IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE **CIVIL APPEAL CASE NO: 02/16**

In the matter between:

JOHN KUNENE	**APPELLANT**
AND	
THE TEACHING SERVICE COMMISSISON	**FIRST RESPONDENT**
THE ATTORNEY GENERAL	**SECOND RESPONDENT**
UNDER SECRETARY	
MINISTRY OF EDUCATION	**THIRD RESPONDENT**

Neutral citation: *John Kunene vs The Attorney General (02/16) 2016 SZICA 08 (14 October 2016)*

CORAM:	**M.C.B. MAPHALALA, CJ** **T.M. MLANGENI, AJA** **M.R. FAKUDZE, AJA**
Date of Hearing:	29th September 2016
Date of Judgment:	14th October 2016

<u>SUMMARY</u>

Labour Law - unfair dismissal – appellant lodged a review application before the High Court and Court of Appeal challenging the dismissal – the review application failed, then appellant reported a dispute to CMAC in terms of the Industrial Relations Act, 2000 as amended and a Certificate of Unresolved Dispute was issued;

Appellant lodged an application for determination of an unresolved dispute – respondents raised a Point *In Limine* that the matter was *res judicata* – Point *in Limine* upheld with regard to procedural fairness but failed on substantive fairness;

Respondent then raised another Point *in Limine* that the matter had prescribed – court *a quo* upheld the Point on prescription of the dispute;

On appeal held that the court retains jurisdiction to hear and determine the dispute on the basis of the Certificate of Unresolved Dispute;

Held further that the institution of the review application stayed the running of prescription – appeal allowed with costs.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] This is an appeal against the judgement of the court *a quo* delivered on the 26th February 2016 in favour of the respondents. The court *a quo* had dismissed an application for reinstatement lodged by the appellant on the 16th July 2007.

[2] It is common cause that the appellant was employed by the first respondent as a teacher with effect from March 1995 and was in continuous employment with the first respondent until 16th March 2005 when his services were terminated. The first respondent terminated the services of the appellant for alleged misconduct in terms of Regulation 17 (1) (a) of the Teaching Service Regulations of 1983 read together with the Teaching Service Act of 1982.

[3] The letter of dismissal is dated 13th April 2005, and, it was signed by the Executive Secretary of the first respondent, Mr. M.V. Zungu. The letter reads in part:

RE: DECISION

Pursuant to your appearance before the Commission on the 16th day of March 2005 wherein your matter was heard in our presence and you were given an opportunity to make your representation, the Commission directs that you be dismissed from service with effect from 16 March 2005. For your misconduct in terms of Regulation 17 (1) (a) of the Teaching Service Regulations read in conjunction with the Teaching Service Act of 1982.

Mr. Kunene proposing love to pupils by teachers is forbidden, and, it is an immoral conduct. Parents send their children to school with confidence that teachers will take guardian status to their children; however, you have betrayed their trust.

Should you be occupying a school house, you are advised to vacate it within seven (7) days and to surrender all school property to the headteacher.

[4] Pursuant to the dismissal the appellant lodged a review application of the decision of the first respondent before the High Court. In particular the appellant sought the following orders:

1. **Reviewing and setting aside the first respondent's letter of dismissal from service date 13th April 2005 as irregular, ultra vires and of no force and effect.**

2. **Directing the respondent to reinstate Applicant to his post as a teacher of Mbabane Central High School with immediate effect.**
3. **Ordering the respondents to pay the costs of this application; and**
4. **Further and/or alternative relief.**

[5] In addition to the first respondent, the appellant further cited the Attorney General in his official capacity as well as the third respondent in the Ministry of Education in his capacity as the *ex-officio* Schools Manager of all Government Aided Schools. It is

apparent from the evidence that it is the third respondent who preferred charges against the appellant on the 26th October, 2004.

[6] The letter outlining the charges was received by the appellant on the 26th October 2004. The letter further invited the appellant to respond to the charges in writing. In addition the letter invited the appellant to a meeting with the third respondent on the 5th November 2004. It is not in dispute that the appellant attended the meeting with the third respondent on the 5th November 2004 and further handed a written response to the allegations made against him.

[7] The letter of misconduct reads as follows:

<u>Misconduct: Yourself</u>

<u>Schedule</u>

1. **You are charged with immoral conduct in that during Term 1, 2004, you did propose love to Nomfundo Mbuli, a Form 5 student in the school. In going about your mission you once called the student to the**

science laboratory, you once asked her age, and once stated to the effect that she would make a good wife.

