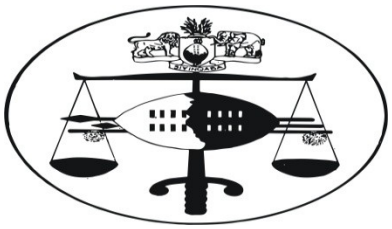

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

CASE NO.324/2012

In the matter between:-

THEMBA PHINEAS DLAMINI
APPLICANT

And

TEACHING SERVICE COMMISSION **1ST RESPONDENT**
THE ATTORNEY GENERAL **2ND RESPONDENT**

Neutral citation: **Themba Phineas Dlamini V Teaching service Commission** (324/2012) [2013] SZIC 21 (9th July 2013)

CORAM: **D. MAZIBUKO**

(Sitting with A. Nkambule & M.T.E. Mtetwa)
(Members of the Court)

Heard: 13th March 2013

Delivered: 9th July 2013

Summary: *Applicant a teacher, was found guilty of immoral conduct by a disciplinary tribunal, sentenced to forced retirement. Applicant appealed against the verdict and sanction. Employer failed to convene appeal hearing. Applicant filed review of the verdict and sanction before Court. Court orders employer to hear the internal appeal. Review proceedings stayed pending finalization of the appeal.*

Appeal against adverse decision of the disciplinary tribunal. Right of appeal affirmed and emphasized by Court. Unjustified denial or undue delay of an appeal hearing may result in a denial of justice.

1. Applicant is Themba Phineas Dlamini. The application before Court is for a review of the decision of the 1st Respondent. The Applicant has prayed for an order as follows:

"

1. *"Reviewing and/or setting aside the decision of the 1st respondent finding the applicant guilty and the subsequent placing of the applicant on forced retirement by the 1st respondent dated the 28th April 2011,*
2. *Granting applicant costs of suit;*
3. *Granting applicant further and/or alternative relief".*

2. The 1st Respondent is the Teaching Service Commission, a statutory body established under The Teaching Service Act No1/1982. The 1st Respondent has power and a duty inter alia:

2.1 To appoint persons to hold office in the teaching service , or to act in such office.

2.2 To make appointments on promotion and to confirm such appointments in the teaching service.

2.3 To exercise disciplinary control over persons holding or acting in the teaching service.

2.4 To remove from office persons so appointed.

2.5 To pay the wages of all persons employed in the teaching service as and when they fall due.

2.6 To compile and publish a code of conduct binding on all persons in the teaching profession.

2.7 At any time as and when circumstances require, to transfer a teacher from one school to another.

2.8 To improve and promote the conditions of service of teachers in Swaziland.

Additional functions of the Teaching Service Commission are listed in regulation (3)1 of The Teaching Service Regulations 1983.

3. A reading of the Teaching Service Act indicates that the 1st Respondent is an agency of the Ministry of Education. The function of the 1st Respondent is largely to govern and regulate the operation of the Primary, Secondary and High Schools in Swaziland, which are funded or aided by the Swaziland Government, and further, to manage and exercise disciplinary control over the teachers who work in those schools.

4. The 2nd Respondent is the Attorney General who is cited in his official capacity as the legal representative of the Swaziland Government. The application before Court is opposed. The Respondents' answering affidavit is deposed to by the Executive Secretary of the 1st Respondent Mr Mduduzi Elliot Nkambule.

5. The Applicant was employed by the 1st Respondent as a teacher in 1978. In 1988 he was promoted to head teacher. Between the period 1992 and 2011 (inclusive) the Applicant worked as headmaster at Evelyn Baring High School, which was his last position with the 1st Respondent.

6. In November 2009 the 1st Respondent instituted disciplinary proceedings against the Applicant for misconduct which allegedly took place involving a pupil at Evelyn Baring High School. The Applicant attended the disciplinary hearing which began on the 10th November 2009 continued intermittently up to the 21st April 2011. The Applicant faced five (5) disciplinary charges.

