# INDUSTRIAL COURT OF APPEAL OF SWAZILAND

## JUDGMENT

**HELD AT MBABANE** **CASE NO. 21/2017**

**In the matter between:**

**DUMSILE R.SHONGWE** **APPELLANT**

**And**

**SWAZILAND NATIONAL PROVIDENT FUND** **RESPONDENT**

**Neutral Citation:** **Dumsile R. Shongwe vs Swaziland National Provident Fund [21/2017] [2018] SZICA 79[2018] (3rd May 2018)**

**CORAM:** **J.S MAGAGULA AJA**

**C.S MAPHANGA AJA**

**D. TSHABALALA AJA**

**DATE HEARD:** **10th April 2018**

**DATE DELIVERED:** **3rd May 2018**

**Summary:** ***Labour law – case dismissed by Industrial court for want of jurisdiction – Appeal Court making factual comments on disciplinary hearing proceedings – whether such comments binding***

***upon Industrial court hearing subsequent application on the same issue – status of such comments.***

**MAGAGULA AJA**

[1] This is an appeal against a judgment of the Industrial Court handed down on the 26th September 2017.

The grounds of appeal are stated as follows:

***1.***

> ***"The court a quo erred in law erred and misdirected itself in finding that the findings of the Industrial Court of Appeal embodied in its written judgment in Case 06/2016 which findings stated that:***
>
> ***"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."***
>
> ***Were not binding in the case before it (Industrial Court case 172/2017) and that such findings constituted non-binding obiter statements of the Industrial Court of Appeal.***

***2.***

***The Court a quo erred in law and misdirected itself in holding that the decision of the Industrial Court of Appeal in case number 06/2016 where latter Court held that:***

> ***" 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 of evidence of commission of the misconduct in accordance with the civil standard applicable in disciplinary hearings."***
>
> ***Was not binding to the Industrial Court when hearing and deciding case 172/2017.***

***3.***

***3.1 While the Court a quo correctly captured the finding of the Industrial Court of Appeal where the latter Court correctly interpreted the Disciplinary Code and summary dismissal should be invoked, and also correctly found that the Disciplinary Code was binding between appellant and respondent, the Court a quo however erred in law and in fact I holding that the DISMISSAL of the appellant cannot be declared unlawful, clearly unreasonable, irrational and without any legal basis.***

***3.2 The Court a quo ought to have found that:***

***3.2.1 The appellant was found NOT GUILTY of the misconduct she was accused of by the respondent in the properly constituted disciplinary hearing in the workplace;***

***3.2.2 In terms of the Disciplinary Code and Procedure of the respondent, which is legally binding on the parties, clause 9.5 provides that:***

> ***" Summary Dismissal***
>
> ***This is used in case 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."***

***3.2.3 The DISMISSAL of the appellant was unlawful, clearly unreasonable and irrational and also not based on any legal basis because the appellant was acquitted on the alleged misconduct.***

***3.2.4 The Court a quo ought therefore to have ordered that the Summary Dismissal of the appellant be set aside."***

BACKGROUND

[2] The Appellant was employed by the Respondent during the year 2007 in its Human Resources Department. She apparently

climbed the hierarchy within this Department until she reached the position of Human Resources Manager.

[3] In October 2014 the Appellant was accused of having committed an act of breach of confidentiality and trust. It was alleged that she sourced her employer's confidential information and transmitted it to the media namely, the Swazi Observer newspaper. She was then charged for the said offence and suspended from work. Thereafter she was invited to a disciplinary hearing which was chaired by an external chairperson, Mr. Muzikayise Motsa, an attorney of the High Court of Swaziland who was appointed by the Respondent. The appellant was also allowed to secure legal representation in the hearing and duly instructed a legal practitioner to represent her.