2. **You are charged with immoral conduct in that in April 2004 during ball games in the school you did invite Nomfundo Mbuli, a Form 5 student to come to your house; she refused and you started to beg her to come but failed to convince her.**

3. **You are charged with immoral conduct in that during Term 2, 2004 on a Saturday when Form 5's were waiting at the station for a bus after their practical on Food and Nutrition, you did invite Nomfundo Mbuli to your house. She refused and you then told her you would take her home by car in the evening. She still refused and left you whereupon you stated to the effect that she had no respect.**

4. **You are charged with immoral conduct in that during Term 3, 2004, and, in the presence of Nomfundo told Mary Mpila, an adult female worker in the school that**

Nomfundo was tempting you. Mary Mpila warned you about this unbecoming conduct to a student. You then intimidated the student by stating that finally she will end up at your Kunene home yard as you would consult witchdoctors of Lomahasha to make Nomfundo love you.

5. **You are charged with immoral conduct in that on or about the 5th October 2004 you did grab Nomfundo's buttocks. She told you that she did not like what you were doing but you did not let go but continuously held her buttocks with your hands until she screamed for help.**

The above are gross acts of misconduct in the Teaching Service Act and Regulations of 1983. Show cause in writing to exculpate yourself from these allegations.

Your reply must reach this office before the 5th November 2004. You are invited to meet the US Schools Manager in

the Ministry of Education on the 5th November 2004 at 08.00 hours.

[8] Subsequent to his appearance before the third respondent, the appellant received a letter from the third respondent dated 8th November 2004 suspending him from duty. The letter reads:

SUSPENSION FROM DUTY: YOURSELF

Pursuant to the gross nature of charges of immoral conduct preferred against you in our letter of the 26th October 2004, section 15 (4) of the Teaching Service Act and Regulations of 1983 is hereby invoked. Consequently, you are suspended from duty with immediate effect on one half pay pending the decision of the Commission to which the matter is referred for consideration.

[9] Subsequently, the appellant was invited to appear before the first respondent in a letter dated 24th February 2005 for a disciplinary hearing. The letter was signed by the Executive Secretary of the Commission Mr. M.V. Zungu.

[10] The appellant attended the disciplinary hearing before the first respondent accompanied by his headteacher Mrs Doreen Nhleko where the allegations against him were read out. The appellant was asked to plead, and, he denied the allegations levelled against him. The Commission led the evidence of witnesses, and, they were duly cross-examined by the appellant. He was further afforded an opportunity to lead evidence in his defence. On the 13th April 2005 the appellant received a letter of dismissal from the first respondent dated on 13th April, 2005.

[11] The basis of the review application was four-fold: first, that the third respondent did not give him an opportunity to respond to the allegations levelled against him contrary to the dictates of the principle of *audi alteram partem*. Secondly, that the third respondent acted ultra vires his powers in suspending him on the basis that the powers to suspend were vested with the first respondent. Thirdly, that when he appeared before the Commission, he was not asked to plead. Fourthly, that he was not allowed to cross-examine witnesses of the Commission including the complainant Nomfundo Mbuli. Lastly, that the Commission

harassed and intimidated him extensively with regard to the fifth allegation of misconduct, and, that it was obvious that they were not interested in hearing his side of the story to the extent that they had made up their minds on the conclusion of the case.

[12] The first respondent filed an Answering Affidavit denying all the allegations made by the appellant in his review application. The complainant and the third respondent filed confirmatory affidavits in support of the first respondent.

[13] The High Court dismissed the review application lodged by the appellant. The court found that there was evidence that the appellant had submitted a written response to the third respondent on the allegations of misconduct levelled against him. Furthermore, the court found that the appellant had been asked to plead at the hearing before the first respondent, and, that he was given an opportunity to cross-examine witnesses and further gave evidence in his defence. Similarly, the court found correctly that the third respondent did not act ultra vires his powers by suspending the appellant.

[14] Justice Josiah Matsebula in the case of John Kunene v. the Teaching Service Commission and Two Others[1] dealt with the powers of the third respondent, and, had this to say:

> **"In terms of the Teaching Service Commission Regulations of 1983, Regulation 15 provides:**
>
> **15. (2) A Manager of a teacher who has misconducted himself in terms of sub-regulation (1) shall**
>
> **(a) inform the teacher in writing of the misconduct alleged against him;**
>
> **(b) allow the teacher an opportunity to present his defence in writing;**
>
> **(3) If the Manager is not satisfied with the defence presented by the teacher, he shall forward to the Commission a written complaint and a copy of the teacher's defence for consideration.**
>
> **(4) If a Manager considers the misconduct alleged against the teacher to be of a serious nature, he may suspend the teacher from service pending a decision by the Commission thereon."**

[1] High Court Case No. 2148/2005 at page 2.

