IN THE

INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 9/2018

In the matter between:

THE ATTORNEY GENERAL **Appellant**

And

THULANI MTSETFWA **Respondent**

Neutral citation: *The Attorney General v Thulani Mtsetfwa (9/2018) [2018] SZICA 09 (23 October 2018)*

Coram : M. Dlamini AJA, T.M. Mlangeni AJA, and T.L. Dlamini AJA

Heard : 15 October 2018

Delivered : 23 October 2018

Summary: *An appeal was filed before this court against a judgment of the Industrial Court. The court a quo found in favour of the respondent and held that his dismissal from work was procedurally unfair because he was denied his right to legal representation, and also because he was not afforded the opportunity to appeal the decision terminating his services. The appeal before this court was against the latter finding viz., denial of the opportunity to appeal.*

Held: *That the right of appeal should be provided for by statute.*

Held further: *That there is no appellate structure beyond the Civil Service Commission.*

Held further: *That the award issued in favour of the respondent should be reflective of the extent of violation of the labour laws by the employer and is accordingly reduced from five (5) months to three (3) months compensation.*

The Appeal succeeds

JUDGMENT

[1] Before this court is an appeal against a judgment of the Industrial Court. The court *a quo* held that the respondent's dismissal from work was procedurally unfair because the respondent was denied legal representation, and also because he was not afforded the opportunity to appeal the decision terminating his services.

[2] The appeal was however filed against the finding that the respondent was not afforded the opportunity to appeal the decision terminating his services (dismissal from work). The appeal grounds were crafted as follows:

> **1. The court a quo erred in law in finding that the dismissal was procedurally unfair because the respondent was not afforded an appeal against the decision to dismiss him.**
>
> **1.1 The court a quo ought to have found that the right of appeal is statutory and there is no statute which gives a dismissed civil servant the right to appeal against their (sic) dismissal.**

[3] The respondent was an employee of the Government of Eswatini under the Department of Fire and Emergency Services. On the 6th March 2013 he appeared before the Civil Service Commission (CSC) on four charges of misconduct, namely; gross insubordination, insolence, abuse of a government motor vehicle and absenteeism. Following a conclusion of the disciplinary hearing, the respondent was dismissed from work and the dismissal was communicated to him by letter dated 13 March 2013.

[4] Following the dismissal, the respondent reported a dispute to CMAC as required in terms of Part VIII of the Industrial Relations Act, 2000 (as amended). A conciliation effort by CMAC failed and a certificate of unresolved dispute was issued, after which the respondent applied to the court *a quo* for determination of an unresolved dispute.

[5] In his application to the court *a quo*, the respondent alleged that he was refused with vital documents which were key to the charges he faced, and was accordingly denied a right to meaningfully and effectively prepare his defence. He also alleged that he was refused legal representation and that he was not allowed to cross-examine witnesses who gave evidence against him. He further alleged that the charges and their prosecution were willfully and unreasonably delayed as some dated back to 2005 up to 2011 yet the disciplinary hearing was in 2013, and that upon dismissal he was not advised/ and or was refused his right to appeal despite having applied for an appeal.

[6] After hearing evidence, the court *a quo* held that substantively, the respondent's dismissal was fair. Procedurally, the court held that the dismissal was unfair because the respondent was denied legal representation, and also because he was not afforded the opportunity to appeal the decision terminating his services.

[7] What culminated to this appeal is the finding of the court *a quo* that the respondent was not afforded the opportunity to appeal the decision of his dismissal.

[8] The record of proceedings of the disciplinary hearing reflects that the respondent was accompanied by his legal representatives from Mkhwanazi Attorneys. During the hearing of arguments the appellant's attorney Mr

Vilakati informed the court that the evidence in the court *a quo* showed that the respondent herein was refused the right to legal representation. It is on that basis, in the view of this court, that the finding concerning the refusal of legal representation was not challenged

[9] Mr Vilakati submitted on behalf of the appellant that the right of appeal should be provided for by statute and in the present case there is no provision for appeal against a decision of the CSC. He referred this court to a judgment of the Court of Appeal (now the Supreme Court) in the case of **Swazi Observer (Pty) Limited v Hanson Ngwenya and 68 Others (19/2006) [2006] SZSC 3 (01 May 2006)**

[10] Ms Dlamini submitted on behalf of the respondent that a fair hearing includes the right to appeal. In support of this submission, she referred this court to the judgment in the case of **Themba Phineas Dlamini v Teaching Services Commission (324/2012) [2013] SZIC 21 (09 July 2013)** where the court cited with approval the judgment in the case of **Joseph Sangweni v Swaziland Breweries Ltd, Industrial Court Case No. 52/2003 (unreported)** where it was stated that *"A fair disciplinary process includes the right to appeal to a higher level of management*."

[11] Ms Dlamini also cited several other articles on labour law principles which emphasize the importance of the right to appeal. From these articles it is

however clear that the appeals referred to are those within the management structures of employers.

[12] When asked by the court about which structure was the respondent expected to approach when appealing against a decision of the CSC, Ms Dlamini submitted that it is a constitutional right for the respondent to appeal and the government is therefore enjoined to create a structure to which appeals from decisions of the CSC are to be made. Ms Dlamini referred this court to sections 21 and 23 of the Kingdom's Constitution, 2005. These sections provide for the right to a fair hearing. As pointed out in paragraph [10] above, a fair hearing includes the right to appeal.

[13] It is an incontrovertible fact that there is no other structure within the Public Service to which appeals against decisions of the CSC can be made. In dealing with issues of discipline for public servants, the CSC is the last port of call and a dead end. The finding of the court *a quo* that the respondent was not afforded an opportunity to appeal the decision of the CSC implies that the respondent was to be advised and or allowed to appeal to a non–existent forum.

