IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGMENT

APPEAL CASE NO: 13/2018

In the matter between:

THE TEACHING SERVICE COMMISSION	**1ST APPELLANT**
THE UNDER-SECRETARY, MINISTRY OF EDUCATION	**2ND APPELLANT**
THE ATTORNEY-GENERAL	**3RD APPELLANT**

And

MUMCY NTOMBI MAZIYA	**RESPONDENT**

Neutral Citation:	*The Teaching Service Commission and 2 Others vs. Mumcy Ntombi Maziya (13/18) [2018]* SZICA *(11) 24th October 2018*
Coram:	**M. Dlamini AJA, T.M. MLANGENI AJA and T.L Dlamini AJA.**
Heard:	**11th October 2018**
Delivered:	**24th October 2018**

Summary

Labour law: *Respondent was dismissed by the Teaching Service Commission for misconduct, then approached the Industrial Court to review and set aside the dismissal on grounds of procedural unfairness. Court dealt with the matter on the basis of both procedural and substantive fairness, and held that her case had no merit and dismissed it.*

Thereafter, she invoked Part VIII procedure whereupon the dispute was unresolved. She then approached the Industrial Court once again, on this occasion alleging both procedural and substantive unfairness.

On the Second occasion she was successful on procedural unfairness und unsuccessful on the substantive aspect. In effect the same court had made contradictory judgments on the aspect of procedural fairness.

On appeal the employer raised the special plea of res judicata, among other grounds, on the basis that in the first hearing the Industrial Court dealt with both procedural and substantive fairness, and thus became functus officio on the matter, hence the second hearing was inconsequential.

In response the Respondent raised waiver, in that by not raising this point at the second hearing the employer was estopped from raising it for the first time on appeal.

Held: *Failure to raise res judicata timeously does not amount to waiver.*

Point of law of res judicata upheld. Appeal upheld, with no order as to costs.

JUDGMENT

MLANGENI AJA.

FACTUAL BACKGROUND

[1] In this matter the Respondent, Mumcy Ntombi Maziya, was employed by the Government as a school teacher. For convenience I may refer to her as Maziya. She was later promoted to the position of headteacher of kaKholwane Primary School and she held this position until August 2007 when she was dismissed by the Teaching Service Commission (TSC), pursuant to a disciplinary hearing.

[2] Thereafter, she instituted proceedings in the Industrial Court to review and set aside her dismissal by the TSC. She also sought reinstatement to the position of headteacher.

[3] At the Industrial Court the application for review was heard by His Lordship Dlamini J. Her grounds of review are captured in His Lordship's judgment at paragraphs 3 to 5 of the judgment.[1] In condensed form, these grounds are that she was denied her constitutional right to a fair hearing by an independent and impartial body, that the principles of natural justice were violated in that the Executive Secretary of the TSC acted as prosecutor and judge at the

[1] Mumcy Ntombi Maziya v The Teaching Service Commission and Two Others (512/2007) [2015] SZIC 26 (8TH June 2015).

same time, that her right to be heard was negated by constant interruptions by the Commission, that no

witnesses were paraded to prove her guilt and that all indications were that the outcome of the hearing was pre-determined – a fait accompli, as it were.

[4] It is clear and needs no emphasis that the challenge was based on procedural rather than substantive grounds. The review process was therefore in order, and the fact that the Honourable Judge properly perceived the nature of the application is to be found at paragraph 13 of the judgment where the following remarks are made:-

> **"…..The critical question for determination by this court …..is whether Mumcy Ntombi Maziya was accorded the right to be heard and to put her defence before the Commission both constitutionally….. and in terms of natural justice?"**

[5] What transpired, however, is that the Honourable Judge embarked upon a detailed and critical analysis of the evidence against Maziya[2]. This analysis includes the findings of a team of investigators from the Examinations Council who made three different visits to the school. On these visits school teachers, students and Maziya were interrogated on separate incidents and the report that was compiled by the team of investigators is described by the Honourable Judge as **"damning"[3].** In response to the damning report, Maziya **"basically admitted to having flouted the procedures as outlined in the Exams Council**

[2] See pages 10-14 of the judgment.
[3] Paragraph 14 of the judgment.

