IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE **CIVIL APPEAL CASE NO: 06/16**

In the matter between:

SWAZILAND NATIONAL PROVIDENT FUND **APPELLANT**

AND

DUMSILE R. SHONGWE **RESPONDENT**

Neutral citation: *Swaziland National Provident Fund vs Dumsile R. Shongwe (06/16) 2016 SZICA 05 (14 October 2016)*

CORAM: **M.C.B. MAPHALALA, CJ**
M. DLAMINI, AJA
M.R. FAKUDZE, AJA

Date of Hearing: 26th September 2016
Date of Judgment: 14th October 2016

SUMMARY

Labour Law – court a quo orders payment of arrear salary from date of lodging appeal against dismissal to date of finalization of the appeal proceedings – appellant lodges appeal on the basis that the lodging of an appeal does not stay the termination of an employee's services – the general rule applicable with regard to this question of law considered – held that the Disciplinary Code of the appellant varies the general rule to the extent that it

stays the sanction pending finalization of the appeal proceedings – the appeal is accordingly dismissed with costs.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] On the 25th July, 2016 the court a quo delivered a judgment in favour of the respondent as follows:

1.1 **Applicant's application only in respect of the review of the employer's decision to terminate the applicant's services dismissed.**

1.2 **The respondent is directed to pay the applicant her arrear salaries calculated from the date of lodging her appeal to the date of finalization of the appeal proceedings.**

1.3 **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.**

1.4 **There will be no order as to costs.**

[2] The appellant lodged an appeal against the judgment of the court a quo. The ground of appeal was that the court a quo erred in ordering that the appellant pay the respondent her arrear salary calculated from date of lodging her appeal to the date of finalization of the appeal proceedings, and, that the court ought to have held that the arrear salary should be paid from the date of breakdown of the settlement negotiations until the finalization of the appeal. The appellant further sought an order for costs.

[3] The respondent was employed by the appellant on the 30th May 2007 as the Human Resources Administrator. Thereafter, she was elevated to the position of Acting Human Resources Manager. Ultimately she was appointed to the position of Human Resources Manager in August 2014. She held this position until she was dismissed by the appellant on the 29th October 2015.

[4] On the 14th October 2014 the appellant accused the respondent of breach of confidentiality and/or trust allegedly for sourcing and transmitting confidential information to the Swazi Observer Newspaper. She was subsequently suspended from employment,

formally charged with the offence and further invited to a formal disciplinary hearing which was chaired by an external independent Chairperson Attorney Muzikayise Motsa. The respondent was represented at the disciplinary hearing by Attorney Sikhumbuzo Simelane. The appellant was represented by Attorney Phindile Sikhondze who acted as the Initiator.

[5] The charge sheet read as follows:

> **"You are charged with the offence of breach of confidentiality and/or breach of Trust in that on or about the month of March 2014, you unlawfully sourced confidential information of the Swaziland National Provident Fund relating to the business and/or transactions between the Fund and some of its specific suppliers to wit; Woodcity, Atmo Air-conditioners and Pianto Investments from one Brenda Dlamini, a creditor's officer with the intention and sole purpose of unlawfully disclosing and/or spilling such information to external bodies for objectives only known to yourself, which information was eventually disclosed to the aforesaid external third parties to the prejudice and detriment of the Fund, thus also bringing the employer's name into disrepute."**

[6] The disciplinary hearing took twelve months to finalise. The appellant led the evidence of two witnesses, being Zithulele Gina who was at the time the Head of Corporate Services in the appellant company as well as Brenda Dlamini who held the position of Creditors Officer within the Finance Department of the company. On the other hand the respondent led evidence of two witnesses, of being Nomile Hlatshwayo the journalist who wrote the article in the Swazi Observer Newspaper as well as herself.

[7] On the 28th October 2015 the Chairperson of the Disciplinary Committee, Attorney Muzikayise Motsa, delivered a detailed and well-reasoned report. The respondent was found not guilty and acquitted; the charge of misconduct against her was dismissed on the basis that the appellant had not proved the case against the respondent on a balance of probabilities.

