THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR2299/14

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS' UNION
obo P M CINDI AND P Z POTSANE **Applicant**

and

SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL **First Respondent**

LUNGILE MATSHAKA, N.O. **Second Respondent**

EMFULENI LOCAL MUNICIPALITY **Third Respondent**

Heard: **11 August 2015**

Judgment: **30 August 2016**

Summary: Application for review in terms of s 145 of the LRA; Applicant contending that the noting of a disciplinary appeal suspended the dismissal of its members; Applicant's understanding of the legal position misconceived; Legal position regarding the noting of a disciplinary appeal restated; Application dismissed with no order as to costs.

JUDGMENT

VOYI, AJ

[1] This is an application to review and set aside an '*in limine* Ruling' issued by the Second Respondent (hereinafter "the arbitrator") on 10 October 2014 under case number GPD 121301.

[2] In his Ruling, the arbitrator dismissed an alleged unfair labour practice claim lodged by the Applicant on behalf of its members, they being Messrs P M Cindi and P Z Potsane.

[3] The unfair dismissal dispute claim was referred to the Second Respondent on or about 9 December 2013 after the Third Respondent stopped remunerating the Applicant's aforesaid members.

[4] The Applicant's members were dismissed by the Third Respondent on or about 14 January 2013 pursuant to an outcome of a disciplinary enquiry issued by one Mr S Roets. They lodged an appeal against the outcome of the disciplinary enquiry.

[5] In terms of recorded minutes of a pre-arbitration meeting held between the representatives of the Applicant and the Third Respondent, the issues to be determined by the arbitrator at arbitration were captured as being (a) whether the Applicant's members were entitled to a salary and (b) whether the Third Respondent had a valid reason to stop the payment of the salaries of the Applicant's members.

[6] The arbitrator records in his Ruling that he had to *inter alia* determine "…*[w]hether or not the Third Respondent's conduct constituted an unfair labour practice when it took a decision in November 2013 to effectively stop paying their salaries in November 2013, pending the outcome of an internal appeal*;…".

[7] The unfair labour practice dispute, lodged by the Applicant on behalf of its members, was premised on a perception that the appeal by the said members stayed the operation of the dismissal which was imposed following the disciplinary enquiry held before Mr S Roets.

[8] The Applicant firmly believes that the noting of the appeal by its members stayed the operation of their dismissal. In the present application, the Applicants asks that the Ruling issued by the arbitrator be altered to *inter alia* read that *"…[a]n appeal stays the operation of a judgment and/or decision of a disciplinary hearing*."

[9] In their heads of argument which were submitted before the arbitrator, the Applicant made reference to the provisions of Rule 49(1) of the Uniform Rules of Court. The Applicant's submissions, on this score, went as follows:

> 'In any event the common law of South Africa which was confirmed by the Labour court in the case of Solidarity and others as well as rule 49(11) of the high court recognises that an appeal stays the execution or operation of an order until the appeal has concluded.'

[10] One of the Applicant's grounds for review is that the arbitrator committed an error "…*in not accepting that the noting of an appeal suspend the operation of a judgment or a decision or the disciplinary tribunal pending the appeal*."

[11] It seems to me that the crisp and dispositive issue for determination in this matter is whether indeed the noting of a disciplinary appeal stays the operation of the decision reached at the disciplinary enquiry. I say this mindful of the test applicable in review proceedings as laid down by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*.[1]

[12] If the arbitrator had accepted the stance that was advanced by the Applicant in relation to the effect of the noting of a disciplinary appeal, his decision would have been totally different.

[1] (2007) 21 *ILJ* 2405 (CC) at para 110.

[13] In as much as what the arbitrator issued is labelled as an 'in limine Ruling', it is in essence an arbitration award issued pursuant to arbitration proceedings held on 15 August 2014. The nature of the dispute that served before the arbitrator was an unfair labour practice as contemplated by s 186(2) of the Labour Relations Act.[2]

[14] There is clear authority on the crisp question raised by the present matter. In *Nchabeleng v University of Venda and Others*,[3] this Court held as follows:

> '[22] An ingenuous contention advanced by the applicant is that the dismissal visited on him on 28 May 2002 is automatically suspended because he noted an appeal against it. In this regard he relies on the common-law rule that the noting of an appeal suspends an order of court. That such is the law in respect of the orders of courts of law is clear from, inter alia, the judgment of Roux J in *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 463F. What the applicant's contention does not give due recognition to, is that this principle applies to orders of court and does not, without more, apply to the decisions of other decision-makers in society. Indeed, this is illustrated in *Leburu v Voorsitter, Nasionale Vervoerkommissie* 1983 (4) SA 89 (W). In that decision Groskopff J considered whether or not an appeal against a decision of a local road transportation board automatically suspended the decision of that board. He held that it did not, the provisions of the governing statute being a clear indication that the common law of automatic suspension would not apply.
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> [23] In my view it is wholly misconceived to attempt to import the doctrine of the automatic suspension of an order of a court upon the noting of an appeal, into the industrial relations environment. It should not be forgotten that a valid lawful dismissal does not incorporate as a matter of law any right to an appeal. A 'right' to appeal flows solely from the practice, endorsed in the LRA Code of Good Conduct: Dismissals, as a ready means by which a procedurally fair dismissal, give the equitable norms promoted under the provisions of the Labour

[2] No. 66 of 1995 as amended ("*the LRA*").

[3] (2003) 24 *ILJ* 585 (LC).

Relations Act, may be proven. The provision of an appeal is confined to the arena of unfairness.

[24] In my view, the notion of the noting of an appeal suspending the effect of an order has no place whatsoever in the law of unfair dismissal.'

[15] The above *dictum* is, in my considered opinion, dispositive of the Applicant's case. The dismissal of the Applicant's members was not and could not have been suspended by their noting of an appeal against their dismissal.[4]

[16] In *Booysen v National Union of Metalworkers of South Africa*,[5] the Labour Appeal Court emphasised the legal position when it held thus:

'When an employee is lawfully, albeit unfairly dismissed, the employment relationship is terminated there and then. (It is true that for the purpose of proceedings in the Labour law realm the necessary fiction is upheld that the relationship continues but that is a legal construct which exists to facilitate equity litigation and does not undermine the finality of the dismissal per se.) Unlike in legal proceedings where an appeal suspends the operation of a judgment, no such doctrine of suspended operation is applicable to a dismissal by an employer.'

[17] In this matter, the arbitrator took the view that there was no employment relationship between the Applicant's members and the Third Respondent by the time their salaries were stopped. On this score, the arbitrator reasoned as follows:

'The important and significant point to note is that Grogan endorses the fact that an employee's protection against unfair labour practice by a particular employer ends with the termination of his or her employment. Therefore, only employees, as defined, may refer disputes concerning unfair labour practice to the appropriate forums. However, an employee who been (sic) dismissed or who

[4] See: *Lugebu v Walter Sisulu University* (1589/2013) [2015] ZAECMHC 3 (29 January 2015) at para 9.

[5] (JA2013/13) [2014] ZALCJHB 161 (13 May 2014) at para 19.

resigned may still claim compensation **for an unfair labour practice perpetrated during the course of his or her employment**.'

[18] As mentioned before, the Applicant's members were dismissed on or about 14 January 2013. By the time their salaries were stopped in or about November 2013, there was no longer an employment relationship between them and the Third Respondent. Their noting of the disciplinary appeal did not serve (and could not have served) to preserve the employment relationship.[6]

[19] There is, in my considered view, no basis upon which to fault the decision reached by the arbitrator in this matter.

[20] The Applicant's understanding of the legal position respecting the effect of the noting of a disciplinary appeal is clearly misconceived.

[21] The application, therefore, stands to be dismissed. There shall be no order as to costs as the application was unopposed.

Order

[22] In the premises, I make the following order:

22.1 The Applicant's application for review is dismissed.

22.2 There is no order as to costs.

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Voyi, AJ

Acting Judge of the Labour Court of South Africa

[6] See: *Bafokeng Rasimone Management Services (Pty) Ltd v Van Wyk* (87403/2014) [2015] ZAGPPHC 87 (26 February 2015) at para 12.

Appearances:

For the Applicant:	Advocate MM Petlane
Instructed by:	BMH Attorneys
For the Respondents:	No appearance