[14] It was correctly pointed out on the appellant's behalf "*that a right of appeal must be provided for by statute"* **see: Swazi Observer (Pty) Limited v Hanson Ngwenya and 68 Others (supra) at paragraph [11].**

[15] The CSC is established in terms of **section 186 of the Kingdom's Constitution**. The section *inter alia* provides as quoted below:

> **"186. (1) Subject to any other provision of this Constitution, the Civil Service Commission is established and constituted in terms of Part I of this Chapter.**
>
> **(2) The Service Commission may, among other things-**
>
> **(a) …**
>
> **(b) enquire or cause to be enquired into any grievance or complaint whether or not leading to disciplinary action;**
>
> **(c) <u>exercise appellate functions</u>, with power to vary, in respect of certain decisions by persons or authorities exercising delegated powers;" (emphasis added)**

[16] It is therefore clear that in terms of the Constitution, the CSC is also an appellate forum when it comes to matters of discipline within the Public Service. There is no other structure, except for the courts, beyond the CSC.

[17] It is therefore a finding of this court that the court *a quo* was incorrect to find that the respondent was not afforded an opportunity to appeal as there is no other appellate forum above the CSC, except for the courts of law. The appeal is accordingly upheld.

[18] The Court finds it important to also comment on the submission that was made on behalf of the respondent, *viz.*, that the government is enjoined by sections 21 and 33 of the Constitution to establish a forum to which appeals from the CSC are to be made. Firstly, this submission appears to be the

respondent's extension of the finding that was made by the court *a quo.* The court *a quo* never made this finding. It also does not appear, either from the evidence or the record, that there were submissions to the court *a quo* on this argument. As an appeal court, we cannot determine issues that were not canvassed in the court *a quo.*

[19] Secondly, sections 21 and 33 of the Constitution are under Chapter III of the Constitution. In terms of section 35 of the Constitution, the High Court has the jurisdiction to enforce the rights provided under Chapter III. If the intention is to compel government to establish a structure to which appeals against decisions of the CSC are to be made, then this court is the wrong forum. Jurisdiction is vested in the High Court to enforce provisions of the rights stipulated in Chapter III of the Constitution.

[20] The last issue for determination that was raised on behalf of the appellant is the amount of the award to be made in favour of the respondent in the event the court upholds the appeal. The court *a quo* awarded the respondent an amount equivalent to five (5) months' salary. This was in respect of being denied legal representation, and also in respect of being denied the opportunity or right of appeal. This court has however found in favour of the appellant with respect to the denial of the right to appeal.

[21] In submissions, Mr Vilakati argued that a finding in the appellant's favour will reduce the appellant's blameworthiness. He further argued that the

award in favour of the respondent should also be reflective of the reduced blameworthiness on the part of the appellant. As a benchmark of the award to be made, Mr Vilakati referred this court to a judgment in the case of **Mumcy Ntombi Maziya v Teaching Service Commission and 2 Others (512/2007) [2018] SZIC 66 (July 06, 2018)** which appeared before the same Honourable Judge who also presided in the matter that is now on appeal.

[22] In the **Mumcy Ntombi Maziya case (supra),** the applicant was charged with professional malpractice and misconduct. It was stated that she allowed a subject teacher into an examination room to assist pupils with answers. She was then subjected to a disciplinary hearing and was found guilty and dismissed from service. The court found that substantively, the dismissal was fair. Procedurally, the court found that the dismissal was unfair because the applicant was not served timeously with the charges. The court also found that there is no evidence that the respondent was informed of the reasons for the decision. It was further found that the respondent was not afforded the opportunity to appeal, and that there is no evidence that she was given a copy of the documentary evidence used against her. As compensation for the procedurally unfair dismissal, the court awarded her an amount equivalent to two (2) months' salary.

[23] Mr Vilakati submitted that in the **Mumcy Ntombi Maziya case** the employer was found to have committed more (in actual fact four) procedural unfairness acts and the court awarded to the applicant compensation of an amount that is equivalent to two months' salary. He also submitted, in

comparison, that in the present appeal the employer was found to have committed two procedural unfairness acts but awarded the respondent compensation that is equivalent to five (5) months' salary.

[24] The disparity in the amounts of the compensations that were awarded is notably obvious, particularly because both matters were determined by the same Presiding Judge. When asked by the court, both attorneys acknowledged the disparity. Mr Vilakati submitted that an award of compensation equivalent to an amount of two months' salary would be fair. Ms Dlamini on the other hand submitted that they can accept an award that is equivalent to three months' salary.

[25] Having considered the findings of this court and the fact that the court *a quo* is vested with discretionary powers in determining the amount of compensation to award, and the obvious disparity in the amounts of compensation awarded by the same Presiding Judge, the following order is issued:

1. The appeal is allowed with costs;

2. The Civil Service Commission is vested with disciplinary powers over civil servants, and also has the power to exercise appellate jurisdiction in terms of the Constitution, 2005. It is accordingly declared that procedural fairness does not require dismissed civil servants to be afforded an appeal against decisions of the

Commission as it is at the apex of the government's disciplinary forums;

3. The order of the court a quo is substituted for the following order:

   3.1 The 2nd Respondent in the court *a quo* (Government of Eswatini) is to pay the respondent herein compensation equivalent to three (3) months' salary for the procedurally unfair dismissal. That is **E10 458.64** x 3 totaling **E31 375.92**

T.L. DLAMINI AJA

I agree

M. DLAMINI AJA

I agree

T.M.MLANGENI AJA

For Appellant : Mr M. Vilakati

For Respondent : Mr V. Dlamini