INDUSTRIAL COURT OF APPEAL OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO. 17/2017**

In the matter between:

NEDBANK SWAZILAND LTD **APPELLANT**

And

SYLVIA WILLIAMSON **1st RESPONDENT**

SUFIAW **2nd RESPONDENT**

Neutral Citation: *Nedbank Swaziland Ltd v Sylvia Williamson and SUFIAW (17/2017 [2018] SZHC 02 (03/2018)*

Coram: J. Maphanga AJA, J. Magagula AJA, J. Tshabalala AJA

Date Heard: 09/04/2018

Date Delivered: 03/05/2018

Summary Labour Law; *Labour law- employee charged with gross negligence- internal disciplinary proceedings conducted resulting in a finding of guilt and recommendation of dismissal; tribunal's decision subsequently overturned by Chairman of a disciplinary appeal on the sanction; appeal*

tribunal determining final written warning appropriate sanction; employer disregarding Appeal determination and dismissing employee; dismissal challenged on the basis that it constitutes a contractual breach in terms of a provision of a code of conduct incorporated in a collective agreement; whether such constituting a justiciable remedy outside the determination of disputes in terms of Part VIII of the Industrial Relations Act; Application for an interdict and setting aside of letter dismissal constituting an impermissible review application; Industrial Court lacking jurisdiction to entertain review of dismissal decision by employer.

JUDGMENTS

[1] This is an appeal which the Appellant (the bank) has brought against a ruling of the Industrial Court of the 5th October 2017 in terms of which the *court a quo* dismissed a point in *limine* taken by the Appellant in an application brought by the 1st Respondent for the setting aside of a letter of dismissal issued by the Appellant directed at her. To place the matter in a factual context a sketch of the background is called for herein.

[2] At all material time leading to the 1st Respondent's dismissal, the Appellant had been her employer. On the 4th April 2017 the bank constituted a disciplinary tribunal to hear and determine a charge of gross negligence preferred against the 1st Respondent. The tribunal was headed and by an independent (external) chairperson. In the outcome the tribunal made an

adverse finding against the 1st Respondent in terms of which it found her guilty of the alleged misconduct and recommended her dismissal to her employer.

[3] Aggrieved by the finding and the sanction the 1st Respondent exercised her options in terms of the prevalent disciplinary code regulating conduct of disciplinary proceedings of staff at the institution. For purposes of determining the Appeal the bank again appointed an external chairperson to conduct the hearing of the appeal and render his determination. In its conclusion the appeals tribunal confirmed the findings of the disciplinary tribunal on the merits but varied the recommended sanction by substituting it with what it considered an appropriate one in its view. In the event it is common cause that it determined and issued the sanction to be a final written warning.

[4] It is again common cause that the bank upon receiving the findings of the Appeals tribunal was dissatisfied with the outcome. The bank shortly addressed a letter to the 1st Respondent in which, citing several reasons, it disclosed that had rejected the Appeal tribunal sanction. In that letter the bank notified the 1st Respondent that it was imposing its own sanction; the effect of which it was to dismiss her; thus terminating her services. That letter was issued on the 11th September 2017.

[5] This was a momentous point from which the proceedings before the court a quo and the events around which the issues in this appeal revolve. I shall

revert to these issues further in this judgment. They primarily turn on the construction of certain provisions of the disciplinary code applied in the misconduct proceedings the bank prosecuted against the 1st Respondent.

[6] A word about the Disciplinary Code; the pertinent Disciplinary Code and Procedure is document negotiated and agreed between the bank and the 2nd Respondent as a representative industry union in which the 1st Respondent was a member. It is common cause that the said Disciplinary Code had been incorporated into the recognition and collective agreement between the union and the bank and thus formed a part and parcel of the individual contractual terms and conditions of the 1st Respondent as an employee of the bank.