[4] The disciplinary hearing was conducted and when it was concluded the chairperson found that the Appellant was not guilty and consequently acquitted her of the charges preferred against her. This ruling was made on the 28th October 2015. However on the 29th October 2015 the Respondent dismissed the Appellant from her employment by letter of the same date. The letter reads in part:

> ***" Notwithstanding the conclusion 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 had bestowed to you and your office have eroded. It is unforeseeable how the relationship of employer and employee can continue under such circumstances, for a person holding such a critical office…….***

***On these bases, you are hereby summarily dismissed…"***

[5] The letter of dismissal also informed the appellant that she could note an internal appeal within five days of the dismissal. The Appellant duly noted the appeal which took some months to finalize but was eventually dismissed. The delay was also caused by the fact that during this period there were also some settlement negotiations entered into by the parties which however failed to yield any fruit in the end.

[6] It would appear that during the period when settlement negotiations were proceeding, the period for hearing and finalizing the appeal lapsed. Also in view of the period it took to finalize the settlement negotiations the Respondent became reluctant to pay the Appellant for this period. The Respondent was apparently prepared to pay for the period running from the break down of the negotiations to the date of finalization of the appeal. There was evidently no agreement on these issues.

[7] On the 31st March 2016 the Appellant launched an application in the Industrial Court claiming the following orders:

7.1 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;

7.2 Directing and/or ordering the Respondent to reinstate the Applicant to her employment position of Human Resources Manager forthwith;

**ALTERNATIVELY**

7.3 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.

7.4 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.

7.5 Costs of this application on the punitive scale of attorney and own client.

[8] Sibandze AJ who heard the application observed at paragraph 11.1 of his judgment that:

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

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

[9] The Industrial Court then went on to dismiss the application only in respect of the review of the employer's decision to terminate Appellant's services.

It however granted the prayer for payment of arrear salaries from the date of lodging of the appeal to date of its finalization thereof. The court also directed that the internal appeal be conducted and finalized. The appeal was indeed heard and the result was that it was dismissed and the dismissal of the Appellant confirmed.

[10] The Respondent herein then noted an appeal against the order that it should pay arrear salaries from the date of lodging of the appeal to date of its finalization. It was evidently contending that it is not liable to pay the salary for the period of settlement negotiations. This is Appeal No 6/2016.

[11] The said appeal was heard by the Industrial Court of Appeal on the 26th September 2016 and judgment thereon was delivered on the 14th October, 2016. In the course of its judgment the Industrial Court of appeal which evidently had before it. The

record of the disciplinary proceedings, made comments on that hearing and the findings of the chairperson. One such comment found in paragraph [10] of the judgment reads:

> ***" 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 re – instate her back to her employment in defiance of the Ruling. She was served with a letter of dismissal signed by Micah 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".***

[12] Upon seeing this and some other comments made by the Industrial court of Appeal in its judgment the Appellant decided to instigate fresh proceedings this time starting at the Conciliation Mediation and Arbitration Commission (CMAC) where a Certificate of unresolved dispute was eventually issued upon issuance of such certificate the Appellant then instituted application proceedings by notice of motion in the court a quo. In that application appellant sought orders in the following terms.

***" 1.1 Declaring the dismissal of the Applicant from employment by the Respondent on the 29th October, 2015 as unlawful, clearly unreasonable, irrational and without any legal basis and that such declaration be made in line with the findings of the Industrial Court of Appeal under case No. 06/16 a copy which is attached marked "DRS 1".***

***1.2 ALTERNATIVELY Reviewing and setting aside the decision made by the Respondent against the Applicant on the 29th October 2015 on the ground that such decision is unlawful, unreasonable, irrational and lacked any legal basis.***

2. ***Directing the Respondent to comply with the independent chairperson's findings of NOT GUILTY and specifically that the Respondent be ordered and directed to accept the Applicant back to employment in her position of Human Resources Manager forthwith.***
3. ***Directing the Respondent to calculate and pay the Applicant all arrear salaries and/or monies which the Applicant would have earned and been paid had the Respondent not terminated the Applicant's employment on the 29th October 2015.***
4. ***Costs of this application to be paid by the Respondent on the Punitive scale of attorney and own client……"***

[13] The application is supported by a founding affidavit. The respondent opposed the Application and a full set of papers was

filed. In its opposing affidavit the Respondent raised three points of law in ***limine*** namely, ***res judicata,*** lack of jurisdiction to review and dispute of facts. Suffice it to say that after hearing full arguments from both sides on both the points raised in ***limine*** and the merits of the case, the court a quo upheld the points raised in ***limine*** and dismissed the application. The Appellant then launched the present appeal.