[15] His Lordship Justice Matsebula continued and said the following:[2]

> **"It is further my considered view that applicant was afforded sufficient opportunity to present his side of the story, and, it is on the basis of his story that the third respondent formed the opinion to forward the submissions to the first respondent. It is further my considered view that the provisions of the Teaching Services Regulations were strictly complied with by both third and first respondents."**

[16] A subsequent appeal lodged by the appellant before the Court of Appeal was correctly dismissed in the absence of irregularities committed by the first and third respondents in the conduct of the appellant's matter. The court was of the view that the first and third respondents had complied with Regulation 15 (1) (f), (2) – (5) of the Teaching Service Regulations of 1983; and, that the appellant had failed to discharge the onus that grounds exist to review the decision of the first and third respondents.

[2] At page 4

[17] The court further referred to Regulation 17 (1) of the Teaching Service Regulations in support of the dismissal of the appeal. The regulation states the following:

> **"17. A teacher found guilty of misconduct under Regulation 15 or inefficiency under Regulation 16 by the Commission may –**
>
> **(a) be dismissed from the service"**

[18] The judgment of the Court of Appeal was delivered on the 16th November, 2006. Thereafter, the appellant reported a dispute with the Conciliation Mediation and Arbitration Commission; however, the dispute was not resolved. The Commission subsequently issued a Certificate of Unresolved Dispute on the 3rd April, 2007.

[19] On the 16th July 2007 the appellant lodged an application for the determination of an unresolved dispute before the Industrial Court in accordance with section 85 (2) of the Industrial Relations Act of 2000 as amended. He alleged that that his employment

was terminated for alleged misconduct in terms of Regulation 17 (1) (a) of the Teaching Service Regulations of 1983 read in conjunction with the Teaching Service Act of 1982.

[20] The basis of the application for unfair dismissal is outlined in paragraphs 5 and 6 of the application:

> **"5. The termination of the applicant's employment was both substantially unfair in that;**
>
> **5.1 The misconduct which was alleged by the first respondent does not constitute a reason for dismissal permitted by section 36 of the Employment Act, 1980;**
>
> **5.2 The disciplinary enquiry made no finding which established any fair reason for termination in terms of section 36 of the Employment Act, 1980;**
>
> **5.3 The Chairman of the disciplinary hearing failed to consider any mitigating factors in the circumstances;**
>
> **5.4 The Chairman of the disciplinary enquiry failed to consider other sanctions available to him and thereby fettered his discretion in**

respect of same by holding that applicant be dismissed.

6. The dismissal of the application was not reasonable and fair in all the circumstances of the case."

[21] The appellant claims costs of suit together with a total amount of E131 457.43 (one hundred and thirty one thousand four hundred and fifty seven emalangeni forty three cents) divided as follows:

(a) Re-instatement, failing which

(i) Notice pay E7 019.58

(ii) Additional Notice E11 486.59

(iii) Severance pay E28 716.30

(iv) Twelve months compensation in terms of Act E84 234.96

[22] The respondents subsequently filed a Notice to Raise a Point of Law that the matter was *res judicatae* on the basis that it was heard and determined by the High Court as well as the Court of Appeal. They further sought an order for punitive costs; no reasons were advanced for the punitive costs.

[23] His Lordship Justice P.R. Dunseith sitting with two Assessors heard the submissions on the Point of Law raised by the respondents and came to the following conclusion:[3]

> **"15 The fundamental question is whether the issues now before the court were finally disposed by the High Court and the Court of Appeal. If the issues now before Court were not examined in the previous proceedings, then the court is at liberty to make a determination.**
>
> **16. The review application before the High Court and the Court of Appeal dealt only with the procedural fairness of the applicant's dismissal. Indeed it is always the proceedings of a statutory tribunal that are subject to review, not the merits of its decision.**
>
> **. . . .**
>
> **19. The issue of the substantive fairness of the applicant's dismissal was not before the High Court for decision nor did the High Court have any jurisdiction to deal with such issues. The dismissal of the review application did not have the effect of finally disposing of the cause of action in the application presently before the Industrial Court in respect of the substantive fairness of the applicant's dismissal. In respect of that issue, the defence of res judicata must fail. We do find however, that with respect to the question of procedural unfairness, the applicant is**

[3] John Kunene v. the Teaching Service Commission and Another case NO. 317/2007 at paragraphs 15,16 and 19.

estopped from raising such issue because it was finally dealt by the High Court and the Court of Appeal. To that extent only, the defence of res judicata succeeds, and, the applicant is barred from advancing any claim based on procedural unfairness or irregularity."

