IN THE HIGH COURT OF SWAZILAND

JUDGMENT

In the matter between: Case No.716/2017

AVENG INFRASET SWAZI (PTY) LTD **Applicant**

and

CLEOPAS S DLAMINI **Respondent**

Neutral citation: ***Aveng Infraset Swazi (Pty) Ltd v Cleopas S Dlamini (722/2017) [2018] SZHC 116 (6th June, 2018)***

Coram : M. Dlamini J

Heard : 30th May, 2018

Delivered : 6th June, 2018

Review powers of the High Court over the Industrial Court of Appeal - the Legislature promulgated that any party wishing to lodge an appeal against the decision of the Industrial Court should do so before the Industrial Court of Appeal on a point of law only. However, a party intending to review a decision of the Industrial Court should proceed to the High Court -

- the question whether a litigant has a right to review the decision of the Industrial Court of Appeal to this court lies at the definition of the Industrial Court of Appeal

- the Supreme Court having defined the Industrial Court of Appeal as a specialist tribunal it can safely be said that it is now settled on what the Industrial Court is, a classification which was wanting when Masuku J decided on whether the Industrial Court of Appeal could be categorised as a subordinate court

- The upshot of section 152 of the Constitution is that this court has both revisionary and supervisory powers over all courts falling under section 139(1)(b) of the Constitution. I have demonstrated above that the Industrial Court of Appeal is one of those courts

- Part VIII is headed under the Act, "Dispute Procedure." This heading has nothing to do with whether a matter is fraught with dispute of facts or not

- To sum the position of the law on termination of contracts of employment, it is that the Industrial Court, as much as it holds exclusive jurisdiction on such contracts or matters, it is not ceased with original jurisdiction

- The rationale for this peremptory requirement is that the forums established under Part VIII are firstly composed of labour experts and secondly timelines are defined for purposes of dealing with the cases in a less costly and expeditiously manner

Summary: Under a certificate of urgency, the applicant seeks for a review of the Industrial Court of Appeal's judgement dismissing its appeal. In opposition, the respondent has raised a number of preliminary points *viz*., doctrine of unclean hands; abuse of court process; lack of jurisdiction. The review is also attacked on its merits.

The Parties

[1] The applicant is a legal *personae* duly registered in terms of the laws of this Kingdom and having its principal place of business at Matsapha Industrial Sites in the region of Manzini. Applicant is the employer of the respondent.

[2] Respondent is a Swazi male adult of eKudzeni area, Manzini region. He was employed by respondent and subsequently rose to the rank of Maintenance Manager.

Epilogue

[3] Applicant instituted internal disciplinary proceedings against the respondent in October, 2016 on a charge of dishonesty on allegations that respondent had asked a supplier to increase its charges for services rendered on behalf of applicant. At the end of prosecution, a guilty verdict was entered against respondent and a dismissal penalty ordered. Respondent lodged an internal appeal against both the verdict and the sentence in November, 2016. He won his appeal and the recommendation was that his disciplinary hearing should start *de novo* before another chair. Ironically, applicant's present attorney set as the chair of that appeal. Applicant then suspended respondent on full pay pending commencement of his disciplinary hearing as per the appeal's award.

[4] In January, 2017, the disciplinary hearing commenced. It is deposed by respondent that the chair, amongst other, declined respondent's constitutional right to legal representation. Respondent demanded a postponement in order to review this decision. The chair refused. Respondent decided to excuse himself from the proceedings. The chair proceeded nevertheless and at the end of prosecution, entered a guilty verdict with a dismissal recommendation. Respondent sought redress at the Industrial Court and his review application was successful. The Industrial Court ordered that respondent's disciplinary hearing should start *de novo* before a different chair by its ruling of 24th March, 2017.

[5] Pursuant to the order of the Industrial Court of 24th March, 2017, on 3rd April, 2017 fresh disciplinary hearing commenced against the respondent. The chair was Mr. S. Simelane. Owing to the non-availability of respondent's Counsel, the disciplinary hearing was postponed firstly on the 3rd of April, 2017 and also on the postponed date of 8th April, 2017. The hearing was set down for the 25th and 26th April, 2017 by consent of the parties. It was later discovered that the 25th April, 2017 was a public holiday. On the 26th April, the hearing commenced. While the respondent's attorney was cross-examining the first applicant's witness, the secretary indicated that she was exhausted. The matter was adjourned to 12th May, 2017.

