IN THE INDUSTRIAL COURT OF ESWATINI

RULING

Case No. 99/18

In the matter between:

SYLVIA WILLIAMSON	1st Applicant
SWAZILAND UNION OF FINANCIAL	
INSTITUTIONS AND ALLIED WORKERS	2nd Applicant
And	
NEDBANK SWAZILAND LIMITED	Respondent

Neutral citation: Sylvia Williamson and Another v Nedbank Swaziland Limited *(311/2017)* [2019] *SZIC 31* (29 March 2019)

Coram: **S. NSIBANDE JP**

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

Heard: 27 February 2019

Delivered: 29 March 2019

RULING

[1] The Applicants brought an application against the Respondent seeking an order in the following terms:-

1. *Declaring the Respondent's conduct to review Appeal Chairperson's decision as to (sic) deviating from the Code and consequently unlawful.*

2. *Directing the Respondent to comply with clause 2.5.4.1.5 of the Disciplinary code by either :-*

   2.1 Reinstating the Applicant to the position of an SMME Banker or its equivalent with payment of arrear wages in the sum of E16,324.50 per month (or such other increments as may have been awarded) calculated from 5th May 2017 and every subsequent month in terms of her employment contract.

   Failing 2.1 above, or;

   2.2 To compensate the Applicant a sum of E2 611 920 (two million, six hundred and eleven thousand, nine hundred and twenty Emalangeni), alternatively an amount to be mutually agreed upon.

3. *Payment of the sum of E46948.10 being expenses incurred by the 2nd Applicant in enforcement of the Disciplinary Code.*

4. *Costs of the Application at attorney and own client scale.*

5. *Such further and/or alternative relief as the above Honourable Court seems meet."*

[2] The 1st Applicant was charged with the offence of gross negligence and on 4th April 2017 attended a disciplinary hearing wherein she was to answer to the charge she faced. She was found guilty on the said charge and subsequently dismissed by the Respondent on 5th May 2017. She appealed against the decision and while the appeal chairperson found that the verdict of guilty was to stand, he overturned the sanction of dismissal and replaced same with one of a final written warning for 12 months.

[3] It is common cause that the Respondent was unhappy with the appeal chairman's decision and advised the 1st Applicant, in writing on 11th September 2017, that *"both the findings and recommendations are not acceptable and as a result the initial finding of dismissal must stand and we hereby communicate that it does so stand….In the circumstances the employer imposes its own decision, having had due regard to your grounds of appeal and the record thereof as follows. The appeal is dismissed and the decision to terminate your services is upheld."*

[4] 1st Applicant then approached this Court on a certificate of urgency to interdict the decision of the Respondent from being implemented and to have the letter of dismissal set aside. It appears that the 1st Applicant's case was that the Respondent had breached a term of the Disciplinary Code – namely clause

2.5.4.1.5. (see **Industrial Court of Appeal Case No.17/2017 Nedbank Swaziland Ltd v Sylvia Williamson and SUFIAW** at page 5 paragraph 10). The Court upheld the application and effect of the letter of termination was stayed. The Respondent then approached the Industrial Court Appeal (the **ICA**) which upheld the appeal, the effect of which was that the 1st Applicant remained dismissed from the employ of the Respondent.

[5] The 1st Applicant now approaches the court seeking the orders set out above. The application is opposed and the Respondent raises two points of law –

5.1 ***Res Judicata*** – The Respondent submits that the substantive issue placed before the Court is whether or not it violated the provisions of clause 2.5.4.1.5; that the **ICA** definitively and finally found that clause 2.5.4.1.5 does not find applicability in the 1st Applicant's circumstances and that the Respondent's conduct did not in the circumstances amount to a breach of its contractual obligations. It was submitted that with the **ICA** having made findings regarding the applicability of the contentious clause and its alleged breach, it was not open to the 1st Applicant to bring to this Court the very same point which has been determined by the **ICA**.

5.2 ***Jurisdiction*** – The Respondent's submission in this regard is that, despite having complied with the dispute reporting procedures under **Part VIII** of the **Industrial Relations Act 2000 as amended**, the 1st Applicant has brought an

application to set aside her dismissal alternatively to award compensation, without actually applying for the determination of an unfair dismissal. It was submitted that the Court lacked jurisdiction to determine the matter in the manner sought by the 1st Applicant because the Court may only order reinstatement or compensation where it has made a finding that an applicant was unfairly dismissed.