[8] The evidence of Brenda Dlamini was contradictory. She alleged that the respondent had asked for the confidential information from her but she did not give her the information required. It is common cause that the respondent had consistently denied this

allegation even under cross-examination. Similarly, the journalist testified that she did not get the confidential information from the respondent or any other employee of the appellant. Even though the journalist was not obliged to disclose her source of information in terms of journalism principles and professional ethics, she told the Disciplinary Committee that the source of the confidential information was a letter written to the editor of the Swazi Observer Newspaper who was complaining about certain irregularities and suspected corruption in the award of tenders to Woodcity and its two sister companies.

[9] In summary of the evidence tendered before the hearing, the chairperson had this to say[1]:

> **"324. The evidence of the journalist in this regard was for all intents and purposes accepted as the truth and was not challenged and/or questioned by the Initiator.**
>
> **. . . .**
>
> **335. The very brief evidence of the respondent is that she never called Brenda to request any information on business transactions between the Fund and Woodcity or its sister companies.**

[1] Paragraphs 324 of the Report.

336. The respondent was very consistent on her denial of this allegation. She did this both in the cross-examination of the complainant's witnesses and also during the presentation of her defence. She was hardly shaken on her stance on this point.

. . . .

339. The respondent further testified that she did not know the journalist until the day of her testimony and that she knew no other person at the Swazi Observer to whom she could have leaked the alleged information even if it was proved that she was responsible. That also remained unchallenged by the Initiator.

340. While I have no reason to believe or even suspect that Brenda was fabricating a story against the respondent, however, there are a lot of difficulties associated with her evidence.

341. Firstly, even if one were to take her evidence as credible and acceptable, which I do, the major problem is that in her own words, Brenda says that she did not give the respondent any information and offers no other person who could have assisted the respondent. Moreover, the external party Brenda refers to is the Anti-Corruption Commission yet the established external

parties in the case are Nomile Hlatshwayo and the Swazi Observer.

342. Her evidence does not establish a nexus between the respondent illegally obtaining the alleged information from Brenda or any other person and disclosing it to Nomile Hlatshwayo and the Swazi Observer. As it stands, Brenda's evidence does not directly link the respondent with the commission of the alleged misconduct.

343. What is clear though is that the alleged private and confidential information of the Fund's business dealings with Woodcity and its sister companies was illegally obtained from the Fund and leaked to the Swazi Observer. The complainant says the respondent is responsible for that, on the other hand, the respondent says it is not her, but a letter to the editor is the source of the leakage.

344. There is no evidence of the respondent sourcing the information from anywhere within the Fund or from anywhere else and then leaking it to the Swazi Observer. There is no evidence showing that the pertinent files were checked and the information in question was found missing in them or at the very least that the files appeared to have been tempered with.

. . . .

355. A notable example of this is the inference sought to be drawn by the Initiator that by virtue of the respondent having allegedly requested for the alleged information from Brenda (although that is vigorously denied and not substantiated any further), and that if consequently that alleged information surfaces from the Swazi Observer; then only the respondent is responsible for leaking that information to the print media in question when in fact there is no direct evidence establishing commission of the offence and in the face of various probabilities.

356. That inference appears to me to be very dangerous and flies in the face of the evidence of the respondent presented by Nomile which remains uncontroverted and proved the by direct evidence (namely, the source of information).

. . . .

365. Weighing the cumulative weight of the probabilities that have been described against direct evidence of the respondent, the reasonable possibility that any other person may have sourced and leaked the information to the Swazi Observer cannot be excluded.

366. From the foregoing, I cannot hold that the complainant and/or the Initiator have proven their case on a balance of probabilities on the charge preferred against the respondent."

[10] The effect of the Ruling by the Chairperson was to reinstate the respondent to a position in the appellant company as the Human Resources Manager. Accordingly, she reported for work on the 29th October 2015, which was a day after the Ruling was made. However, the appellant refused to reinstate her back to her employment in defiance of the Ruling. She was served with a letter of dismissal signed by Miccah Nkabinde, the General Manager of the appellant company. The dismissal of the respondent was clearly unreasonable and irrational and without any legal basis. The Chairperson was not only independent but he had been appointed by the appellant, and, his Ruling cannot be faulted in law.