[24] On the 23rd October 2007 the respondents filed a Notice to Raise Points *in Limine* that the appellant was time barred from reporting the dispute to the Conciliation Mediation and Arbitration Commission. In addition the respondents argued that the Commission had acted ultra vires its powers in conciliating the dispute, and, that the matter was not properly before court. They further prayed for a dismissal of the application with costs.

[25] On the 25th July 2013 the respondents filed a Reply in respect of the application for unresolved dispute. In *limine* the respondents raised the two preliminary objections mentioned in paragraph 24 above. On the merits with regard to substantive fairness, the respondents argued that the appellant was lawfully dismissed by the Commission for misconduct. With regard to procedural fairness the appellant's contention was that the matter was

res judicata having been determined and adjudicated by the Court of Appeal.

[26] The court *a quo* heard submissions on the points of law raised by the respondents. It is apparent from the evidence that the appellant was dismissed on the 16th March 2005; the letter of dismissal was dated 13 April 2005. The appellant was dismissed with effect from 16th March 2005 which was the date of the disciplinary hearing before the Teaching Service Commission.

[27] The judgment of the Court of Appeal was delivered on the 16th November 2006, and, the appellant reported the dispute to the Conciliation Mediation and Arbitration Commission on the 26th November 2006; hence, the applicable legislation is the Industrial Relations Act of 2000 as amended. The Industrial Relations (Amendment) Act of 2005 only came into effect on the 1st September 2005, and, it is not applicable to the present proceedings.

[28] On the 26th February 2016 the court *a quo* upheld the point in *limine* that the application was time barred, and, the court consequently dismissed the application with no order as to costs. The court further made a finding that the respondents did not waive their rights to raise the point *in limine* by their failure to raise the objection before the Commission. The Court found that there was no evidence that the respondents intended to waive their rights in this regard. The court *a quo* further held that the appellant did not plead waiver in the Reply.

[29] A Labour dispute should be reported to the Commission before the lapse of eighteen months since the issue giving rise to the dispute arose.[4] An unresolved dispute means a dispute in respect of which a certificate has been issued.[5] Such a dispute may be referred to the court for determination or to arbitration if the parties agree. The dispute should concern the application to any employee of existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal, employment, reinstatement, or re-engagement.[6]

[4] Section 76 (2) Industrial Relations Act No. 1 of 2000 as amended.
[5] Section 85 (1) Industrial Relations Act of 2000 as amended.
[6] Section 85 (2) (a) of the Industrial Relations Act of 2000 as amended

However, if the unresolved dispute concerns a matter other than the one referred to in section 85 (2) of the Act, the parties may agree to refer the dispute to arbitration.[7]

[30] It would be a travesty of justice if this court could turn a blind eye to the litigation that ensued between the parties pursuant to the dismissal of the appellant. This litigation began on the 14th June 2005, about three months after the dismissal. The litigation ended on the 16th November, 2006 when the Court of Appeal delivered its judgment, and, the report of dispute was made on the 26th November 2006, ten days thereafter.

[31] Furthermore, the dispute was duly conciliated in terms of the Industrial Relations Act of 2000 as amended, and, a Certificate of Unresolved Dispute was issued after the parties had made their submissions to the Commission. It is common cause that the respondents acquiesced and did not raise prescription as a preliminary objection during the conciliation process. This clearly paved the way for the issuance of a certificate of Unresolved Dispute. Similarly, the Certificate was never challenged paving the

[7] Section 85 (3) of the Act

way for the lodging of an application for determination of an unresolved dispute in terms of the Act.

[32] After the application was lodged, the respondents filed a Notice To Raise a Point of Law that the matter was *res judicata*. Justice P.R. Dunseith seated with two members held that the High Court as well as the Court of Appeal only dealt with the procedural fairness of the matter, and, that the substantive fairness of the matter was not res judicata.

[33] There was no appeal to this judgment, and, the appellant was entitled to challenge the substantive fairness of the matter as outlined in the Certificate of Unresolved Dispute. It was only after this judgment on the 23rd October, 2007 that the respondents filed another Notice to Raise Points of Law that the appellant was time barred from reporting the dispute to the Commission, that the Commission had acted ultra vires its powers in conciliating the dispute; and, that the matter was not properly before the court. However, the court only addressed the issue of prescription and did not address the second issue relating to ultra vires.