[6] On the 12th May, 2017, the hearing had to be postponed at the instance of the chair and the applicant's witness who were both indisposed. There was therefore no definite date set. Thereafter, the chair authored a correspondence to the parties tendering his apology for his absence on the 12th May, 2017 and directing that the matter would proceed on 25th and 26th May, 2017. Upon receipt of this correspondence, respondent's attorney

wrote to the chair indicating that the dates were not suitable to him and that he would be available on 1st and 7th June, 2017. The respondent deposed that his attorney advised him that he then had a verbal communication with the chair who assured him that the hearing would not proceed on the 26th May, 2017 following that the prosecutor did not confirm that he would be available on that date.

[7] On 31st May, 2017, the respondent was telephoned by the applicant to report to applicant's principal place of business. He obliged. He was given a letter of termination by applicant. After the 31st May, 2017, respondent's attorney was served with a letter authored by the chair, Mr. S. Simelane that he was recusing himself from the disciplinary hearing. According to respondent, this created a further confusion as firstly he was dismissed without the hearing coming to an end and secondly the letter of termination pointed out that the dismissal was based on the findings and recommendation of the chair. This precipitated respondent's attorney to write to the chair requesting for his reasons for the finding and recommendation. The chair, by correspondence refuted any findings and recommendations by him. Neither the applicant nor the prosecutor responded to the demand for the reasons of the ruling which led to the letter of termination, so contended the respondent in his founding affidavit before the Industrial Court.

Respondent's prayers at the Industrial Court

[8] Following the above narration at the instance of the respondent, the respondent rushed to the Industrial Court. His application was registered under case No. 183/17 where he prayed mainly as follows:

"*2.* *Declaring that the termination of the Applicant's* (respondent *in casu) employment by the Respondent on the 30th May, 2017 is grossly irregular, unlawful and null and void.*

3. *Directing that the termination of the Applicant's employment be hereby set aside.*

4. *Interdicting and restraining the Respondent from recruiting another employee to take the Applicant's position of Maintenance Supervisor."*

[9] The applicant opposed the respondent's application on the ground that the Industrial Court had no original jurisdiction to hear the application. The matter was enrolled before the honourable **Nkonyane J** who granted respondent's application. The applicant lodged an appeal before the Industrial Court of Appeal and raised the same ground. The Industrial Court of Appeal dismissed applicant's appeal. The applicant has lodged the present review application.

Applicant's review prayers

[10] The applicant has prayed mainly as follows:

"*2.* *Reviewing, setting aside and correcting the judgment of the second, third and Fourth Respondent under Industrial Court of Appeal case number 16/17 as irrational and grossly unreasonable on the grounds set out in the applicant's founding affidavit.*

3. *Declaring that no reasonable judicial body would have come to the decision made by the second to the Fourth Respondents in the matter referred at paragraph 1 above.*

4. *Staying the execution of the Judgment of the Industrial Court dated the 22nd September under case Industrial case Number 183/2017 pending final determination of this review application.*

5. *Costs of the Application."*

[11] The respondent has raised a number of points *in limine*. These are the doctrine of dirty hands; lack of jurisdiction by this court to review the Industrial Court of Appeal; the judgment of the Industrial Court of Appeal is not suitable for review or rather the grounds raised for review do not fall under review; lack of urgency; and abuse of court process by applicant. I intend to address these points of law *ad seriatim*.

Adjudication

Doctrine of dirty hands

[12] This doctrine of unclean hands could not have been well echoed as it was by their Lordships in the case of **Jajbhay v Cassim**[1]:

"*All writers upon our law agree in this**, no polluted hand shall touch the pure fountains of justice*."

[1] 1939 AD 537 at 551

[13] It is not disputed that by judgment of 22nd September, 2017, the Industrial Court set aside the letter of termination of respondent's employment pending a disciplinary hearing which was ordered to commence *de novo*. The effect of this judgment was that respondent ought to be reinstated to his employment. It is common cause that applicant subsequently lodged an appeal to the Industrial Court of Appeal. Section 19(4) of the Industrial Court Act No. 1 of 2000 as amended (the Act) reads:

> "*The noting of an appeal under subsection (1)* ***shall not stay the execution of the Court's order unless the Court on application, directs otherwise.***" (My emphasis)

[14] In compliance with section 19(4) of the Act, applicant moved an application at the Industrial Court, praying for the stay of execution, pending its appeal before the Industrial Court of Appeal. The honourable Justice **Nkonyane J** dismissed the application for stay on the basis that there was no prejudice to be suffered by the applicant on reinstating the respondent. This decision was later challenged by the applicant before this court. Applicant's challenge was however, dismissed on the very legal doctrine that "*no polluted hand should touch the pure fountains of justice*." The applicant has appealed this decision to the Supreme Court.