Checklist. It was on the basis of this response that she was then charged for misconduct.[4]"

[6] At paragraph 22 of the judgment there are more momentous observations by the Honourable Judge. He has this to say:-

> **"And from the record of proceedings of the hearing at the TSC what is succinctly clear is that the decision of the TSC to find the Applicant guilty was reasonable in the circumstances …..When given the opportunity to examine this witness (Patience Phumlile Dlamini – Mdluli) the Respondent said '*I know all what she said and I cannot dispute it*'."**

[7] For the avoidance of doubt, I emphatically repeat that although the application was presented as one for review based on procedural issues, what actually transpired is that the court dealt with it holistically – inclusive of both procedural and substantive considerations, and came to the conclusion that Maziya's case had no merit.

[8] Undeterred by Honourable Dlamini J's comprehensive judgment, Maziya then invoked the dispute resolution procedure in terms of Part VIII of The Industrial Relations Act 2000 as amended. The dispute was unresolved and, now represented by a different firm of attorneys, she was back to the Industrial Court for determination of the unresolved dispute. On this occasion the matter served before Honourable Nkonyane J. This court was informed from the bar that on this occasion

[4] Paragraph 19 of the judgment.

Dlamini J. declined to hear the matter, one may needlessly add that rightly so.

[9] This court has not had the privilege of seeing the application for determination of the unresolved dispute, but a reading of the summary of the judgment and the judgment itself shows that the case that was canvassed before Nkonyane J. was in respect of both procedural and substantive considerations of Maziya's dismissal. In this regard I refer to paragraph 4 of the judgment of Nkonyane J. on the matter[5].

> **"4. The Applicant in her papers stated that her termination by the 1st Respondent was unlawful, unfair and unreasonable in all the circumstances……",**

and at paragraph 6 of the judgment His Lordship states that the question to be decided by the court **"is whether or not the 1st Respondent was able to prove on a balance of probabilities that the Applicant was guilty of the charges of professional malpractice and misconduct that she was facing."**

[10] There is every reason to believe that Honourable Nkonyane J. was not aware that when the matter was heard by His Brother Dlamini J. it was dealt with on the basis of both procedural and substantive considerations – i.e. on the merits. This situation is difficult to fathom. For one thing, one would think that a copy of Dlamini J's judgment was in the file, since the same case number was used on both occasions. Or at the very least this could have been brought to the attention of the Court by the Attorney-General's counsel who dealt with the matter on both occasions.

[5] Mumcy N. Maziya v The Teaching Service Commission & Others (512/2007) [2018] SZIC 66 (July 6, 2018).

[11] After a full blown trial, with oral evidence and all, His Lordship Nkonyane J. came to the conclusion that Maziya's dismissal by the TSC was procedurally unfair but substantively fair. On the basis of the procedural unfairness it was ordered that she must be paid a salary equivalent to two months as compensation.

[12] The disconcerting eventuality is not difficult to see. It sticks out like a sore thumb. On the same matter one judge has come to the conclusion that the dismissal was fair and reasonable in all the circumstances, another one at the same level has come to the conclusion that it was substantively fair but procedurally unfair. For those who are trained and have experience in law this may not be totally astonishing, but the truth is that it is most undesirable and should not have happened.

APPEAL

[13] The Attorney-General, acting on behalf of the TSC, has appealed to this court against the subsequent judgment of Nkonyane J. The grounds of appeal relate largely to matters of evidence and findings of fact. In its heads of argument the Appellant has raised, for the first time, the special plea of *res judicata*. This is raised specifically in respect of the procedural aspect, the argument being that since this aspect was dealt with and pronounced upon by Dlamini J, it was improper to again canvass the same issue in the later hearing before Nkonyane J. The inexplicable tragedy is that this was not raised before Nkonyane J, as it should have been.