[11] The letter of dismissal was dated 29th October 2015, a day after the Ruling was made, and, it reads as follows:

“ . . . .

RE: SUMMARY DISMISSAL

Reference is made to the Ruling of the Disciplinary Hearing Proceedings involving SNPF and yourself, dated 28th October, 2015.

Notwithstanding the conclusions of the said hearing it is noted that the hearing confirmed as credible the evidence to the effect that you went out of your way to seek confidential information from the accounts section with an intention to use same to the detriment of the Fund.

The consequences of your actions are that the trust and confidence that the Fund has bestowed on you and your office have been eroded. It is unforeseeable how the relationship of employer and employee can continue under such circumstances for a person holding such a critical office.

The office of the Human Resources Manager is at the heart of the operations of the Fund and the incumbent occupying this office should be one with a high degree of integrity and confidentiality, critical traits which the Fund opines are lacking in you.

You shall be paid your outstanding leave, Notice Pay and salary for the month of October 2015. In addition you are required to submit all property of the Fund in your

possession before the close of business on or before 29th October 2015.

Should you wish to appeal this decision, be advised to forward your written appeal to the CHIEF Executive Officer within five (5) working days, per the Fund's Disciplinary Code.

If your written appeal is not received within the stated period, it shall be assumed that you have accepted your dismissal."

[12] On the 2nd November 2015 the respondent, acting n accordance with the appellant's Disciplinary Code and Procedure lodged an appeal against the decision of the appellant to dismiss her from employment. The appeal was addressed to the Chief Executive Officer of the appellant company.

[13] The respondent's appeal reads as follows:

“RE: NOTICE OF APPEAL – DUMSILE R. SHONGWE

. . . .

2. I hereby appeal the dismissal decision made by SNPF (as my employer) by letter dated 29th October 2015 signed by Mr. Nkabindze, and my grounds of appeal, though not exhaustive are as follows:

2.1 The dismissal decision was irrational, grossly irregular and unreasonable given the fact that I was found not guilty by the independent chairman of the disciplinary enquiry.

2.2 What the employer was expected to do after delivery of the findings was to lift the suspension and accept me back to employment but did the opposite.

2.3 The purported termination of my employment was not only unfair but was also unlawful especially because SNPF is a Category A parastatal and a public institution which is expected to uphold the rule of law and to act in a manner that promotes good industrial relations.

2.4 The purported erosion of trust and confidence in me, as alleged in the letter of dismissal is baseless and unfounded especially because the accusations made against me are not what I have been dismissed for.

2.5 I have worked for SNPF diligently for a lengthy period of time and have an unblemished disciplinary record and as such I do not deserve the harsh and inhumane treatment that I have been subjected to by the Fund.

3. I pray that the dismissal decision be set aside and/or reversed, and, that I be reinstated to work together with payment for all the days between 1st November 2015 to the date of finalization of this appeal.

4. My legal rights are reserved and I also reserve my right to add more grounds of appeal and to substantiate them on the date of the appeal hearing."

[14] The Disciplinary code and Procedure is binding on the parties. The Disciplinary Code is a product of negotiations between the appellant company and the employees of the company. The code started operating on the 10th February 2011, and, it forms part of the terms and conditions of employment of the workplace. The Disciplinary Code and Procedure gives an employee the right of appeal against the decision made pursuant to a disciplinary hearing. The Code provides, in part, the following:

> **"4.6 An employee will have the right to appeal to one level higher of management against any disciplinary penalty imposed.**
>
> **4.7 Any person who is not satisfied with disciplinary action taken against him/her will be entitled to invoke the relevant steps of the appeal procedure.**
>
> **4.8 The disciplinary code will not be applied for the purpose of intimidation or victimisation.**
>
> **4.9 Formal hearing and verdicts shall be initiated and delivered by management within the stipulated time frame. Similarly, management shall hear and adjudicate**

appeals within the time periods specified in the disciplinary code.

. . . .