[15] In response to the above, the applicant did not deny that it has not complied with the judgment of the Industrial Court dated 22nd September, 2017. Counsel on behalf of applicant submitted on two technical points. Firstly, he contended that section 19 (1) and (4) refers to an appeal. The applicant has not lodged an appeal in the present proceedings but a review. In that regard applicant was not bound by the provisions of section 19(4). It

follows that the reviewed judgment could not be a subject of execution as it is equally not under appeal but review.

[16] This line of argument, with due respect to learned Counsel on behalf of applicant, is flawed. Firstly and foremost, it is trite that when the Legislature provided that an appeal shall not suspend a judgment of the Industrial Court, its intention was that while the matter was pending further determination, the party in whose favour the judgment should enjoy the benefits of that judgment. This is in line with the dictates of labour. Labour matters pertain to bread and butter issues as it is often stated. To await the hierarchy of the machinery of justice to grind to completion while a party has been given by the very machinery of justice a favourable order would be devastating to such a litigant. It is for this reason that Parliament in its wisdom enacted an exception to the common law principle that an appeal automatically suspends execution of a judgment. To assert that the provision of section 19(4) are inapplicable to a review would be to defeat the very intention of the Legislature.

[17] Secondly, one needs to draw an analogy to what transpires in this court. A litigant who is dissatisfied with a judgment of this court, may either lodge an appeal or file a review. In both instances, the judgment of this court is automatically stayed. The rationale for the automatic stay is not just the concept “appeal” or “review” but that the litigant has “challenged” the decision of the court. Similarly, in the Industrial Court when a litigant, whether he challenges its judgment by means of an appeal or review, it is immaterial in so far as the end result are concerned. In either circumstance the judgment is described as “impugned” once exposed to an appeal or a review. Now to seek to draw a distinction between an appeal and a review for purposes of ascertaining whether section 19(4) is applicable or not is

tantamount to splitting hairs, an untenable position in law. The key focus for purposes of section 19(4) is that the judgment is "challenged" and this could be either by appeal or review. Thirdly, when the review application served before me, that the Industrial Court's judgment was still effective following that the Industrial Court of Appeal dismissed applicant's appeal thereby confirming the decision of the Industrial Court. It follows therefore that the provision of section 19(4) were still haunting applicant. He could only allay it by purging its contempt.

[18] Applicant raised a second point of peremptory. It was held that following the challenge on the very Industrial Court's judgment, it was imperative that the applicant should avoid complying with it in order to avoid any allegation of acquiescence. The submission was that it was untenable to comply with a judgment on one hand and on the other challenge it.

[19] The position that a party cannot approbate and reprobate at the same time is part of our law. However, in the present case, it must be borne in mind that when the applicant complies with the Industrial Court's judgment, the defence on acquiescence cannot sustain because the applicant would be complying with a provision of the law. It cannot be said therefore that the applicant complied out of his own volition in order to sustain the defence of acquiescence.

[20] On the basis of the above, I indicated to applicant's attorney that I was bound by the doctrine of unclean hands and unless applicant tendered to purge its contempt, I was not prepared to entertain applicant's application. Learned Counsel on behalf of applicant then entered an undertaking to pay all wages due to the respondent as if reinstated from date of judgment of the Industrial Court.

Jurisdiction:

[21] In support of his submission that this court has no jurisdiction to review a decision of the Industrial Court of Appeal, learned Counsel on behalf of respondent referred this court to section 21(4) of the Act. In *contra* learned Counsel for the applicant cited section 152 of the Constitution.

[22] It is imperative at this stage to ascertain whether this court firstly, has jurisdiction to review the decision of the Industrial Court of Appeal. If the answer is positive, the second question relates to the quorum. Should it by a single Justice or a full bench?