RES JUDICATA/FUNCTUS OFFICIO

[14] The special plea of ***'res judicata'*** means that the matter at hand has already been decided, it has been adjudicated upon and cannot be raised again[6]. The requirements for this plea or defence are that the earlier judgment was a final one, that the parties are identical in both matters and that the subject matter is identical[7]. The public policy justification for this defence is that it is in the interests of justice that there must be an end to litigation. The other justification is that a litigant should not be vexed twice for the same cause. Where a court has dealt with a matter on the merits and to finality, it is said that the court has become *functus officio,* which means that it should not deal with the same matter again.

[15] There should be no doubt that *res judicata* does apply in respect of the procedural aspect of the matter. That is the avowed basis upon which the matter was presented to Honourable Dlamini J. But then His Lordship did not restrict his analysis to the issue of procedure. As demonstrated earlier on in this judgment, he dealt with the matter holistically and came to the conclusion that the dismissal was reasonable in all the circumstances of the case. On this basis it appears to me that it was competent to raise *res judicata* before Nkonyane J, not only in respect of procedure but in respect of substance as well.

[16] Having not raised the issue before Nkonyane J., is it open to the Appellant to raise this defence for the first time in this appeal court? In other words, by not raising it before Nkonyane J. has the Respondent waived its right to do so, and therefore estopped from doing so? *Res judicata* is a strictly legal concept – either a matter was dealt with and

[6] Per Zondi JA in Transalloys (Pty) Ltd v Mineral – Loy (781/2016) [2017] ZASCA 95.
[7] See note 6 above, at para 22 of the judgment.

finalized or it wasn't. If it was dealt with and finalized, it appears to me that it is not open to one party, through omission, to waive it.

[17] Respondent's counsel, Ms. Dlamini, was adamant that by not raising *res judicata* before Nkonyane J. the Appellant thereby waived the right to do so, and is therefore estopped from raising it at this level. The authority that is offered for this argument is the case of JOHN KUNENE v THE ATTORNEY-GENERAL[8]. One difference between that case and the present one is that the former was about prescription as opposed to *res judicata*, and the two are different not only in form but in their effect as well. Prescription renders a right unenforceable due to lapse of time. In most instances the time bar is imposed by statute, and the same statute often provides for circumstances under which the bar may be lifted. On the other hand, *res judicata* is final in effect in that once a matter has been adjudicated between the same parties there should never be an instance for it to be re-opened, as this would go against the **"once and for all"** rule which has its basis on public policy and fairness. I am therefore not persuaded that the principle in John Kunene can be extrapolated to the present case.

[18] If there is need to point out a further distinguishing factor between John Kunene and the present case, in the former case it was common cause that at the High Court and in the Court of Appeal the live issue was procedural fairness only, not substantive fairness, and it is on that basis that Dunseith J. was of the view (in John Kunene) that *res judicata* did not apply in respect of the aspect of substantive fairness.

[8] (02/16) [2016] SZICA 08.

[19] If anything, the present case demonstrates the need for rigid application of *res judicata* in order to avoid the potential of a court of law arriving at inconsistent or contradictory conclusions on one and the same matter. There is no doubt that this has the potential to put the administration of justice to disrepute.

RESPONDENT'S TERMINAL BENEFITS

[20] Respondent's counsel submitted from the bar that the issue that was placed before Nkonyane J. was that of terminal benefits payable to the Respondent. Well, if that was the case then *res judicata* would certainly not apply. But the real difficulty is that in the judgment of Nkonyane J. there is no mention of terminal benefits. This being a court of appeal, we are not ordinarily allowed to go into a matter that was not canvassed in the *court-a-quo*, not even in the most liberal interpretation of Section 21 (3) of the Industrial Relations Act 2000 as amended[9]. For that reason we are reluctant to make any pronouncement in respect of the Respondent's terminal benefits which are, in any event, expressly provided for in the relevant legislation. The Government of Eswatini is extremely unlikely to refuse to pay to the Respondent what is due to her on account of the dismissal.

[21] We have come to the conclusion that because Dlamini J. dealt with both procedural and substantive fairness, it was not proper for the same issues to be canvassed again before Nkonyane J. Accordingly, the point of law on *res judicata* is upheld with the result that the appeal succeeds. In view of the conclusion that we have arrived at on *res judicata/functus officio*, there is no need to consider the other grounds of appeal that were raised.