5.5 An employee must lodge his/her appeal one level above that of the official who adjudicated the case within five working days of the announcement of the sentence. No sanction will be implemented while an appeal hearing is pending. The appeal mechanism is as follows:

5.5.1 If an employee is not satisfied with the decision at the disciplinary hearing, he/she may ask for that decision to be reviewed.

5.5.2 The review hearing will be held at the next level of management and the employee is entitled to representation as provided in this policy."

[15] In terms of the Disciplinary Code, Summary Dismissal should be invoked in cases of serious misconduct "when management feels that the employee's conduct is such that it brings about an immediate cessation of the employee/employer relationship".[2] Invariably the employer would have to prove on a balance of probabilities that the employee has committed a case of serious misconduct deserving summary dismissal. In the present case the

[2] Article 9.5 of the Disciplinary Code of the appellant company.

independent Chairperson found that there was no evidence that the respondent had committed the offence preferred against her; hence, she was found not guilty, and, the charge of misconduct against her was dismissed. Accordingly, she was acquitted and discharged.

[16] It is common cause between the parties that on the 16th November 2015 the appellant commenced settlement negotiations with the respondent through their Attorneys. However, these negotiations reached a deadlock on the 17th February 2016; hence, the respondent lodged review proceedings against the decision of the appellant to dismiss her from the workplace.

[17] The review proceedings were lodged on the 31st March 2016 before the Industrial Court seeking the following orders:

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.

2. Directing and/or ordering the respondent to reinstate the Applicant to her employment work position of Human Resources Manager forthwith.

<u>ALTERNATIVELY</u>

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.

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.

5. Costs of this application at the punitive scale of Attorney and own client costs.

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

[18] The basis of the review was that the respondent, as a statutory body and a Category A Public Enterprise, was required by law to

act fairly, lawfully and reasonably at all times when handling issues of employer/employee relationships such as the present matter. The respondent argued that the appellant had acted in a grossly irregular and unreasonable manner by dismissing her summarily against the decision of the independent Chairman who had found her not guilty and further dismissed the charge of misconduct preferred against her by the appellant. It was a further submission by the respondent that the dismissal was so unreasonable and irrational to the extent that no reasonable employer, having applied its mind objectively and fairly to the finding of the Chairman would have arrived at such a decision.

[19] The appellant filed an Answering Affidavit in which it raised four preliminary objections before dealing with the merits. Firstly, that the Industrial Court lacks jurisdiction to review an employer's decision terminating the services of an employee. Secondly, that the review application is fraught with disputes of fact which were reasonably foreseeable by the respondent; and, that such material disputes render the motion proceedings inappropriate for purposes of determination of this matter. Thirdly, that the

Industrial Court does not have jurisdiction to order reinstatement of a dismissed employee unless it has conducted an enquiry in terms of section 16 of the Industrial Relations Act. Fourthly, that in the absence of the record of proceedings, the court cannot exercise review powers.

[20] The preliminary objections were argued simultaneously with the merits of the case. On the merits the appellant's contention was that the report of the disciplinary hearing was not binding but was a mere recommendation. Furthermore, the appellant was highly critical of the report to the extent of accusing the Chairman of committing a number of fundamental irregularities which were reviewable when making the pronouncement. The Chairman was also accused of ignoring competent and valid evidence including that of Brenda Dlamini, which according to the appellant implicated the respondent to acts of dishonesty. The Chairman was also accused of having committed a serious error of law by applying criminal trial standards to a disciplinary hearing. Notwithstanding the criticisms, the decision of the Chairman on the merits cannot be faulted. The Chairman weighed the

evidence on the basis of a balance of probabilities. Similarly, there was no evidence of commission of the misconduct in accordance with the civil standard applicable to disciplinary hearings.

[21] The court *a quo* came to a correct decision that it does not have jurisdiction to review the decision of an employer who has terminated the services of an employee without adherence to Part VIII of the Industrial Relations Act, 2000 as amended.

[22] The question whether or not it is competent for the Industrial Court to determine a review application in terms of the Common Law seeking to enforce the applicant's right to administrative justice as guaranteed by section 33 of the Constitution was settled by a full bench of the High Court in the case of *Alfred Maia v. Civil Service Commission and Two Others*[3]. Justice N.J. Hlophe who delivered the majority judgment of the full bench had this to say:[4]

> **"[13] The Industrial Court is a creature of statute. In that sense it has no inherent power in itself but can only**

[3] Civil Case No. 1070/2015
[4] Paragraph 13 of the judgment

exercise the power accorded it by the statute that establishes it. In this jurisdiction the Industrial Court is established in terms of Section 6 of the Industrial Relations Act 2000. Section 6 (1) of the Act provides as follows in this regard:-

> **'(1) An Industrial Court is hereby established with all the powers and rights set out in this Act or any other law, for the furtherance, securing and maintenance of good industrial or labour relations and employment conditions in Swaziland'.**

[14] On the jurisdiction of the Industrial Court, Sections 8 (1) and 8 (3) of the Act, which are the relevant ones for consideration, provide as follows:-

> **'8 (1)The Court shall, subject to Section 17 and 65, have exclusive jurisdiction to hear, determine and grant an appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court or in respect of any matter which may arise at Common Law between an employer and an employee in the cause of employment or**

between an employer or employer's association and a trade union or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof.

. . . .

(3) In discharge of its functions under this Act, the court shall have all the powers of the High Court, including the power to grant injunctive relief.'

. . . .

[20] . . . . Whatever the position, these functions cannot include a review of a decision dismissing an employee because a dismissal is defined in the Act as a dispute which can only be dealt with after following the procedure set out in Part 8 of the Act. This means that a review instituted to challenge a dismissal without it having been preceded by conciliation would be against the express provision of the Act on how disputes between an employer and an employee should be resolved.

[21] As already indicated above, a review is not one of the appropriate reliefs to be granted by the Industrial Court, because as a creature of statute that power is not extended to it anywhere. It also could not have been part of those powers given the

Industrial Court under the broad reliefs it is entitled to grant, which are those that arise between employer and employee, as it does not so arise.

. . . .

[23] It seems to me that there is something fundamentally wrong about the power of the Industrial Court to review decisions of employers relating to the dismissal of employees be it in the Public Sector or in the Private Sector. It seems settled that the review of a decision of an employer dismissing his employees only applies in favour of a particular type of employees or against a particular type of employers. It applies in the Public Sector setting leaving out the Private Sector employer and employee. On the face of it, this smacks of discrimination in the treatment of certain employers and employees. In other words it has the tendency of treating one type of employees and employers differently from the others and therefore not uniformly with the same practice being extended to the other employees and employers. It encourages a different law for one sector of employees and another for the other sector, which is untenable and is in my view a recipe for disaster.

[24] This is because only Public Sector employees seem to be allowed to review the decision of their

employers dismissing them. Clearly this practice is against one of the fundamental principles of Employment Law or Labour Law that employees in similar situations ought to be treated equally or similarly. I have no doubt it was in realization of this principle when the Legislature promulgated Section 3 of the Industrial Relations Act 2000 which reads as follows:-

> **'3. This Act shall apply to employment by or under the Government in the same way and to the same extent as if the Government were a private person but shall not apply to –**
>
> **(a) Any person serving the Umbutfo Swaziland Defence Force established by the Umbutfo Defence Force order, 1977.**
>
> **(b) The Royal Swaziland Police Force Order, 1977.**
>
> **(c) His Majesty's Correctional Services established by the Prisons Act No. 40 of 1964'.**
>
> . . . .

[27] . . . . It suffices to point out that the Constitution also does not extend any power to the Industrial Court to enforce the Bill of Rights under Chapter III of the Constitution. According to Section

35 (1) of the Constitution, it is the High Court that is empowered to hear any matter where any person complains of a violation of any Section of Chapter 3 of the Constitution to which Section 33 (1) is a part."

[23] Accordingly, the court *a quo* was correct in dismissing prayers 1 and 2 of the application on the basis that the Industrial Court does not have jurisdiction to hear and determine review applications dealing with the dismissal of employees without adherence to Part VIII of the Industrial Relations Act 2000 as amended.