[23] I must point out from the onset that the plethora of cases that have served before this court for review emanated from the Industrial Court and not the Industrial Court of Appeal. In this regard there is scanty, if any at all, precedent on the question of jurisdiction by this court for review of the Industrial Court of Appeal's decisions. The reason is not very far off to fathom. Litigants were so guided as it was contended by **Mr. L. Simelane** on behalf of respondent by section 21(4) of the Act. Section 21(4) provides:

> "*The decision of the majority of the judges hearing an appeal shall be the decision of the Court* ***and such decision shall be final."*** (My emphasis)

[24] I agree with learned Counsel for the respondent that following that matters of employment relate to the livelihood not only of the employee-employer but both his nuclear and extended family, there should be limited forums for litigation. Curtailing litigation forums translates into having labour issues disposed of expeditiously. To extend the jurisdiction on such matters

beyond that of the Industrial Court of Appeal would therefore have negative economic results not only upon the employee-employer as an individual or his family but also the country as a whole.

[25] It is well to sum up that labour matters are an integral part of commerce. Commercial and legal scholars, together with renowned jurists agree that, "*Commerce (finance) is the life blood of society."* It is imperative therefore that the legal axiom, "*There must be an end to litigation,*" must apply with greater vigour on labour matters. The effectiveness of this legal parlance on "*end to litigation"* depends also largely on the number of litigation forums. Obviously, the wider the hierarchy of litigation, the deeper the litigants have to dig into their pockets and the narrower the effectiveness of the principle calling for matters to be disposed of with expediency. At the end, the repercussions are a weak economy. Holding a similar view **Masuku J**[2] articulated:

> "*One of the unfortunate ramifications of reviewing I.C.A decisions would be that the channels open to dissatisfied litigants would first be too long, too costly and also result in a considerable delay…"*[3]

[26] One can safely conclude that it is the above scenario that influenced the wisdom of the Legislature when it so promulgated under section 21(4) of the Act that a decision of the Industrial Court "*shall be final*." The use of "*shall,*" in terms of our general canons of interpretation is peremptory. **Browde JA,**[4] adjudicating on the question whether this court has jurisdiction to review the decisions of the Industrial Court, concurred

[2] In Matiwane v Industrial Court of Appeal and Another (NULLL) [2000] SZHC 26 (08 March 2000) at page 12
[3] N[1] at page 12 para 3
[4] In Memory Matiwane v Central Bank of Swaziland [2000] SZSC 23 (13 December 2000)

entirely with **Masuku J**'s decision, firstly, that both the Industrial Court and the Industrial Court of Appeal were courts *strict sensu*. Secondly, that unlike the Industrial Court which the honourable Justice classified as a subordinate court, the Industrial Court of Appeal did not fall under that category. In this sense, the High Court had revisionary jurisdiction over the Industrial Court but certainly not over the Industrial Court of Appeal. **Masuku J** so held after rejecting Counsel's submission that the Industrial Court and the Industrial Court of Appeal were specialised tribunals and therefore this court had revisionary powers over them. **Browde JA** then drew the following excerpt from **Masuku J's** decision:

> "*What is abundantly clear therefore is that the Legislature gave jurisdiction to the High Court to review the decisions of the Industrial Court only. Had Parliament intended to extend that power to reviewing the proceedings, decisions or orders of the Industrial Court of Appeal, it would have expressed its intention in clear language. What transpires therefore is that Parliament intended the Industrial Court of Appeal to be the last port of call in all industrial matters and with its decisions becoming final."*[5]

[27] Their Lordships[6] relied heavily, *inter alia*, on section 104(1) of the repealed Constitution. It provided:

> "*The High Court shall be a superior court of record and shall have –*
>
> *(a) Unlimited original jurisdiction in civil and criminal matters;*
> *(b) Such appellate jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland;*

[5] N[4] at page 4
[6] Honourable Masuku J and Browde JA

*(c) Such revision jurisdiction, additional to the jurisdiction mentioned in paragraph (c) as may be prescribed by **or under any law** for the time being in force in Swaziland."*[7] (My emphasis)

[28] **Masuku J** in his wisdom, proceeded to make a search on "*any other law*" and discovered section 11 of the Industrial Relations Act No. 1 of 1996. He defined this Act as "*that established the I.C.A."* The learned Justice meticulously quoted the entire section 11 as follows:

(1) There shall be a right of appeal against the decision of the Court on a question of law to the Industrial Court of Appeal.

(2) The Industrial Court of Appeal, in considering an appeal under this section shall have regard to the fact that the Court is not bound by the Rules of evidence or procedure which apply in civil proceedings.

(3) A decision, or order of the Court shall at the request of any interested party, be subject to review by the High Court on grounds permissible at common law.