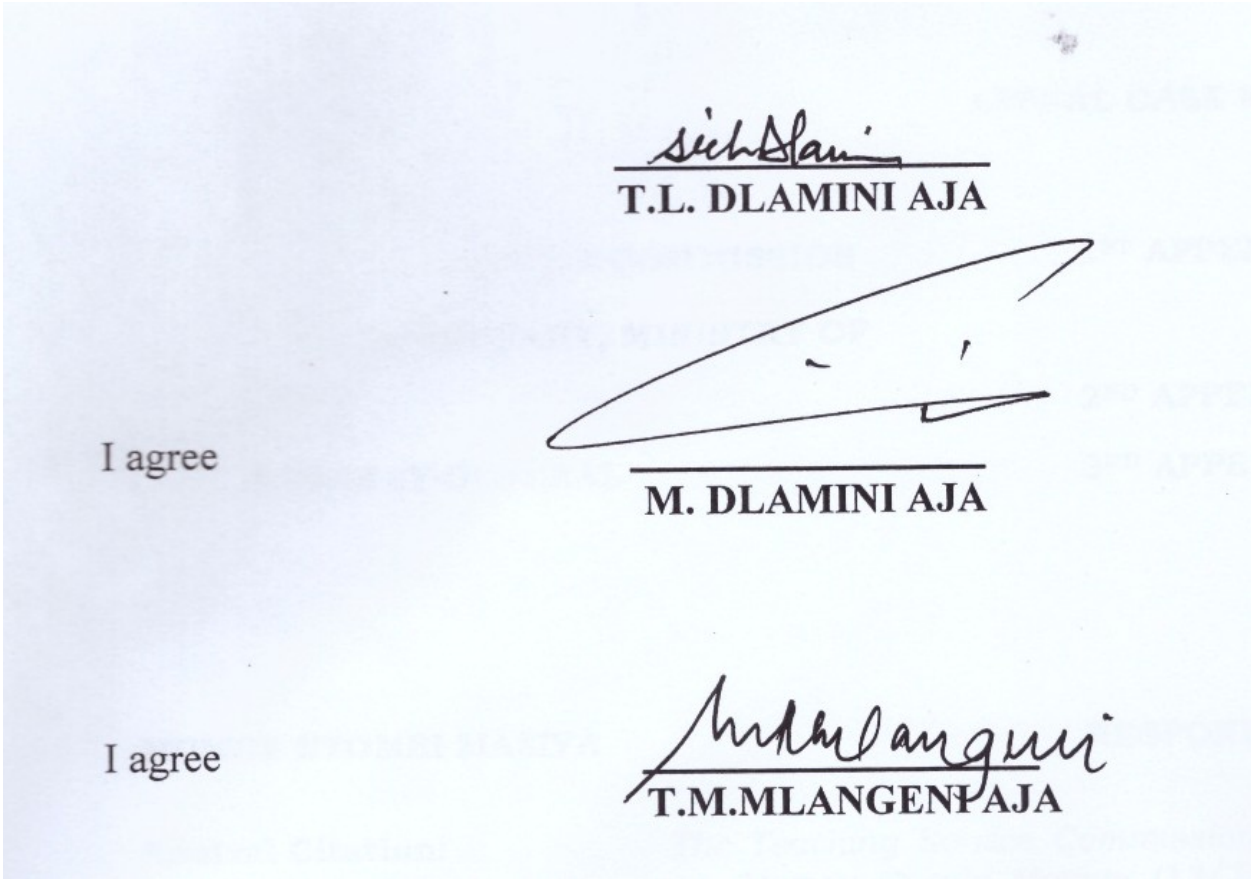
[9] The section empowers this court to confirm, amend or set aside the decision or order against which the appeal has been noted or make any other decision or order including an order as to costs, according to law and fairness.

[22] It was most remiss of the Appellant not to raise *res judicata* before Nkonyane J. For this reason costs are not going to follow the event.

[23] The orders that we make are as follows:-

23.1 The appeal succeeds.

23.2 There is no order for costs.



For The Appellants: Mr. K. Manana

For The Respondent: Ms. Dlamini