In the first four (4) counts the Applicant was charged with immoral conduct. In the 5th (fifth) count the Applicant was charged with unprofessional behavior. The Applicant was legally represented in the hearing. The 1st Respondent has a standing disciplinary tribunal whose task is to conduct disciplinary hearings against the teachers. The Applicant appeared before the said tribunal and the hearing proceeded.

7. The Applicant was found guilty of immoral conduct on count (4) four only. He was sentenced to forced retirement. The letter containing the verdict and sanction is dated 28th April 2011 and is marked annexure TPD1. Annexure TPD 1 reads as follows:

KINGDOM OF SWAZILAND
TEACHING SERVICE COMMISSION

P.O. BOX 976
MBABANE

28th April 2011

TSC 15885

Themba Phineas Dlamini
C/O Mabila Attorneys
Mbabane

Dear Sir

RE: DECISION OF THE TEACHING SERVICE COMMISSION

Following your appearance before the Commission on several occasions, wherein evidence was led against you and given an

opportunity to present your side of the story, as well as cross examining the witnesses through your legal representative. I am directed by the Teaching Service Commission to inform you that:

1. *After considering your personal circumstances, it was decided to evoke Section II of the Public Service Order of 1993, which is "Forced Retirement" with effect from 21st April 2011.*

2. *You have a right to take the matter for review in the High Court if you so wish.*

3. *Should you be occupying any Government/School or Community House, you are ordered to vacate within seven (7) days from date of receipt of this correspondence at your own cost.*

Yours faithfully

M.E. NKAMBULE
EXECUTIVE SECRETARY

cc: US Schools Manager
REO- Shiselweni
Head Teacher – Evelyn Baring [High school]

8. In September 2011 the Applicant appealed against the decision of the 1st Respondent which placed him on forced retirement. The appeal was addressed to the 1st Respondent by letter dated 13th September 2011, which is marked annexure TPD 2. The 1st Respondent acknowledged receipt of the letter of appeal (annexure TPD 2) and promised to consult on the matter. According to the Applicant the 1st Respondent failed to hear the appeal. The 1st Respondent has conceded this accusation.

9. The reason given by the 1st Respondent for failing to hear the appeal was that the Teaching Service Act and the Regulations do not provide for the establishment of the appeals tribunal. As a result the 1st Respondent has failed to convene the appeals tribunal, since it has no power to do so.

10. Thereafter the Applicant challenged both the dismissal and the sanction by way of review before this Court. The Applicant's grounds of review can be summarized as follows;

10.1 The Respondent committed gross irregularity in finding the Applicant guilty of the charge despite overwhelming evidence that he is innocent.

10.2 The 1st Respondent does not have power in law to pass a sentence placing him on forced retirement. Such power is vested in the board of directors for the Public Services Pension Fund and the Minister of Public Service in terms of the Public Pensions Service Order of 1993.

10.3 The 1st Respondent committed gross irregularity in allowing some of the members of the disciplinary committee who were absent on certain days during the disciplinary hearing, to take part in the decision which is contained in annexure TPD 1. In particular, two (2) members of the disciplinary committee namely Mrs Stella Lukhele and Mr Solomon Nxumalo were

absent on certain days of the sitting of the committee yet were present when the decision was made and consented to it.

10.4 An officer from the Ministry of Education and Training a certain Mr Knowledge Ngwenya was always found in the company of the members of the disciplinary committee. Mr Ngwenya investigated the allegations which were circulating concerning the Applicant. That investigation culminated in the disciplinary charges which the Applicant faced at the hearing. Mr Ngwenya was seen consulting with the members of the disciplinary committee. This consultation took place in the absence of the Applicant and his legal representative, and they were not informed what was discussed at that consultation. The Applicant concluded that, that discussion was about his case which the committee was seized with.

10.5 The Applicant was denied a chance to go to Evelyn Baring High School in order to access school records, yet he believed that certain school records could assist him in his defence. The item in question was a T-shirt which was part of the school uniform. The issue was whether the pupil in question had paid for her T-shirt or that she had received it as a gift from the Applicant.

10.6 The Applicant further complained that the T-shirt and a cellular telephone which were mentioned at the hearing as gifts which the pupil had received from the Applicant, were never presented as evidence.

11. The absence of a forum to hear appeals against the decision of the disciplinary tribunal, unfairly discriminates against teachers who are subject to disciplinary action at the hands of the 1st Respondent. The absence of the appeal tribunal effectively denies an aggrieved teacher the right to an appeal. Under normal circumstances, an employee who has been disciplined by his employer is allowed an opportunity to be heard on appeal.

12. The Applicant did lodge an appeal against the verdict of the disciplinary tribunal as well as the sanction. The appeal is dated 13th September 2011 (annexure TPD 2). By letter dated 20th September 2011 (annexure TPD 3), the 1st Respondent acknowledged receipt of the notice and grounds of appeal. The 1st Respondent promised to consult on the matter and revert to the Applicant in due course. The 1st Respondent failed to arrange an appeal hearing and further failed to revert to the Applicant, despite the promise.

13. According to the Respondents the absence of an appeal hearing could be remedied if the Applicant were to refer the matter to CMAC for conciliation and failing conciliation–to arbitration.

By CMAC is meant the Conciliation, Mediation and Arbitration Commission established under section 62 (1) as read with 64 (1) of the Industrial Relations Act No. 1/2000 as amended. The Respondents' argument is that at conciliation the Applicant would be given a chance to challenge the conviction and/or the sanction which was handed down at the conclusion of the disciplinary hearing. In the event that the parties fail to resolve their dispute through conciliation, the matter can be referred to arbitration. The Applicant will be given another chance to prove his innocence before the arbitrator as the trial will commence de novo. Any irregularity which the Applicant has identified in the hearing before the disciplinary tribunal should be dealt with by the arbitrator whose decision is determinative of the matter.

14. With respect, the Respondents' argument is fallacious. At conciliation stage CMAC has no power to make a legally binding decision. The duty of CMAC is to advise and persuade the parties to come to an agreement. However, CMAC cannot compel the parties to achieve that goal. In the event that the parties fail to resolve their dispute through conciliation, CMAC is enjoined by section 81 (6) as read with 85 (1) of the Industrial Relations Act to issue a certificate of unresolved dispute. It is clear therefore that CMAC does not have the same power and authority, as an appeal tribunal would have, in dealing with the Applicant's matter. The 1st Respondent's failure to convene an appeal hearing cannot be remedied by the referral of the matter to CMAC.

15. The Commissioner's power to arbitrate a dispute is provided for in section 64 (1) (b) and (c) of the Industrial Relations Act. The relevant portion of section 64 provides as follows:

" 64 (1) The Commission shall -

a)…

b) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act;

c) where a dispute referred to it remains unresolved after conciliation, arbitrate the dispute if -

(i) this Act requires arbitration ;

(ii) this Act permits arbitration and both parties to the dispute have requested that the dispute be resolved through arbitration; or

(iii) the parties to a dispute in respect of which the Industrial Court has jurisdiction consent to arbitration under the auspices of the Commission;…"

16. The dispute between the parties herein is not one that is subject to compulsory arbitration. Instead, it is a dispute in respect of which the Industrial Court has jurisdiction, provided a certificate of unresolved dispute has been issued. In that case, the dispute can only be referred to arbitration by the consent of both parties. In the event that the 1st Respondent does not consent to arbitration, the Applicant would be deprived of a chance to prove his innocence (before the arbitrator),

and/or expose the irregularities which the Applicant claims occurred during the disciplinary hearing and further argue for a favourable decision. The Applicant is not guaranteed a hearing before the arbitrator. The provisions of the Industrial Relations Act do not therefore remedy the failure by the 1st Respondent to convene an appeal hearing. The 1st Respondent's argument on this point accordingly fails.

17. The general rule which had been endorsed by both the Courts and legal writers is that an employee who has been disciplined or dismissed from work is entitled to challenge on appeal, both the decision to dismiss him and the procedure that was followed. An opportunity to be heard on appeal is therefore a matter of right for a disciplined or dismissed employee and not a favour which the employer may grant or withhold at his discretion.

17.1 In the matter of JOSEPH SANGWENI VS SWAZILAND BREWERIES LTD SZIC CASE NO. 52/2003 (unreported), the employee appealed against the decision to dismiss him. The employer convened an appeal hearing, but failed to invite the employee to the hearing. The appeal was dismissed due to the employee's absence. The Court found the termination of the Appellant's employment to be procedurally unfair for this and other reasons. The Court restated the principle regarding the necessity of an appeal as follows;

" A fair disciplinary process includes the right to appeal to a higher level of management".
(at page 18 and paragraph 48).

See also RYCROFT AND JORDAN: A GUIDE TO SOUTH AFRICAN LABOUR LAW; 2ND EDITION,1994, (Juta and co) ISBN 0 7021 2806 at page 208.

17.2 The honorable jurist Mr Edwin Cameron commented as follows (in his article) on the requirements of a fair hearing before dismissing an employee;

"(10) The employee should be able to appeal.
…A right to an appeal is an important safeguard, giving the affected employee a chance of persuading the second tier of authority that the adverse decision was wrong or that it should otherwise be considered . In the end the final decision will have been the subject of more careful scrutiny, prolonged debate and sober reflection."

EDWIN CAMERON: THE RIGHT TO A HEARING BEFORE DISMISSAL PART 1 (1986) 7 ILJ 183 at page 214.

17.3 In the matter of MAHLANGU V CIM DELTAK
GALLANT V CIM DELTAK (1986) 7 ILJ 346 (IC) at page 357.

The Court made the following helpful remark on the subject;

"The other important ingredient of a fair disciplinary hearing would include: … the right of appeal, i.e usually to a higher level of management …." at page 357 paragraph 24.10.

17.4 The learned authors Messrs Van Jaarsveld and Van Eck, made the following instructive observation on the matter;

"The granting of an appeal may assist in convincing the court that the dismissal took place in a fair manner. It may also assist the appeal committee in reconsidering alleged substantive or procedural defects and in making an appropriate decision."

VAN JAARSVELD AND VAN ECK; PRINCIPLES OF LABOUR LAW, 2nd edition, 2002 (Butterworths), ISBN 0 409 06012 7 at page 204.

17.5 The learned authors Messrs Brassey et al, added their valuable discussion on the matter as follows;

"The purpose of an appeal hearing is basically the same as that of the disciplinary hearing, viz to determine whether the employee is guilty of the alleged misconduct or whether he is incompetent as alleged, and to decide upon the appropriate penalty or sanction."

BRASSEY, CAMERON , CHEADLE AND OLIVIER: THE NEW LABOUR LAW, (Juta and co), 1987 ISBN 0 7021 1828 1 at page 419.

18. With the aforementioned authorities, which the Court is in agreement with, a case has been made that an appeal is a necessary process in examining the substantive and procedural fairness of the employer's decision to terminate the services of the employee.

19. As aforementioned, this is a general rule. The Court may in the exercise of its discretion, taking into account issues of fairness and practicality allow an exception in certain cases. A case in point would be that of a one man business. However Mr Edwin Cameron cautioned as follows when dealing with an exception;

> "*(10) The employee should be able to appeal.*
> *This requirement will obviously not be held to apply to a one man business but it is submitted that fair procedure requires that wherever practicable an employee should have the right to appeal against the disciplinary enquiry finding or penalty to a 'higher level of management'*".
>
> *EDWIN CAMERON ibid at page 214.*

20. The Applicant lodged an appeal following the 1st Respondent's decision taken at the disciplinary hearing. The Applicant has a right to be heard on that appeal.

The 1st Respondent's failure to convene an appeal hearing was partly due to a misunderstanding of the legal position regarding the CMAC procedures. Since the appeal was not withdrawn, and further it was not heard and determined by the employer (1st Respondent) that means it is pending to date.

21. The Respondents have argued further that the 1st Respondent is a creature of statute, its powers are derived from The Teaching Service Act and the Regulations made thereunder. The Respondents have also argued that the Act does not enable the 1st Respondent to establish an appeals tribunal to deal with matters that emanate from the disciplinary tribunal. It is the Court's finding that this argument is erroneous as will be shown below.

21.1 The Teaching Service Act authorizes and empowers the 1st Respondent to exercise disciplinary control over its employees (the teachers) including power to dismiss where necessary, as stated in paragraphs 2–2.8 above.

21.2 The Teaching Service Act provides as follows in section 14 (1), (2) and (3) regarding the disciplinary powers of the 1st Respondent;

"Powers and functions of the Commission.

14.1 Subject to this Act and any other law, the Commission shall have the power to appoint persons to hold office in the teaching service or to act in such office (including the power to make appointments on promotion and to confirm appointments), <u>to exercise disciplinary control over persons holding or acting in such office and to remove from office persons so appointed.</u>

14.2 The Commission may, in writing or by Notice in the Gazette, delegate subject to any such conditions as it may think fit, any of its functions under this Act to any of its members [,] any member of the service or to any public officer either generally or in any particular case or class or cases:….

14.3 The Commission may, in the performance of any of its functions appoint any person or body of persons to assist it in the discharge of such function and any such person or body of persons shall, for that purpose, have the powers and privileges set out in sections 15 and 19."

(underlining added)

21.3 The power given the 1st Respondent is section 14(1) namely; to exercise disciplinary control over its employees, includes the power to institute a disciplinary hearing, concerning an offending employee.

It further includes the power to convene an appeal tribunal to hear an employee who is dissatisfied with the decision of the disciplinary tribunal and/ or the 1st Respondent.

21.4 The power given in section 14(2) authorizes the 1st Respondent to delegate to a fit and proper person or persons its power and duty to take disciplinary action against an offending employee. The 1st Respondent is accordingly authorized by the same provision to delegate its power and duty to sit as an appeal tribunal. Since the 1st Respondent has been given power by the Act to convene a disciplinary hearing concerning its employee , it follows by necessary deduction that it also has the power to convene an appeal hearing concerning the same employee.

21.5 In terms of section 14(3) the 1st Respondent is authorized to obtain or solicit advice and/or assistance from a competent person or persons which will facilitate the performance of its obligations in terms of the Act. The 1st Respondent can therefore obtain the services of an attorney, industrial relations practitioner or any other competent person (if necessary), to handle the appeal hearing concerning the Applicant.

21.6 The 1st Respondent has wide powers to conduct a fair disciplinary hearing concerning an offending teacher including power to conduct a fair appeal hearing. The 1st Respondent's failure to hear the Applicant's appeal has no legal justification.

21.7 Both the Counsel for the Applicant and Counsel for the Respondents have stated before Court that they are not aware of a Court judgment which defined the powers of the 1st Respondent to hear an appeal from a disciplined or dismissed teacher. The Court will give the 1st Respondent the benefit of doubt and give her an opportunity to discharge its obligations in terms of the appeal which was lodged by the Applicant. A similar approach was taken by the Labour Commissioner in the matter of ;

NKOSINATHI NDZIMANDZE 1ST Applicant

VUSI SHABANGU 2ND Applicant

And

UBOMBO SUGAR LIMITED Respondent

SZIC 476/2005 (unreported) at paragraph 57.

In this matter, the employees were informed at the time of dismissal, of their right to appeal to the next level of management. The employees did not appeal but reported a dispute for conciliation to the Labour Commissioner.

The Labour Commissioner postponed conciliation of the dispute for the express purpose of giving the employees a chance to exhaust their remedy of internal appeal. In the Court's view the Labour Commissioner's decision was correct.

22. The failure or delay on the 1st Respondent in convening the appeal hearing no doubt has frustrated the Applicant in his plan to challenge the decision of the disciplinary tribunal. The Applicant complained inter alia, that the verdict was not supported by the evidence. Rather the evidence fell short of what was required to sustain a conviction. In the Applicant's opinion the disciplinary tribunal came to the wrong conclusion on the facts. The Applicant does not therefore agree with the results of the disciplinary tribunal. The Court views this particular point as a matter which should be dealt with on appeal before the appeal tribunal as opposed to a review before the Court.

23. The Applicant should be given a chance therefore to argue this point on appeal. However the Court cannot sit as an appeal tribunal. The Court is not seized with jurisdiction to decide on a matter which should be decided by the appeal tribunal. The Applicant will be prejudiced in his quest for justice and fairness in the disciplinary process, if he is denied an opportunity to argue the appealable aspects of the disciplinary hearing. When the internal appeal is finalized and the Applicant still feels aggrieved, he can approach the Court to deal with the aspect of his case that is subject to a review. However, when the review is finalized before Court and the judgment has been handed down, the Applicant cannot go back to argue the appealable aspect of his matter before the appeals tribunal.

24. An internal appeal gives the Applicant a second chance to prove his innocence and/or expose irregularities that exist in the disciplinary hearing. If the internal appeal is successful,

the adverse decision will be reversed and that will bring the matter to an end, there would be no need for the Applicant to argue the review. However if the conviction is upheld on appeal, the Applicant still has another chance to make submission in mitigation of the sanction. If the mitigation is successful, the Applicant will get a lesser sanction than a dismissal. An internal appeal is therefore a speedy, less formal and cheaper procedure available to the Applicant to obtain relief than a review before Court. A denial of an appeal is therefore a denial of justice for the Applicant.

25. An appeal and a review are legal processes that differ in a material respect. A review challenges the proceedings and not the merits of the decision. Therefore , a party who is dissatisfied with the decision of the tribunal or court a quo, ought to approach the Court by way of appeal. The authors Herbstein and Van Winsen have aptly stated the point as follows;

> *"At common law, appeal and review are ' distinct and dissimilar remedies'".*

HERBSTEIN AND VAN WINSEN: THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA , volume 2 (Juta & Co), 5th edition, 2009, ISBN 978 0 7021 7933 4 at page 1275,paragraph (g).

The Court is also in agreement with the statement of law as laid down by the Industrial Court in the case of JOHN KUNENE AND THE TEACHING SERVICE COMMISSION AND 2 OTHERS; SZIC CASE NO. 317/2007 at page 5 paragraph 16, as follows;

> *" … it is always the proceedings of a statutory tribunal that are subject to review, not the merits of its decision :*
> *ELLIS V MORGAN; ELLIS V DESAI 1909 T.S. 576"*

26. With the exception of matters that overlap the appeal and review requirements, a litigant who approaches the Court by way of review and proceeds with his argument cannot be allowed to suddenly change course and use the same forum to argue points that are reserved for an appeal hearing. An amendment of pleadings would have to take place to facilitate such a change. It is therefore in the interest of justice that the Applicant be given an opportunity to exercise his right to argue the appealable aspects of his case before the appeal tribunal. The Court will accordingly defer its decision on the review matter in order to give the parties a chance to exhaust the internal remedy of an appeal.

27.Wherefore the Court orders as follows:

27.1 The review matter before Court is hereby stayed pending finalization of the Applicant's internal appeal.

27.2 The 1st Respondent is directed to convene an appeal tribunal to hear the Applicant's appeal. The appeal tribunal and/ or the 1st Respondent must hand down its decision and file a copy with the Registrar of the Court not later than the 27th September 2013.

27.3 In the event that the appeal tribunal and/or any of the parties before Court require more time to carry out any exercise in relation to the appeal, an application for extension of time should be applied for on notice of motion accompanied by an affidavit.

27.4 The matter is postponed to the 2nd October 2013 for further consideration.

Members agree

_____

D. MAZIBUKO
INDUSTRIAL COURT-JUDGE

Applicant's Attorney: Mr S. Madzinane
Madzinane Attorneys

Respondent's Attorney: Mr T. Vilakati
Attorney General's Chambers