[29] The learned Justice proceeded to point out section 2 of the 1996 Act on the definition of Court:

[7] N[2] at page 10

*" 'Court' means the **Industrial Court** established under Section 4 **and the Industrial Court of Appeal** established under Section 17."*(My emphasis)

[30] On the above, His Lordship concluded:

"*The context of Section 11 referred above makes a clear distinction between the two Courts. "Court" in the various sub-sections of Section 11 refers to the Industrial Court and the I.C.A. is referred to as the Industrial Court of Appeal. What is abundantly clear therefore is that the Legislature gave jurisdiction to the High Court to review the decisions of the Industrial Court only."*

[31] On appeal, honourable **Browde JA** found this judgment to be impeccable. The appeal was dismissed.

[32] Learned Counsel on behalf of applicant **Mr. Z Dlamini** pointed out that the judgment so cited above was before the advent of Act No. 1 of 2005 (the Constitution). The question for determination therefore is, "Did the Constitution change the position of the law as espoused by the learned Justice **Masuku J** and confirmed by the Appeal Court under the able hand of honourable **Browde JA**?

[33] I must point out from the onset that I need not reinvent the wheel as the above question was well canvassed by **Hlophe J**[8]**.** I intend to add my flare to honourable **Hlophe J's** judgment.

[8] Ezulwini Municipality and 3 Others v Presiding Judges of the Industrial Court of Appeal and 3 Others (661/16) [2016] SZHC 214 (21st October, 2016)

[34] Before paying attention to the **Ezulwini Municipality** decision by **Hlophe J**, I must refer to a judgment of the Court of Appeal, which was deliberated and delivered after the commencement of the Constitution. The Supreme Court set as a full bench to deliberate on whether that court had jurisdiction to entertain an appeal from the Industrial Court of Appeal. His Lordship **Browde AJP** wrote the unanimous judgment and held:[9]

> *"It should not be surprising, therefore, that although the Constitution was gazette in July, 2005, the finality of the Industrial Appeal Court's decisions was left untouched when the Act was amended in certain aspects in September 2005. The esoteric nature of industrial problems led not only to the creation of the special Industrial Court, but also to the Industrial Court of Appeal with its exclusive jurisdiction to hear and determine appeals from that special court."*[10]

[35] In essence, the Supreme Court as per **Browde AJP** espoused that the Supreme Court has no powers to interfere with the decisions of the Industrial Court of Appeal post the constitution era. It appears to me however, that the position that the High Court has jurisdiction to review the decisions of the Industrial Court only was maintained even after the advent of the Constitution.

[36] A close analysis of **Masuku J's** decision reveals that **Masuku J** referred to section 104 of the repealed Constitution and correctly concluded that the High Court had power to review decisions of subordinate courts. The

[9] Swazi Observer (Pty) Limited v Hanson Ngwenya and 68 Others Appeal No. 19/2006
[10] N[6] at page16 last para

learned Justice quoted section 4 (1) of the High Court Act No. 20 of 1954 as follows"

> "*The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Swaziland, and if necessary to set aside or correct the same."*[11]

[37] From the above section, the learned Justice then concluded:

> "***The above in my view is the power set out in the Constitution and the law then in force at the commencement of the Constitution. According to the above Section, the High Court can review proceedings of subordinate courts of justice in Swaziland. The subordinate courts of justice have not been defined in the High Court Act, nor in the interpretation Act 21 of 1970. That notwithstanding, it is however clear that the use of the word "subordinate court" in legal parlance in Swaziland is normally associated with Magistrate's Courts. This is apparent when one has regard to the Magistrate Court's Act 1938. <u>The reference to subordinate court of justice in Section 4(1) must in my view be regarded to refer to Magistrate's Courts. I am again of the firm view that the I.C.A cannot be regarded as an inferior court of justice within the meaning of Section 4 (1) above and I hold that it is not</u>.***[12]

[38] The above conclusion to me form the *ratio decidendi* of the entire judgment by **Masuku J**. Once he established that the Industrial Court of Appeal is

[11] N[2] at page 9
[12] N[2] at page 9

not a subordinate court although by inference he held that the Industrial Court was such a Court, the only reasonable conclusion was to hold that this Court has no review powers over the Industrial Court of Appeal. This leads me to **Hlophe J's** judgment whose *ratio decidendi* revolves on the same question on the nature of the Industrial Court and its appellate court.