[24] The court *a quo* cannot be faulted in its dealing with the alternative prayers 3 and 4 of the application. The essence of the alternative relief is that failing the review application, the appellant be ordered to accept the respondent into service and pay her arrear salaries from the date of termination of her services to the date of finalization of the appeal. The basis of the alternative prayers is clause 5.5 of the appellant's Disciplinary Code and Procedure.

[25] The appeal is premised on the Common Law principle that an employer is not obliged to pay a salary to an employee whose services has been terminated pending the determination of an appeal. The Judge President of the Industrial Court Justice P.R. Dunseith in the case of *Lwazi Mdziniso v. Conciliation Mediation Arbitration Commission*[5] quoted with approval the case of *Nchabeleng v. University of Venda and Others*[6]:

> "**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.**
>
> **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."**

[26] His Lordship Justice P.R. Dunseith further quoted with approval Grogan, in his book Workplace Law, 8th edition. The writer was

[5] Case No. 8/2007 para 6
[6] (2003) 24 ILJ 585 (LC) at paragraph 23

himself relying on the authority of *Nchabeleng v. University of Venda and Other*[7].

"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.

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.

A dismissal is not suspended merely because an employee notes an appeal or refers a dispute to the CCMA or Labour Court."

[27] His Lordship Justice P.R. Dunseith also quoted with approval the judgment of the South African Labour Court in the case of *South African Commercial Catering and Allied Workers Union v. Edgars Stores Ltd and Another*[8] where Justice Zondo AJ said the following:

[7] Lwazi Mdziniso case (Supra) paragraph 7
[8] (1997) 18 ILJ 1064 (LC) at 1074

"The applicant's contention is simply that the operation of such dismissal was suspended until the outcome of the internal appeal, and 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 appeal."

[28] The Disciplinary Code and Procedure of the appellant is binding on the parties, and, it forms part of the terms and conditions of employment of the respondent. The essence of Clause 5.5 of the Code is that upon the lodging of the appeal, the sanction of dismissal is stayed pending finalisation of the appeal proceedings. This clause is binding upon the parties and further creates legal rights to the respondent as well as corresponding legal obligations upon the appellant. This clause has the effect of varying the Common Law principle that the noting of an appeal does not stay

the termination of an employee's service.[9] Accordingly, the court *a quo* was correct in holding that the appellant should pay the respondent arrear salaries calculated from the date of lodging her appeal to the date of finalization of the appeal proceedings.

[29] The court *a quo* was correct in holding that the dismissal of the respondent should be stayed pending the appeal proceedings pursuant to clause 5.5 of the Disciplinary Code and Procedure. However, the Court cannot order reinstatement of the respondent in the absence of adherence to Part VIII of the Industrial Relations Act 2000 as amended followed by a determination in accordance with the provisions of section 16 of the Industrial Relations Act 2000 as amended.

[30] Furthermore, the finding of the court *a quo* is correct that whilst the Code is binding on the parties, there was no malice on the part of the appellant in not hearing the appeal within the time specified in the Code in light of the settlement discussions

[9] Nedbank Swaziland Limited v. Swaziland Union of Financial Institutions & Allied Workers (SUFIAW) and Another Appeal Case No. 10/2012 at para 20 where this court held that a Disciplinary Code which is a product of a negotiated agreement forms part of the contract of employment and was binding upon the parties.

between the parties. It is common cause that the discussions lasted for a period of four months before they broke down, and, that the parties had agreed to the process of negotiations on a possible settlement of the matter. However, there is no evidence that the respondent had waived her rights to pursue the appeal after the negotiations had failed.

[31] Accordingly, the following order is made:

1. The appeal is dismissed with costs.

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M.C.B. MAPHALALA

CHIEF JUSTICE

I AGREE:

_____

M. DLAMINI

ACTING JUSTICE OF APPEAL

I AGREE:

_____

M.R. FAKUDZE

ACTING JUSTICE OF APPEAL

For Appellant Attorney Zweli Jele

For Respondent Attorney S.M. Simelane