[7] The relevant and material aspects of the code that go into the subject matter and merits of this appeal relating to the status and effect of the rules governing of conduct of appeals from disciplinary proceedings. The key terms appear in clause 2.4.5.1. of the code whose full text of forms part of the record of the proceedings before the *court a quo*, that clause provides as follows:

> ***"If a decision is reached that the employee has been unfairly dismissed and the employee will be terminated or compensated as mutually agreed upon by the parties".***

APPLICATION

[8] On the 20th September 2017 the 1st Respondent launched an urgent application before the court a quo challenging the bank's letter of dismissal. I use the words 'challenge the banks letter of dismissal' reservedly in because it is would be more accurate to say technically she attacked the bank's act of issuing the letter of dismissal as opposed to the content or effect thereof and approached the court for specific relief.

[9] The substantive objective of that relief was in part a declaratory order that the letter of dismissal be declared unlawful void and invalid. By that token the 1st Respondent second of the relief was the setting aside of that dismissal letter.

[10] I come upon an aspect that in my view called for closer examination in the proceedings before the court a quo as indeed it does presently. It concerns the construction or interpretation to be given to the allegedly pertinent provisions of the disciplinary code on which the 1st Respondents case before the Industrial Court was founded. This is so because the primary premis of the 1st Respondents case a quo was that the Appellant had breached a term of the Disciplinary Code (*ergo* a material term) - namely the said clause 2.5.4.1.5 that I have referred to above.

[11] Thus in my view it became imperative and indispensable in the circumstances to consider and examine the wording of the clause – an

exercise in interpretation of a contractual clause. The court appears to have accepted without question that the clause relied on in the code was indeed applicable supportive and pertinent to the 1st Respondents cause as set out in her papers without first having examined its content to ascertain if indeed it bears out the construction relied on by the 1st Respondent.

[12] This is evident from a reading of the remarks of the learned Judge in this regard. I consider it appropriate to the critical conclusions made by the court in to the code. Those appear from paragraph 19 of the judgment as follows:

> ***"19.0 In his answer as regards the question of jurisdiction, Mr Simelane, who appeared on behalf of the Applicant, argued, per contra, that his client was entitled to the relief sought because Applicant had approached Court in order to interdict Respondent from reneging from the terms of the Parties' Recognition Agreement.***
>
> ***20.0 For authorities in this regard Counsel for the Applicant referred the Court to the Lynette Groening v Standard Bank & Another ICA Case No. 2/2011.***
>
> ***21.0 And following the Lynette Groening case, this court is satisfied that the Parties, through their Recognition Agreement did intentionally exclude the power of the Respondent, qua employer, to interfere with the decision of a chairperson, See Clause 2.5.4.1.5 of the Recognition Agreement.***

22.0 We are of the opinion, further that the Agreement is binding upon the parties to the extent that none of them should be allowed to do as they wish whilst they remain in it. Put differently, we are of the opinion that the doors of this court must not be closed to one of the two who finds himself at the mercy of the other.

See: Mbongiseni Dlamini And 4 others V The Swaziland Electricity Company IC CASE No. 138/2017

Also: Swazi Poultry Processors V Swaziland Manufacturing & Allied Workers Union & Another. IC No.454/2013

23.0 And it would appear to the court that in holding Respondent to the strict terms of their contract, Applicant has approached this court not by way of view but in terms of Rule 14 of the rules of this court. That, in mind of the Court cannot be said to be a matter beyond the scope of the industrial court."

[13] The court invoking rule 14 (6) (b) the court found that the application before it brought by the 1st Respondent was not before the Court for review. It is clear that the Court regarded the formulation of prayers in the form of prayers for declaratory orders and for the setting aside of the Appellants actions, a mere matter of style/form than that of substance.

[14] It is necessary to set out the applicable principles of interpretation of contracts here, if to remind ourselves of the relevant aspects herein.

Interpretation of Contracts

[15] The law as to the correct approach to be followed by the courts is fairly settled. It has recently been revisited by the Supreme Court in the case of ***Swazi MTN Limited and Others v Swaziland Posts and Telecommunications Corporation and Another (58/2013) [2013] SZSC 46 (29 November 2013)*** where the court, following the principles in the leading case of ***Firestone South Africa (Pty) Ltd v Genticuro A.G 1977 (4) SA 298 (A)*** *at 30*4 adapted these principle to the specific setting of interpreting court orders.

[16] These principles on the interpretation of contracts are most apposite and applicable here. I am inclined towards the somewhat terse statement thereof by Theron JA in a judgment from the South African case of *Air Traffic and Navigation Services v Esterhuizen (668/2013) 138* at paragraph 9 as follows:

"The intention of the parties, as it emerges from the language used, is the determining factor in problems of contractual interpretation. In North East Finance (Pty) Ltd v standard Bank of South Africa Ltd, Lewis JA stated that a court must examine what the parties intended by having regard to the purpose of their contract. To determine the intention of the parties, the nature, character and purpose of the contract must be

established. This is ascertained from the language used, read in its contextual setting and in the light of any admissible evidence"

[17] That elementary process would seem to have been over looked in the court a quo in the determination of the applicability of the clause cited and applied in the matter.

[18] Applying the above principles it is my respectful view that the above is the correct approach that the court a quo should have adopted in dealing considering the matter before it in relation to the clause relied on in the code.

[19] I propose to consider the contents of the clause in the code hereunder.

RELEVANCE OF THE PROVISION OF THE DISCIPLINARY CODE

[20] In adapting and applying the interpretation rule in the quoted core terms the court would in examining the wording of the provision of the clause been able to determine its true intent purport and effect as well as its relevance to the issues before it.

[21] Clause 2 of the code sets out the framework or the general conduct of disciplinary the proceedings. It is divided into sub clauses dealing with a range of procedural matters including hearings and appeals. Clause 2.5 is dedicated to appeal hearings. Of particular relevance herein is clause 2.5.4 under which the cited clause 2.5.4.1.3 falls as regards scope of application.

[22] That clause It reads as follows (here I reproduce the entire rule – clause in fullness:

> ***"2.5.4 <u>Should all employee fail to at appeal hearing/enquiry after been given timeous notice, the following action will be taken:</u>***
>
> ***2.5.4.1.1 A new appeal hearing/enquiry will be set and the employee accordingly by letter. The letter will state that if the fails to respond or attend, the appeal hearing/enquiry will be held in absentia.***
>
> ***2.5.4.1.2 If the employee fails to attend the appeal hearing should proceed without him;***
>
> ***2.5.4.1.3 Any decision, which will be taken will be advised to the employee in writing;***
>
> ***2.5.4.1.4 The appeal hearing/enquiry will not just review a decision, it will however, re – examine the whole hand from both a substantative and procedural point view;***
>
> ***2.5.4.1.5 <u>If a decision is reached that the employee has been fairly dismissed, that employee will be reinstated or compensated as agreed upon parties.</u>"***

(Emphasis in underscore mine)

[23 It is clear from the wording of sub – clause 2.5.4.1.5 as read together with the rest of the entire clause 2.5.4 that the sub – clause is directed at prescribing an appropriate outcome upon a finding of unfair dismissal where the employee 'has failed to appear before the enquiry'. That is clear from the clause and the associated surrounding provisions.

[24] The sub – clause is also clear unequivocal as to the outcome options an appeal shall apply in the event it determines the employee has been unfairly dismissed. It envisages reinstatement as but one of two options which includes compensation ***"as mutually agreed upon by the parties."***

[25] The qualifying provisions as to the circumstances where clause 2.5.4.1.5 is one of the actions referred to in the preceding provision of 2.5.4 are the words "the following action will be taken. This one gets from an ordinary reading of the clause in the context of the entire code and the purpose thereof.

[26] It was contended by Mr. Simelane who appeared for the Respondents in his written submissions placed before this court that the outcome of the appeal was that, apart from reversal of an recommended sanction of dismissal by the disciplinary tribunal the Chairman determined that the 1st Respondent be handed a final written warning.