THE PRESENT APPEAL

[14] The appeal is launched on the grounds set out in paragraph [1] hereof. Under the first two grounds of appeal it is contended that the court a quo erred in holding that the findings of the Industrial Court of Appeal in its judgment in cane No. 06/2016 were not binding upon it.

[15] It is common cause that in appeal case No.06/2016, the Appeal Court had not been called upon to adjudicate on the propriety or otherwise of the decision of the Chairperson of the disciplinary proceedings. It had not been called upon to make any findings on that matter. It therefore goes without saying that whatever that court said touching upon that matter was mere comment as opposed to findings. It therefore goes without saying that whatever that court said upon that matter was mere comment as opposed to findings. The court could only make findings if it had been called upon to conduct an enquiry on that matter. The court a quo was therefore correct in finding that those

comments were not finding upon it and correctly dismissed this argument.

[16] All the comments of the Appeal Court sought to be relied upon by the Appellant are based on the facts of the case and what transpired during the disciplinary hearing. They are not a statement of any principle of law. They therefore have no binding effect upon any court. They are mere ***obiter dicta***, which has no binding effect upon any other court.

[17] The Appellant's argument also overlooks the fact that the correctness or otherwise of the findings and decision of the chairman were never an issue before the *court a quo*. The real issue was whether or not the respondent was entitled to intervene in the disciplinary proceedings and substitute its decision for that of the chairperson. Unfortunately the Industrial court never had opportunity to deal with that point since its jurisdiction to hear the application which came in the form of review proceedings was challenged. Having found that it lacks such jurisdiction it dismissed the application for review whilst granting some other ancillary relief which did not have bearing on this point. The appeal court had only been called upon to adjudicate on one of the relief granted ancillary to the main issue before the Industrial court namely, whether the Industrial Court correctly ordered the respondent to pay the Appellant herein arrear salary for the period of duration of settlement negotiations. That is the issue that was before the appeal court and any other comment which it made not relevant to the

determination of such issue was mere comment which had no binding effect upon anyone.

[18] It is trite law that ***obiter dicta*** have no binding effect upon other courts and there are numerous judicial pronouncements in that regard.

In the South African case of EDWARD MBUYISELO MAKHAYA vs. THE UNIVERSITY OF ZULULAND (218/08) [2009] ZASCA 69 (29 May 2009), Nugent JA who delivered the unanimous judgment of the appeal court stated at page 6 paragraph 7:

> ***" It is well established that precedent is limited to the binding basis (ratio decidendi) of previous decisions …..Anything in a judgment that is subsidiary is considered to be 'said along the wayside'(obiter dictum) and is not binding on subsequent courts…."***
>
> ***See also THE DIRECTOR GENERAL OF THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER vs. NANAGA PROPERTY TRUST REPRESENTED BY ITS TRUSTEE FOR THE TIME BEING (4689/2014) (unreported) where Hartle J stated at page 1 paragraph [6]:***
>
> ***" The nature of an obiter dictum is that it does not bind any other court, even lower courts. It is a mere expression of an opinion upon points of law which is***

***not necessary for the decision of the case. At most it is valued as a reasoned statement which may well influence another court in future decisions, but it is not binding on such other courts."***

(see also Jabhay vs Cassiam 1940 TPD 182 at 185)

We accordingly find no merit in the first two grounds of appeal.