[39] Before turning to **Hlophe J's** decision, I must point out that I shall not delve much on **Appeal No. 19/2006**[13] for a number of reasons, *inter alia*, that it is a matter that served from the Industrial Court of Appeal straight to the Supreme Court. It was an appeal and not a review. Besides that I am bound by it, I totally agree with its decision that the Supreme Court has no appellate jurisdiction over the Industrial Court of Appeal as section 21(4) provides that the Industrial Court of Appeal's majority decision is final. I must emphasise that it is final following an appeal. An appeal to the Industrial Court of Appeal must comply in terms of section 19 of the Act which provides:

> "***Right to appeal or review***"
>
> *(1)* *There shall be a right of appeal against the decision of the Court* ***on a question of law to the Industrial Court of Appeal****.*
>
> *(2)* *The Industrial Court of Appeal, in considering an appeal under this section, shall have regard to the fact that the Court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings.*
>
> *(3)* *An appeal against the decision of the Court to the industrial Court of Appeal shall be lodged within three (3) months of the date of the decision.*

[13] N[9]

(4) The noting of an appeal under subsection (1), shall not stay the execution of the Court's order unless the Court on application, directs otherwise.

(5) ***A decision or order of the Court or arbitrator*** *shall, at the request of any interested party, be* ***subjected to review by the High Court on grounds permissible at common law****.*

[40] Clearly from the above, the Legislature promulgated that any party wishing to lodge an appeal should do so before the Industrial Court of Appeal on a point of law only. However, a party intending to review a decision of the Industrial Court should proceed to the High Court. In brief, the Industrial Court of Appeal has no jurisdiction to review decisions of the Industrial Court. Its jurisdiction is to deal with appeals and in exercise of such powers, the Industrial Court of Appeal shall have final jurisdiction. The question left open is, "What should happen where a party serving before the Industrial Court of Appeal wishes to review and not appeal that decision? Again, it is my humble view that the answer lies on what is the Industrial Court of Appeal. **Masuku J** held that it was not a subordinate court. He justified his finding by stating partly:

> "*At the moment, the Justices of the I.C.A. are three High Court Judges, including the Honourable Chief Justice. Exercising the inherent power would require a single Judge of the High Court where he considers it fit to overturn a decision of three of this Brethren, including the Chief Justice. In other division in South Africa, and common sense dictates that is should be the other way round i.e. three Judges reviewing a decision of one of their Brethren. I dare say that an argument that sitting as Justices of Appeal the High Court Judges are cloaked with different apparel as it were and*

> *are sitting in a different capacity is only superficial and does not sufficiently address the realities of the situation.* ***It is necessary****, in company law parlance,* ***to pierce the "Judicial veil****", to see who exactly sit as Justices of the Industrial Court of Appeal."*[14]

[41] In other words the honourable Justice was also influenced by the composition of the Industrial Court of Appeal in holding that it was not a subordinate court. He did so by piercing what he termed as the "*Judicial veil*," having borrowed same from company law, "corporate veil."

[42] **Hlophe J** was very much alive to the question on the nature of the Industrial Court of Appeal. He appreciated that any answer on the recourse by a dissatisfied litigant at the Industrial Court of Appeal who intended to file a review, must first lie on the classification of the Industrial Court of Appeal itself. In other words, the question whether a litigant has a right to review the decision of the Industrial Court of Appeal to this court lies at the definition of the Industrial Court of Appeal. **Hlophe J** expressed this view as follows from the onset of his judgment:

> "*This matter brings into sharp focus the status of the Industrial Court of Appeal vi-a-vis the High Court; the real question being whether or not a decision of the Industrial Court of Appeal can be taken on review to the High Court, particularly since the advent of the Constitution of the Kingdom of Swaziland in 2005*."[15]

[43] **Hlophe J** then referred to section 139 which reads:

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[14] N[2] at page 12
[15] N8 at para 1

"*The Judiciary*

139(1) The Judiciary consist of –

(a) the Superior Court of Judicature comprising –

(i) The Supreme Court, and

(ii) The High Court;

(b) such specialised, subordinate and Swazi courts or tribunals exercising a judicial function as Parliament may by law establish."

[44] Following that the Industrial Court and its appellate court were not classified under section 139(1)(a) as a "*Superior Court of Judicature,*" it followed that both courts fell under the same section but under (b). In other words, the drafters of the Constitution clearly dispelled any doubt which was pointed out by **Masuku J** when he stated that there was no legislation defining the Industrial Court of Appeal. Put differently, we now know from the Constitution under section 139(1) that the Industrial Court and the Industrial Court of Appeal fall under category (b) of the Judiciary. This category is referred to as specialised tribunals despite that they are referred to as Courts in their enabling statutes.

