noting of the appeal, to have suspended the dismissal by suspending the services of the applicant, but on full remuneration, pending the outcome of the appeal.

As the court's powers under s 43(4) of the Act are limited as to the nature of the relief it can grant, it cannot make an order in the abovementioned terms, but a similar effect can be achieved by the granting of a status quo order....."

11. With the greatest respect, Hansen's case contains various anomalies and errors of principle:

11.1. It appears from the **Hansen** judgement that the Applicant had also brought an application in the Supreme Court for a declaratory order that the noting of the appeal suspended the Applicant's dismissal. The Supreme Court dismissed this application, but granted leave to appeal to the Appellate Division. The Industrial Court was bound by the judgement of the Supreme Court. The court remarks that it is not "attempting to usurp the functions of the appeal court" but then purports to do exactly that, **in** disregard of the principles of *res judicata* and *stare decisis.*

11.2. The court expresses only a *"prima facie'* view on the legal position, which suggests that the court has not given proper consideration to the issue and is loath to commit itself to a firm statement of the law.

11.3. The court refers to the rule (that execution of a judgement is automatically suspended upon the noting of an appeal) as a "common-law rule of practice". **In** fact it is a rule of substantive law, not practice.

See **REID AND ANOTHER V GODART AND ANOTHER 1938 AD 511 AT 513**

SOUTH CAPE CORPORATION V ENGINEERING MANAGEMENT SERVICES 1977 (3) SA 534 (A)

NEL v **LE ROUX NO AND OTHERS 2006 (3) SA 56 (SE)** at **59**

11.4. The court expresses the view that the common law rule should, *"on grounds of equity,* a/so be *applied in the field of labour relations i.e in dealing with appeals from disciplinary hearing findings."* Since the common law rule is confined to suspending the operation and execution of judgements of courts of law, the court is proposing that a substantive rule of law should be extended and transplanted to apply to situations where it normally has no application. Whilst the Industrial Court has jurisdiction to ensure that there is fairness and equity in labour relations, this does not empower the court to amend and/or extend the substantive common law.

11**.5.** The court appears to contradict its own view when it goes on to say that it would have been fair and just for the respondent, after the noting of the appeal, to have suspended the dismissal by suspending the services of the applicant on full remuneration. If the common law rule applies to internal disciplinary appeals, as proposed, then the dismissal is automatically suspended and there is no necessity for the respondent to suspend the dismissal

12. This court agrees with **Nchabeleng** and **SACCAWU** that the doctrine of the automatic suspension of a decision upon the noting of an appeal, is confined to orders of court (and possibly public administrative orders also - see MAX v INDEPENDENT DEMOCRATS AND OTHERS 2006 (3) SA 112 (C)) and it is misconceived to attempt to extend the doctrine into the industrial relations environment as a general rule governing the disciplinary process.

13. In our view there is also no *equitable* basis for extending the common law rule to govern the disciplinary process. The foundation of the rule is to prevent irreparable damage from being done to the intending appellant. In the limited context of disciplinary action, there is very little likelihood of an appellant suffering irreparable harm if his employment remains terminated pending internal appeal. If he is successful, he will be reinstated with full backpay. There is more likelihood of an employer being prejudiced should the employment relationship continue, with all its contractual obligations, pending the appeal. The suggestion in **Hansen** that the employee be suspended on **full** pay pending the appeal is artificial and potentially prejudicial to the employer, who is unlikely to recover the remuneration paid *post* dismissal should the appeal be dismissed.

14. There may be individual cases where it is fair and just for the Industrial Court to make a 'status quo" order preserving the employment relationship pending the outcome of an internal appeal, but this would be based upon the peculiar circumstances of the particular case. Looking at the circumstances of the present case, there is no evidence that the

Applicant may suffer any irreparable harm or loss. Should his appeal succeed and result in his reinstatement, he will be entitled to full remuneration for the period after the date of dismissal.

15. For the above reasons, the application is dismissed.
There will be no order as to costs.

The members agree.

PR DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT