IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Held at Mbabane | Case No.**072/2016**

In the matter between:

DUMSILE R. SHONGWE APPLICANT

And

SWAZILAND NATIONAL PROVIDENT FUND RESPONDENT

NEUTRAL CITATION: **DUMSILE R. SHONGWE v SWAZILAND NATIONAL PROVIDENT FUND (072/2016) [2016] SZIC 32 (25 JULY 2016**

CORAM: **SIBANDZE J, (ACTING JUDGE)**
(SITTING WITH D. NHLENGETHWA & S.P. MAMBA NOMINATED MEMBERS OF THE COURT)

HEARD SUBMISSIONS: **21ST JULY 2016**

DELIVERED JUDGMENT: **25TH JULY 2016**

Summary:

Labour Law, Industrial Court has no jurisdictional authority to review an employer's decision to terminate an employee's services. Industrial Court is bound by the decisions of the High Court sitting as a constitutional court, on a point of law referred to it by the Industrial Court.

JUDGMENT

1. The Applicant**, Dumsile R. Shongwe** was employed by the Respondent, the **Swaziland National Provident Fund** in 2007 and rose to the position of Human Resources Manager in August 2014, which position she occupied until 29th October 2015 when her services were terminated by the Respondent after a disciplinary hearing.

2. The Applicant had been charged with misconduct relating to alleged breach of trust and confidentiality, in that, it was alleged, she had unlawfully sourced confidential information relating to business transactions between the Respondent and some of its suppliers with the intention of disclosing this information to third parties, to the detriment

of the Respondent and thus bringing the name of the employer into disrepute.

3. The employer appointed one Mr. Muzikayise Motsa to chair the Applicant's disciplinary hearing and on the 28th October 2015, Mr. Motsa gave a lengthy and detailed determination of the matter, finding the Applicant not guilty.

4. On the 29th October 2015, the Applicant, according to her version without ceremony, was presented with a letter of dismissal signed by one Mr. Miccah Nkabinde on behalf of the Respondent. To the extent that there is a dispute on what transpired between the Applicant and Respondent after the decision of Mr. Motsa and before the letter of termination, it will become clear further in this judgment that this is not relevant. For the sake of completeness however, according to the Respondent, Applicant was invited to work on the 29th October 2015 and informed of the employer's decision and also handed the letter of termination.

5. The Respondent's counsel in his heads of argument made further allegations in this regard stating that, the Applicant at the meeting with Mr. Gina, was given an opportunity to make representations but failed to do so, prior to the letter of dismissal being handed to her.

6. Quite apart from the fact that evidence cannot be

introduced in this manner, the court must only wonder what purpose these consultations would have served when the Applicant's letter of termination had already been prepared.

7. The Applicant filed an appeal within the five (5) day period allowed by the Respondent's internal disciplinary code, which it is common cause, is binding on all the parties and forms part of the Applicant's terms and conditions of service.

8. The Applicant and Respondent however, then entered into what turned out to be lengthy negotiations which were seeking to settle the matter between the parties.

9. These negotiations were not concluded successfully and from what can be gleaned from the papers, although there is some dispute on the exact date, sometime in February 2015, the negotiations deadlocked.

10. On the 31st March 2016, the Applicant launched the present proceedings, seeking the following prayers:

    10.1 Reviewing and/or correcting and/or setting aside the Respondent's decision of terminating the Applicant's employment summarily made on the 29th October 2015;

    10.2 Directing and/or ordering the Respondent to reinstate

the Applicant to her employment work position of Human Resources Manager forthwith;

Alternatively

10.3 Directing and/or ordering the Respondent to accept the Applicant into service on a date to be fixed by the Honourable Court on the basis that the Respondent has failed to convene an appeal hearing within the time stipulated in its own disciplinary code.

10.4 Directing the Respondent to pay the Applicant arrear salaries calculated from the date of lodging her appeal to date of finalization of the appeal proceedings;

10.5 Costs of this application at the punitive scale of Attorney and own client costs;

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

11. The Respondent filed its answering affidavit and raised, in addition to dealing with the merits, four (4) points in limine, in substance the following:-

11.1 The Industrial Court has no jurisdiction or power to review a decision of an employer who has terminated

the services of an employee and cannot set aside an employer's decision to terminate an employee's services without there having been adherence to part VIII of the Industrial Relations Act. The court does not sit as a court review but considers all relevant facts giving rise to the dismissal and makes its own conclusion as to the fairness of the dismissal.

11.2 The application is fraught with numerous foreseeable and material dispute of facts and the Applicant ought not to have proceeded by way of application proceedings;

11.3 The Industrial Court cannot grant reinstatement except where it has first heard the matter and conducted an enquiry as envisaged Section 16 of the Act;

11.4 The absence of the record renders the review proceedings defective, and the application ought to be dismissed on that basis.

12. The matter could not be heard timeously since their Lordships my brothers Nkonyane J and Mazibuko J recused themselves from the matter, prompting the Applicant to launch an intervening application, seeking the interdiction of any efforts by the Respondent to employ a person in the position of Human Resources Manager, pending the

finalisation of this matter.

13. It was agreed by counsel for both parties that it would not be necessary to deal with the intervening application as the Respondent had undertaken to stay the process of recruiting a Human resources Manager, pending the outcome of this matter.

14. In respect of procedure it was agreed that the matter will be argued in its entirety, which is to say both the points of law and the merits.

15. In Applicant's opposition of the Respondent's first point in limine, the Applicant's counsel cited an number of judgments of this court and the Industrial Court of Appeal, in particular the case of **Mathembi Dlamini v Swaziland Government, Industrial Court of Appeal case No.04/2005** in which the Industrial Court of Appeal accepted that light of Section 8.1 of the Act as read with Section 8.3 and Section 6.1, the Industrial Court has the power to review a decision of an employer.

16. The cases of **Melody Dlamini v The Teaching Service Commission & Others, I/C 121/2008** and **Zeblon Mhlanga v Swaziland Government, I/C of Appeal Case no.2010/2003** were also cited by the Applicant in this regard.

17. Respondent’s counsel argued to the contrary, citing the recent judgment of the High Court of Swaziland in the matter between **Alfred Maia v The Chairman of the Civil Service Commission & Two Others H/C case no.1070/2015**.

18. This was a matter that was referred to the High Court by the learned Nkonyane J for determination of a constitutional issue which arose between the parties at the Industrial Court.

19. The question which arose related to the competence or otherwise of the Industrial Court to entertain review proceedings brought by the said court in terms of the common law as a result of an alleged contravention of the Applicant’s rights to administrative justice as guaranteed by Section 33 (1) of the Constitution of Swaziland.

20. The Honourable Court went further than the question before it, and in our opinion necessarily so and considered whether the Industrial Court has the power to review the decisions of employers relating to the dismissals of employees, whether in the private or public sector.

21. The Honourable Court, per the judgment of the learned Hlophe J, sitting with two other Judges of the High Court, Fakudze J and Mabuza J considered, inter, alia the judgments of Melody Dlamini & Mathembi Dlamini and came to the conclusion that the Industrial Court of Appeal

had not critically analysed Sections 6.1, 8.1 and 8.3 of the Industrial Relations Act and found that on a critical analysis, these sections do not extend a jurisdiction to review the decisions of employers to the Industrial Court.

22. Mr. Simelane for the Applicant submitted that this court may disagree with the judgment of the High Court in its findings on the review jurisdiction of the Industrial Court, but could not provide the court with any submission not considered by the High Court in the **Maia** matter and only referred the court to the judgments which were already considered and criticized by the High Court, sitting on a constitutional issue, with a full bench.

23. We have no hesitation in finding that the Industrial Court is bound by the decision in the **Maia** case in this regard, and in the premises the Respondent's first point of law is upheld.

24. That however, is not the end of the matter. The Applicant also prayed for alternative relief as set out in paragraphs 3 and 4 of her notice of motion. The complaint in this regard is a simple one, that failing the review application the Respondent be ordered to accept the Applicant into service and pay the Applicant arrear salaries from the date of termination of her services to the date of finalisation of her appeal proceedings.

25. The basis of this alternative prayer is Clause 5.5 of the

Respondent's Disciplinary Code & Procedure which states as follows;

"an employee must lodge his/her appeal one level above the official who adjudicated the case within five (5) working days of the announcement of the sentence. <u>No sanction will be implemented while an appeal hearing is pending…</u>" [own emphasis]

26. Before dealing with this aspect, clearly in respect of these prayers the Applicant is not asking for the review of any decision, but rather for a declaration of rights, which was conceded by counsel for the Respondent and accordingly the upholding of the Respondent's first point in limine does not do away with this aspect of the matter.

27. Whilst it is not necessary to deal with the other points raised in limine in respect of prayers 1 and 2, they do bare mentioning in respect of Prayers 3 & 4.

28. In this regard, there is no material dispute of fact. The Applicant's services were terminated, her emoluments were stopped, she filed an appeal and this appeal has still not been heard. These are all the facts that are necessary to determine the matter, together with an interpretation of Clause 5.5 of the Disciplinary Code.

29. The point of law with regard to the court's power to reinstate an employee without exercising its jurisdiction in terms of Section 16 of the Industrial Relations Act clearly has no relevance in respect of this issue.

30. In the circumstances, none of the points in limine eliminate Prayers 3 & 4. For the sake clarity, in respect of Prayers 3 & 4, there is no material dispute of fact and we find that the absence of a record, in review proceedings does not necessarily taint the proceedings unless the record is relevant and necessary for determination of issues before the court, which in this case, it is not.

31. The Respondent’s response to this prayer is that whilst the code is binding on the Respondent there was no malice or bad faith on the part of the Respondent, but that this was on account of the fact that the parties were involved in settlement discussions which dragged over a period of four (4) months and that the Respondent should not be penalised for having failed to conduct an appeal hearing because the parties had agreed to the process of trying to settle the matter.

32. The Respondent further stated that, the Applicant had waived her rights to an appeal. This was a rather half-hearted and bald allegation in the Respondent’s answering affidavit with no further evidence or detail suggesting a waiver, on the contrary there appears to have been no further communication between the parties after the negotiations broke down or prior, relating to the appeal.

33. In the natural scheme of things, particularly in the labour environment between an employer and an employee,

whilst negotiations are being undertaken there is a cessation of hostilities, as it were. This tacit cease-fire ended when the negotiations broke down.

34. Upon the breakdown of these negotiations and for up to a month up to the institution of these proceedings on the 31st March 2016, the Respondent did not convene an appeal hearing as required by its code of conduct, nor did it pay the Applicant her arrear salaries from the date of termination of her services, in light of clause 5.5.

35. The import and meaning of Clause 5.5 of the disciplinary code is clear and unequivocal.

36. The Respondent could not give any explanation why this clause was not given effect.

37. Generally speaking, the noting of an appeal does not stay the termination of an employee's services however, in this matter the Respondent has bound itself and its employees to the disciplinary code which provides to the contrary.

38. Whilst the effect of Clause 5.5 clearly stays the sanction, we do not consider it practicable to grant the Applicant Prayer 3 as prayed, in respect of accepting the Applicant back into service, pending determination of the appeal.

39. This court clearly cannot set aside the dismissal of the Applicant on review but can in application of Clause 5.5 of

the disciplinary code order that its application be stayed pending appeal which it hereby does.

40. We make the following order;

40.1 Applicant's application only in respect of the review of the employer's decision to terminate the Applicant's services is dismissed;

40.2 The Respondent is directed to pay the Applicant her arrear salaries calculated from the date of lodging her appeal to the date of finalisation of the appeal proceedings;

41. Under the head of further/alternative relief, the Respondent is ordered to convene a disciplinary Appeal hearing as soon as practically possible after the handing down of this judgment giving due regard as much as possible to the time lines contained in Respondent's appeal procedures.

There will be no order as to costs.

The members agree,

M. SIBANDZE
ACTING JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

For Applicant : Mr. S. Simelane
(Simelane Mtshali Attorneys)

For Respondent : Mr. Z. Jele
(Robinson Bertram)