[45] **Hlophe J** pointed out that their classification was so held by the Supreme Court.[16] In the **Abel's** case, **Farlam JA** writing the unanimous judgment, albeit as an *obiter dictum*, had the occasion to point:

"The Industrial Court of Appeal, if the matter should come before it in due course, will be well equipped to consider this aspect of the

[16] in Abel Sibandze v Stanlib Swaziland (Pty) Ltd and Others Supreme Court Case No. 57/2009

case, in view of ***the fact that it is a specialist tribunal*** *established to hear appeals in industrial matters, from which no further appeal lies to this Court:"* (My emphasis)

[46] In brief, the Supreme Court having defined the Industrial Court of Appeal as a specialist tribunal, it can safely be said that it is now settled on what the Industrial Court is, a classification which was wanting when **Masuku J** decided on whether the Industrial Court of Appeal could be categorised as a subordinate court. Section 139(1)(b) ranks it in that category.

[47] Having ascertained that the Industrial Court of Appeal, just like the Industrial Court falls under category (b) of section 139(1), the next question is, "Does the High Court have jurisdiction to review the Industrial Court of Appeal?" This calls for an enquiry on the jurisdiction of the High Court. Section 151 of the Constitution provides:

"*Jurisdiction of the High Court*

151 *(1)* *The High Court has*

(a) *unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution:*

(b) *such appellate jurisdiction as may be prescribed by or under this Constitution or any law for the time being in force in Swaziland;*

(c) *such revisional jurisdiction as the High Court possesses at the date of commencement of this Constitution; and*

(d) such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland.

[48] Turning to section 151(1)(c) such revisional jurisdiction as prescribed by the "*High Court may possess at the date of commencement of this Constitution*," is found for purposes of the case at hand under section 19(5) of the Industrial Relations Act No. 1 of 2000 (the Act). That section refers however to the Industrial Court and is silent on the Industrial Court of Appeal. This section does not take the matter any further therefore as we are currently concerned with the Industrial Court of Appeal and not the Industrial Court. The question therefore is, "Is there any other law which empowers the High Court to review the decision of the Industrial Court of Appeal?" Put in the language of the Constitution itself following that the laws on labour matters are silent on the revisional jurisdiction of the High Court over the Industrial Court of Appeal, one must proceed to look at section 151 subsection (1)(d), *viz*. "Is there '*such additional jurisdiction prescribed by or under any law for the time being in force in Swaziland'* (eSwatini)?"

[49] The answer to the immediate above question lies under section 152 of the Constitution itself. It prescribes under the main heading, "*Jurisdiction of the High Court"*:

> "*The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction issue orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers."*

[50] The upshot of section 152 of the Constitution is that this court has both revisionary and supervisory powers over all courts falling under section 139(1)(b) of the Constitution. I have demonstrated above that the Industrial Court of Appeal is one of those courts. **Hlophe J** eloquently articulated on the rationale behind section 152 of the Constitution as follows:

> "*It suffices for me to observe it may not have been erroneous on the part of the Drafters of the Constitution to insist on the Industrial Court of Appeal having its decisions reviewed if one considers the fact that even the highest court in the Land, the Supreme Court, had its decisions subject to review where appropriate, even though by the same Court."*[17]

[51] Having so held, **Hlophe J** then concluded on the issue of revisional powers of the High Court:

> "*The reality may be how such a review is to be conducted, that is, should it be by a single Judge or by a full bench of the High Court given that it would be reviewing a judgment by three Judges who qualify to be Supreme Court Judges. I think all there would be are matters for the Chief Justice to look into, as Head of the Judiciary and, as guided by the interests of Justice in each case*."[18]

[52] I must point out that this question on the quorum of this court boggled my mind when I sat over the present matter. I did adjourn the proceedings to consult with the Chief Justice who gave me a go ahead.

[17] N8 at para 40 page 25
[18] N8 at para 46 page 29

Are the grounds raised by applicant reviewable?

[53] In its founding affidavit, applicant asserted as its gist ground for review:

> "*The Industrial Court of Appeal acted unreasonably and irrationally in holding that Rule 14 of the Rules of the Industrial Court gives the Industrial Court powers which are contrary to section 16 of the Act and Part VIII of the same. I wish to state that no reasonable Industrial Court of Appeal Tribunal would reach such a decision and interpret rules of Court as if they are superior to legislation*."