[19] Under the third ground of appeal it is contended that:

***" ….the court a quo erred in law and in fact in holding that the DISMISSAL of the appellant cannot be declared unlawful, clearly unreasonable, irrational and without any legal basis."***

We could not come across any such finding in the judgment of the court a quo. This ground therefore lacks factual basis and we accordingly also find no merit in it.

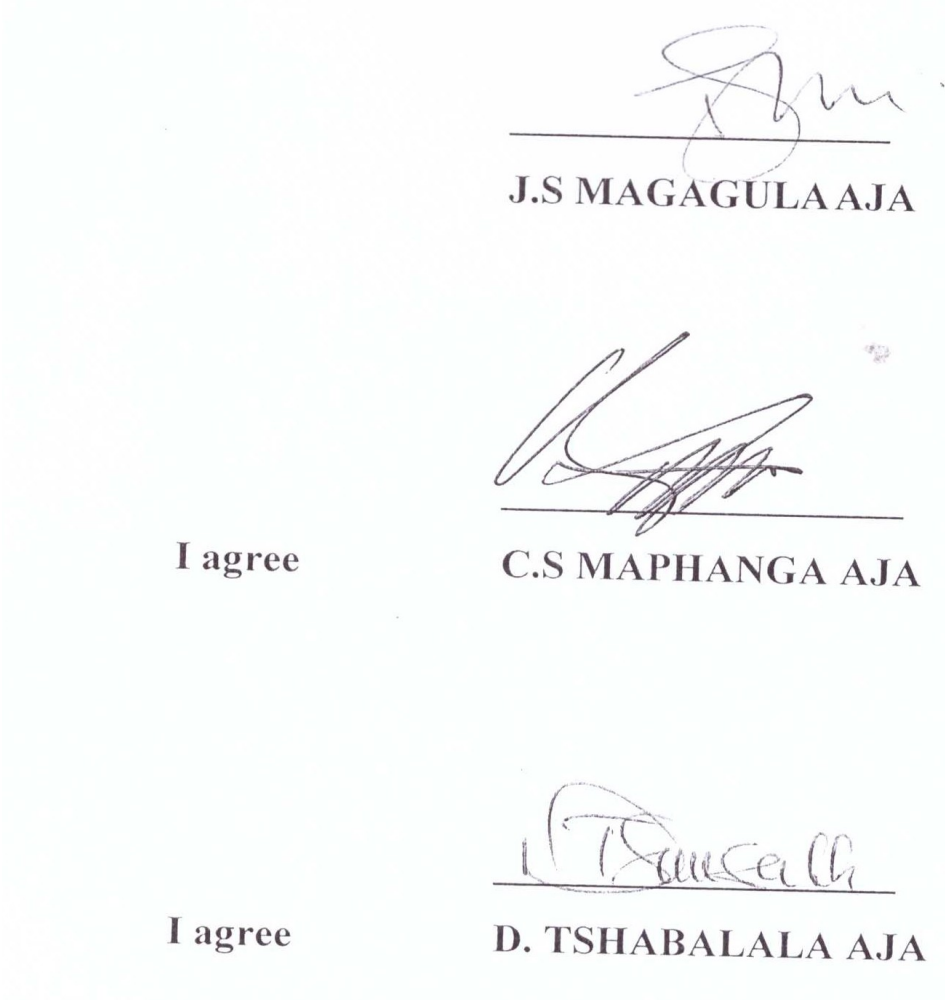
[20] Under grounds of appeal No. 3.2 and 3.2.1 it is contended that

***" The court a quo ought to have found that the appellant was found NOT GUILTY of the misconduct she was accused of by the respondent in the properly constituted disciplinary hearing in the workplace."***

[21] For the foregoing reasons it is our finding that there is no merit in all the grounds of appeal. In the result we make the following order:

21.1 The appeal is dismissed

21.2 There shall be no order as to costs.



J.S MAGAGULA AJA

I agree

C.S MAPHANGA AJA

I agree

D. TSHABALALA AJA

**For Appellant:** **Mr S.M Simelane**

**For Respondent:** **Mr Z.D Jele**