[6] The 1st Applicant argued that the matter before Court came in terms of Rule 14 of the **Rules of the Industrial Court 2007** because there were no foreseeable disputes of fact and the crisp issue of law to be decided is clear – compliance with clause 2.5.4.1.5 of the Disciplinary Code. It was also submitted that it is clear what should happen if the Court finds that the letter of dismissal was unlawful – 1st Applicant should be reinstated or compensated. The matter for determination was said to be different and new and not *res judicata*. It was denied that the Court of Appeal made a definitive and final finding regarding clause 2.5.4.1.5.

[7] On the issue of jurisdiction 1st Applicant submitted that the matter was new and the Court was at liberty to make pronouncement on it; that the 1st Respondent had complied with **Part VIII** of the **Industrial Relations Act** as directed by the

Court of Appeal judgement and the matter was therefore properly before the Court.

[8] With regard to the point of *res judicata*, we have not had the benefit of the pleadings in the 1st Applicant's initial application to Court under Case No. 311/2017. We have, however found part of the current pleadings and the ICA judgement helpful in understanding the nature of the 1st Applicant's initial application.

[9] With regard to the matter before Court, the Respondent makes the following averment in paragraph 5 of its Answering Affidavit –

> *"The **substantive issue** that the Applicant places before Court for determination is for the Court to decide whether the Respondent violated clause 2.5.4.1.5. of the disciplinary code."*

To this averment the 1st Applicant replied *"the contents of this paragraph are not denied."*

In other words, the 1st Applicant admits that the important issue for determination before Court is whether clause 2.5.4.1.5 was violated by the Respondent.

[10] The point of departure between the parties is that 1st Applicant insists that the matter before the **ICA** dealt with the jurisdiction of the Industrial Court to review the Respondent's act of terminating the services of the 1st Applicant and did not deal with the interpretation of clause 2.5.4.1.5 of the disciplinary code in the manner that this Court is being asked to. It is submitted that the **ICA** had not been called upon to determine the interpretation of the said clause. We were told, in the 1st Applicant's heads of arguments, that neither the Industrial Court nor the **ICA** had been requested to direct the Respondent to comply with the provisions of clause 2.5.4.1.5 by either reinstating the 1st Applicant or compensating her in the sum of E 2 611 920.00.

[11] The Respondent's position is that despite the different framing of the Applicants' current application the 1st Applicant primarily seeks the same order she sought under Case No. 311/2017 which was finalised on Appeal under Case No. 17/2017; that, what the Applicant sought in Case No.311/2017 was a finding that the Respondent had breached clause 2.5.4.1.5 of the disciplinary code and that therefore she was entitled to reinstatement i.e. that the setting aside of the dismissal letter; that the **ICA** has dealt with that issue and that this Court can not again deal with it.

[12] It is trite that "*the essentials of the **exceptio re judicata** are three fold, namely that the previous judgement was given in an action or application by a competent court (1) between the same parties; (2) based on the same cause of action; (3) with respect to the same subject matter.*" Per Friedman JP in **Bafokeng Tribe v Impala Platinum Ltd and Others 1999 (3) SA 517 (BH)**. (See also **Custom Credit Corporation (Pty) Ltd v Shembe 1972(3) SA 462(A)**.)

[13] It is common cause that the current matter is between the same parties as was the matter before the **ICA**. It is whether the current application is based on the same cause of action and with respect to the same subject matter. To succeed with the current application the 1st Applicant must prove –

13.1 Firstly, that the Appeal Chairperson made a decision that categorised her dismissal as an unfair dismissal;

13.2 Secondly, that clause 2.5.4.1.5 of the disciplinary code was applicable to the 1st Applicant;

13.3 Thirdly, that the Respondent has reviewed the Appeal Chairman's decision and has thus deviated from the code and acted unlawfully.

[14] A perusal of the judgement of the **ICA** in respect of the earlier matter between the parties indicates that all three of the above elements were dealt with by the ICA. With regard to the first point above the ICA states at **page 12**, **paragraph**

27 : “*It was contended by Mr. Simelane…on behalf of the Respondents (*The 1st Applicant herein*) that the outcome of the appeal was that, apart from the dismissal outcome being overturned the determination of the appeal was that the 1st Respondent be handed a final written warning. I have not seen any reference to that recommended sanction despite close scrutiny of the text of the decision of the appeal tribunal. That is probably because the text of that decision appears to be incomplete.”*

[15] At paragraph 28 the Court says, “*Assuming however that it was indeed issued, it is unclear to me how that can be equated to the prescribed outcome in the code for either reinstatement or compensation as mutually agreed upon by the parties. Certainly, this is not what the appeal tribunal in this instance has recommended in the alleged deference to clause 2.5.4.1.5.”*