[34] The Industrial Relations Act 2000 as amended provides for the appointment of a Commissioner to resolve the dispute through conciliation; and, the appointment should be made by the Commission within four days of receipt of the dispute.[8] The Commissioner should conciliate within twenty-one days of the appointment; however, the parties may agree to extend this period where further conciliation is required.[9] On the expiry of the period of conciliation, the Commissioner should issue a certificate in the prescribed form stating whether or not the dispute has been resolved.[10] Once a Certificate of Unresolved Dispute has been issued, either party has a right to refer the dispute to court for determination where the dispute concerns existing terms and conditions of employment or the denial of any right applicable to any employee in respect of his dismissal or employment, reinstatement or re-engagement; the parties may elect to refer the dispute to arbitration.[11]

[8] Section 80 (1) Industrial Relations Act of 2000 as amended.
[9] Section 81 (1) of the Act
[10] Section 81 (5) of the Act
[11] Section 85 (1) and (2) of the Act

[35] From a reading of the Industrial Relations Act of 2000 as amended, it is apparent that preliminary objections relating to prescription of the cause of action should be raised during conciliation and form part of the record of proceedings.[12] Once the Certificate of Unresolved Dispute is issued, the aggrieved party acquires a right to adjudicate the dispute in court.

[36] Van Niekerk AJ in the case of *Velinov v. University of Kwazulu-Natal and Another*[13] said the following;

> **"8. As far as the jurisdictional point is concerned, it is now settled law that the Commission acquires jurisdiction to arbitrate a dispute after a certificate of non-resolution has been issued (see *Fidelity Guard Holdings (Pty) Ltd v Epstein N.O. & Others* [2000] 12 BLLR 1389 (LAC)). The Court found in this case that even if the dispute is referred late, the Commission retains jurisdiction, provided a certificate of "non-resolution" has been issued. It went on to find that the only way in which a defective certificate can be challenged is by way of review.**
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> . . . .

[12] Velinov v University of Kwazulu-Natal and another
[13] Supra at paragraphs 8 and 14

I consider that the principle remains the same and that as long as the certificate of outcome has not been set aside, the Commission retains jurisdiction. It is the setting aside of the certificate of outcome that would render the Commission without jurisdiction to arbitrate."

[37] The court or the arbitrator retains the jurisdiction to entertain the dispute as long as the Certificate of Unresolved Dispute has not been set aside.[14] It is common cause that in this matter the certificate was lawfully issued, and, it has not been set aside. Until the certificate is set aside the court retains jurisdiction to hear and determine the dispute.

[38] It is a trite principle of law that the institution of legal proceedings by a party against the other has the effect of staying the running of prescription.

In the case of *Tsakatsi v. Arbitrator (DDPR) and Another*[15] the court held as follows:

[14] The judgment of Zondi JP in Fidelity Guards Holdings (Pty) Ltd v. Epstein LMNO and Two Others (2000) 12 BLLR 1389 (LAC) at paragraphs 12 and 21.
[15] (2009) LSLC 5 at paragraphs 9 and 10.

“There is however a further ground on which the learned arbitrator’s award falls to be reviewed and that is the learned arbitrator’s failure to apply his mind to the facts and the principles of the Common Law which makes his award to fail the test of rationality. In paragraph 7 of his award, the learned arbitrator correctly observed that under the Common Law, appeal stays execution. Having said that he failed to connect that principle of stay of execution with its equivalent in cases of prescription and that is the principle of interruption or suspension of the running of the period of prescription. . . In the case of *Volkskas BPK v. The Master and Others* 1975 (1) SA 69 at 73 D-E Margo J held that “under the Common Law the two chief causes of interruption of prescription are acknowledgments of liability by the debtor (*recognitio*) and the institution of legal proceedings against the debtor (*interpellatio*) . . . In *casu* the applicant did not just seat back and do nothing after his purported dismissal. He instituted legal proceedings by way of an internal appeal to challenge the dismissal. This is a proper case where prescription can be said to have been interrupted and the learned arbitrator said as much when he recognized that appeal stays execution. In the same manner it stays the running of prescription as it interrupts its operation.”

[38] Accordingly, the court makes the following order:

1. The appeal is allowed with costs.

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M.C.B. MAPHALALA

CHIEF JUSTICE

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I AGREE:	T.M. MLANGENI
	ACTING JUSTICE OF APPEAL

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I AGREE:	M.R. FAKUDZE
	ACTING JUSTICE OF APPEAL

For Appellant	Attorney B.S. Dlamini
For Respondent	Senior Crown Counsel M.N. Dlamini