[27] It was contended by Mr. Simelane in his written submissions on behalf of the Respondent before this Court that the outcome of the appeal was that, apart from the dismissal outcome being overturned the determination of the appeal was that the 1st Respondent be handed a final written warning. I have not seen any reference to that recommended sanction despite close scrutiny of the text of the decision of the appeal tribunal. That is probably because the text of that decision appears incomplete.

[28] Assuming however that it was indeed issued, it is unclear to me how that can be equated to the prescribed outcome in the code for either 'reinstatement or compensation as mutually agreed upon by the parties'. Certainly this is not what the appeal tribunal in this instance has recommended in the alleged difference to clause 2.5.4.1.5. It escapes me how it can be argued that the Appellant has breached the code by not abiding the appeal decision when that decision itself has not conformed or meted out the stipulated sanction in the form or manner prescribed.

[29] I have not seen any reference in the appeal finding to the effect that the 1st Respondent had been unfairly dismissed. I must say this makes the remarks of the court a quo in this regard somewhat curious if not remarkable. This is what the Court says at paragraph 6 page 4 of its ruling:

> ***"6.0 One other sub-clause which brings an interesting dimension to the matter before us is clause 2.4.5.1.5 which states:***

'2.4.5.1.5 If a decision is reached that the employee has been unfairly dismissed, that employee will be reinstated or compensated as mutually agreed upon the parties"

7.0. From First Applicant's (1st Respondent's) founding affidavit it can be taken for granted, firstly, that the 'higher authority' was constituted by the Respondent in order to sit and dispose of her appeal. Secondly, that the said structure reached a decision that First Applicant was unfairly dismissed"

[30] As indicated I have not seen the expression of a finding of unfair dismissal in the copied excerpt of the appeal decision in the record. However even if that were that case and we can for purposes hereof assume this to be the case, that finding would not be consistent or compatible with either the recommendation of a final written warning. The provision that is oft-cited by the respondent in the code is clearly predicated on a dismissal hence the notion of reinstatement or alternatively compensation 'as mutually agreed'. It certainly would not be in alignment with the wording of the sub-clause 2.4.5.1.5 in the code.

[31] In sum the facts and circumstances of the matter do not bear out the construed effect of the code nor do they support the contentions advanced by the respondents. It is for that reason that I find the assumption by the Court a quo that the Appellant acted in breach of the provisions of clause 2.4.5.1.5 of

the code are insupportable. Consequently I am not satisfied that the Appellant's conduct in rejecting the Appeal tribunal findings and verdict constituted a breach of contractual obligations or a decision to disregard or contravene the clause. I have already said that I am not satisfied in any case as to the applicability of the clause to the facts in the first place. In any event the clause does not state that the Appellant is enjoined to implement whatever decision of the Appeals process made.

[32] It may well be that the Appellant did not follow the letter of the sub-clause but that is a matter a tad removed and distinct from the assertion that the Appeals decision either recommended the action set out in the sub-clause which as demonstrated herein it did not, or that the bank was contractually obliged to follow the Appeal tribunal's recommended action in its exact form.

THIS APPEAL

[33] I now turn to the specific issues raised in this appeal.

[34] The first issue in this appeal turns on whether the Court a quo was correct in its finding that the respondent's application was not a review application and in dismissing the Appellant's point in limine that the Industrial Court lacked the requisite jurisdiction to entertain the application.

[35] Thus there are two interconnected issues or tracks emerging from the first ground:

1. Whether the nature of the 1st respondent's application was essentially one of review; and

2. Whether the relief sought by the Applicant was competent one or one justiciable within the ambit of the court jurisdiction in the form of remedy sought by the respondents a quo.

[36] In context it may be observed here that the essence of the second ground of appeal can best be crystalised as follows: that the court erred, having erroneously determined that he court had the requisite jurisdiction, in finding that the application was not one predicated on unfair dismissal as would engender compliance with Part VIII of the Industrial Relations Act pertaining to the reporting of disputes for such causes.