The Court goes on to address the third point above by saying, at paragraph 28, thus, “*It escapes me how it can be argued that the Appellant (*the current Respondent*) has breached the code by not abiding the appeal decision when that decision itself has not conformed or meted out the stipulated sanction in the form or manner prescribed”.*

[16] In the preceding pages the ICA had dealt with the second point by saying that clause 2.5.4.1.5 of the code read with the rest of the entire clause 2.5.4 “*is directed at prescribing an appropriate outcome upon a finding of unfair*

*dismissal where an employee '**has failed to appear before the enquiry**.' That is clear from the clause and the associated surrounding provisions."* (see **paragraph 23** of the Judgement).

[17] The ICA sums up the position thus at page 13 of its judgement – *"In sum, the facts and circumstances of the matter do not bear out the construed effect of the code nor do they support the contention advanced by the respondents* (the Applicants in the current matter).*It is for that reason that I find the assumption by the Court a quo that the Appellant acted in breach of the provisions of clause 2.4.5.1.5 of the code **insupportable*** (my emphasis). *Consequently I am not satisfied that the Appellants conduct in rejecting the appeal tribunal findings and verdict constitute a breach of contractual obligations or a decision to disregard or contravene the clause. I have already said that I am not satisfied in any case as to the applicability of the clause to the facts, in the first place…."*

[18] The judgement of the **ICA** leaves no doubt in our minds that the present case is a repeat of the litigation finalised by the **ICA** under **Case No 17/2017**. The manner in which the prayers are framed currently is different from the manner in which they were framed in **Case 311/2017** however the effect sought thereof is the same i.e. the setting aside of the 1st Applicant's dismissal and her reinstatement to her previous position at Respondent failing which

compensation. The **ICA** has pronounced on the matter and it is not proper that this court reopens the matter once again. It is our finding that the matter is *res judicata*.

[19] For the sake of completeness it is necessary to comment on the Applicants' submission that the **ICA** had not been called upon to decide on the issue of the contentious clause since that was not part of the Respondent's grounds of appeal. While it is correct that the grounds of appeal from the decision of this court did not include an interpretation of clause 2.4.5.1.5 of the code, it seems, in our view it was necessary for the court to delve into the clause in order to ascertain the true nature of the 1st Applicant's application. In essence the 1st Applicant had asked this court to declare the letter of dismissal unlawful, irregular, null and void and thus of no force and effect and to set it aside on that basis. It was necessary for the court to explore the basis of the application identified by the 1st Applicant as a breach of the contentious clause of the disciplinary code. There was nothing untoward about the **ICA** doing so.

[20] Having found that the matter is *res judicata* it is not necessary to decide on the issue of jurisdiction. We do however wish to comment that our courts have, on numerous occasions pointed out that "*once an employer has exercised its prerogative to terminate the services of an employee the contract of*

employment comes to an end. The Industrial Court has the power and jurisdiction thereafter to award compensation for unfair dismissal or to restore the employment contract by making an order for reinstatement or re-engagement. The court must however take into consideration all the circumstances of the dismissal ***<u>and may not simply set aside the dismissal on the basis of a review of the disciplinary hearing</u>****.*" (per Dunseith J.P. in **Gcina Dlamini v Nercha and Another (633/08)[2009] SZIC8).** The Court went on to say that an employee who seeks redress for his/her dismissal is expected to go through the process set out in **Part VIII** of the **Industrial Relations Act and** that if the matter ends up before the court, it does so normally by way of action proceedings so that all the circumstances of the dismissal – including any alleged procedural irregularities – may be fully explored by way of oral evidence at the trial.

(See also **The Central Bank of Swaziland V Memory Matiwane ICA Case No. 11/1993**).

[21] In conclusion, it is our view that with the **ICA** having already given a final judgement between the parties on the same subject matter the present case is *res judicata.*

We have considered the issue of punitive costs and while we consider that this repeat litigation was unwarranted, we do not consider that it constitutes an

abuse of court process. Although the Respondent might feel harassed it was not called upon to go into extra ordinary defensive action to warrant an order of costs.

In the result the following order shall issue:

1. **The Respondent's point of law succeeds;**
2. **The application is therefore dismissed;**
3. **We make no order as to costs.**

The members agree.

S. NSIBANDE

PRESIDENT OF THE INDUSTRIAL COURT

For the Applicants: Mr M. Ndlangamandla

For the Respondent: Mr M. Sibandze