[37] As a corollary it is inferable from the Appellant's second ground that it seeks to impugn the ruling of the Court a quo on the premise that it erred in finding that the respondents' relief was purely one of enforcement of a contractual provision or obligation and therefore within the purview of the courts power to grant relief in terms of Rule 14 proceedings under the Industrial Court Rules. In this regard the appellation 'specific performance' has been used by the Appellant even though the Court a quo itself did not

use the term. I am prepared to assume for purposes of this appeal that indeed that is what the Court meant.

[38] It becomes evident upon close consideration of the two grounds of appeal that the issues I have articulated and subsumed under the first ground are interlinked with the second ground as well. That is the structure and analysis that I propose to follow henceforth in this judgment.

Whether Application was a Review

[39] The thrust of the Appellant's case originating from the point in limine dismissed by the Court a quo on jurisdiction amounts to this: that regard being had to the form, structure and content of the prayers for relief as set out in the 1st Respondent's Notice of Motion, the 1st Respondent's bore the hallmarks of a review application and therefore leads to the conclusion that the relief sought constitutes the remedy of review. It is premised on certain perceived procedural irregularities and the notion of 'legality'.

[40] To illustrate the point reference is had to the 1st Respondent's prayer in her Notice of Motion a quo in terms of which she sought 'the setting aside of the appellant's letter dismissing her as per Prayer 3 of the Notice. Admittedly that prayer is not prefaced with the conventional phrase 'review" but it contains an exhortation for the Court to 'declare' that letter unlawful irregular null and void and thus of no force and effect. The application seeks to have the letter also set aside on that basis.

[41] In light of the above is seems to me the approach taken by the Court a quo in disregarding the true nature and obvious effect of the application, by charactering the problem as a breach of contract remediable by specific performance or enforcement of a terms of contract is with respect, artificial. For the reasons alluded to and demonstrated earlier upon an analysis of the cited provisions of the disciplinary code this is an untenable position. Clearly the provisions relied on have no bearing on the matter.

[42] There is a second and rather fundamental flaw to the approach adopted by the Court a quo on the jurisdictional issue. It arises from the manner in which the Court avoided the effect of the doctrine in the case of ***Alfred Maia v The Chairman of the Civil Service Commission and 2 Others SZHC Case No. 1070/ 2015*** by seeking to distinguish the circumstances of this case from the import and principle laid down in that case to the effect that the Industrial Court lacks jurisdiction to determine unlawful and unfair dismissal by way of review.

[43] It was Mr. Sibandze's submission that the Court a quo whilst ostensibly acknowledging the authority of the Maia judgment on the jurisdiction question, it ignores and seeks to obviate another critical dimension of that judgment. This aspect may be tersely summarised in the principle as articulated in that case that the dismissal of an employee constitutes a 'dispute' in terms of the interpretation section of the Industrial Relations Act

of 2000, which is only justiciable, like all disputes, by following Part VIII of the Industrial Relations Act 2000 as amended.

[44] In other words, as the argument goes it is not competent for the Industrial Court to entertain a dispute or relief arising out of or in connection with an instance of dismissal of an employee outside of the remedial process and procedure set out in the Act. It was further contented by the Appellant that this is the upshot of the Maia judgment that appears to have escaped the Court's attention.

[45] The Respondent's counter argument is that the Industrial Court was merely exercising its power to grant injunctive relief as provided for under Section 8 (3) of the Industrial Relations Act by staying the effect of the letter of dismissal; that is to say the 1st Respondent was merely seeking the relief of an interdict as opposed to review. It was further contended by the Respondents' counsel, Mr. Simelane, that he 1st Respondent application before the Court a quo was merely one for the enforcement of a binding agreement whilst deferring to the Court a quo's ruling to that effect on that point.

[46] There are two problems with the 1st Respondent's and with respect the Court *a quo's* approach on the above questions. Firstly, nowhere in the Notice of Application filed a quo by the 1st Respondent does she contend for a 'stay' of the effect of the letter of dismissal, even if that were a competent remedy. The only relief sought is a declarator that the said letter is unlawful, nullity

and therefore of no force and effect. What the 1st Respondent seeks is the 'setting aside' of the said letter and not its 'stay'.

[47] Secondly, as pointed out earlier herein the relief is demonstrably not one of enforcement of an agreement. As indicated earlier the 1st Respondent firstly appears to have misconstrued the provision of the code of conduct; which provision is inapplicable to the circumstances and facts as it clearly and unequivocally qualified to be applicable to and regulate proceedings where the employee fails to appear. That is evident from the wording of the code. The breach alluded to is therefore unfounded.

[48] This leads me to what I consider to be the most pertinent and compelling reason why the 1st Respondent's position is untenable. It is that once there has been a dismissal or termination of employment either perceived as 'automatically, procedurally or substantively' unfair, the Industrial Court ultimately retains an exclusive statutory jurisdiction to hear and determined such matters in terms of the procedural and remedial provisions under Part VIII of the Act; its procedural prescripts must be followed.

[49] The Act has provided for and avails the aggrieved litigant who has been unfairly dismissed, a special remedy which include the very substantive relief the 1st Respondent seeks to assert including reinstatement or compensation in the exercise by the Court's discretion following an unfair dismissal. Ironically the finding of 'procedural unfairness' alluded to in the

appeal tribunal finding that the 1st Respondent relies on forms part of the very issues within the jurisdictional remit of the Court.

[50] I must mention that in support of the 1st Respondent's submissions and as authority for the proposition that it is competent for the Industrial Court to grant the relief it did, we were referred to the decision of this Court in the matter of ***Gugu Fakudze v Swaziland Revenue Authority SZICA Case No. 8/2017*** as authority relied upon for the argument that the setting aside of the Appellant's letter was justified. In that case in the judgment of Langwenya AJA, this Court expressed its disapproval for a chairpersons deference to an employer's rejection of her prior recommendation and verdict discharging or absolving an employee from, certain misconduct charges and the employers rejection of that outcome in contravention of clear procedural provisions in a binding disciplinary code. The Court in the SRA case further granted an injunction interdicting an employer from proceeding with certain intended and impending review or the tribunal's decision. The Court pronounced the process the employer had initiated to undo the tribunal's findings to be reviewable and thus set the same aside.

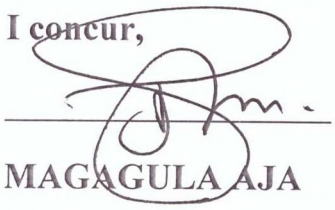
[51] In my view that Gugu Fakudze case and its outcome is not incompatible with the principle set out by the full bench of the High Court in Maia and the doctrine discernible therefrom as regards the jurisdiction of the Industrial Court on the powers of review or lack thereof particularly on any matter attendant on employment disputes. Further it is clear that in the Gugu Fakudze case the circumstances thereof can be distinguished from those in

the instant case in that in the former case the employer had not 'dismissed' the employee but had simply initiated a process of reviewing the tribunal's outcome having indicated an intent to reverse such a decision adversely to the employees interests. In the matter at hand the employee had already been dismissed; her employment terminated thus subject to the remedial options that avail dismissed employees to challenge such dismissal in law.

[52] In the circumstances of this case and having considered the law, it is my decision that on the strength of the authority in the Maia judgment which is binding on this Court, the Appeal has merit and therefore must succeed. It is accordingly upheld. I make no order as to costs.

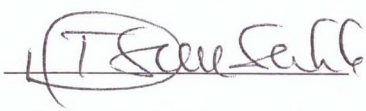
MAPHANGA AJA

I concur,



MAGAGULA AJA

I concur,



TSHABALALA AJA

Appearances:

For the Appellant: Mr. M. Sibandze

For the Respondent: Mr. M. Simelane