[54] It is settled law in our jurisdiction that the list for review is inexhaustible. One of the enquiries is whether the *court a quo* did apply its mind to the issues at hand. Where for instance it is alleged that the *court a quo* considered irrelevant facts and ignored relevant ones, such would be a ground for review. In the present matter, I understand the applicant to be saying that the *court a quo* considered irrelevant rules over relevant legislation. My duty under review is to ascertain the veracity of such allegations at the instance of applicant. In this way, I hold that the present matter is appropriate for review.

Urgency

[55] On the question of urgency as a *point in limine*, I consider that such legal point has been overtaken by events. This is because on the 11th May, 2018 when the matter was first enrolled before me, Counsel on behalf of respondent applied to be granted indulgence to file its papers. The applicant did not oppose this application. By so applying and the court granting its application, the matter ceased to be urgent. After all respondent's main bone of contention was that he was given short notice to

file its papers. For this reason I make no findings on urgency as the point is now moot and courts of law do not ordinarily deal with academic matters. I say ordinarily because I am much alive to **Yacoob J** and **Mandlanga AJ's** judgment to the following:

> "*Even though a matter may be moot as between the parties in the sense defined by **Ackermann J**, that does not necessarily constitute an absolute bar to its justiciability. This court has a discretion whether or not to consider it."*[19]

Abuse of Court

[56] In support of this point of law, the respondent submitted as per his heads of arguments:

> "*On the 2nd November 2017 the Applicant brought an application before this Honourable Court under Case No. 1687/17 for review of the dismissal by the Industrial Court of its application for stay of execution of the judgment in issue. The review application was dismissed by this Honourable Court on the 3/11/2017 on the ground that the Applicant was coming to Court with dirty hands. It had not complied with the judgment delivered on 22nd September 2017. The Applicant has now brought the present application to the same Court fully aware that it has not yet complied with the judgment delivered on the 22nd September 2017*."

[57] From the above, the crust of respondent's contention is that applicant was still in court not having purged its contempt. This point is intertwined with the doctrine of dirty hands. I have already indicated above that applicant undertook to purge its contempt. I must point out that the parties appeared

[19] Independent Electoral Commission v Langeberg Municipality 2000 (3) SA 925

before me on 4th June, 2017 where by their consent, the applicant undertook to pay half of the amount due not later than 7th June, 2018 and the balance by the 5th July, 2018. I indicated that as this amount was in respect of arrear salaries following that applicant ought to have complied with the orders of 22nd September, 2018, it follows therefore that this payment is regardless of the outcome of the present application serving before me. Should the matter eventually be decided in favour of the applicant, applicant shall in due course be advised on the appropriate recourse in law.

Merit

[58] The main bone of contention raised on behalf of the applicant is that *the court a quo* considered the Rules of Court and ignored the provisions of the enactment to the effect that the first port of call by a party in a labour matter is CMAC. The respondent however, submitted to the contrary by pointing out that the *court a quo* was fully aware of the procedure but treated the respondent's application as one falling outside the category of cases appropriate for CMAC by virtue of their exceptional circumstances.

Issue

[59] From the parties' contentions, the question for determination is whether the *court a quo* did apply its mind to the issues before it. Did it ignore relevant circumstances and considered irrelevant ones?

Determination

[60] The *court a quo*, in pointing out the issue before it stated:

> "*The question is whether or not in the circumstances the court a quo was entitled to hear and determine the matter without it first having followed the procedure laid down in Part VIII of the Industrial*

Relations Act 2000 as amended. This is actually the first ground of appeal and in this ground the appellant states:

> *'The Court a quo erred and misdirected itself in law by making a determination of unresolved dispute without following the procedures laid down in Par VIII of the Industrial Relations Act of 2000 as amended.'*[20]

[61] With due total respect to the *court a quo*, the question for determination was incorrectly captured from the onset let alone that the *court a quo* had misdirected itself by making determinations which were not before it. Paragraphs 13, 14 and 15 of the impugned judgment bears testimony to that. What was before court in terms of the quoted paragraph 18 of the *court a quo'*s judgment, was not whether the Industrial Court ought to have followed the provisions laid down in Part VIII of the Act as can be gleaned from the wording ***"without it first*** *having followed the procedure laid down in Part VIII of the Industrial Relations Act 2000 as amended.* The issue for determination was well captured by the applicant as quoted by the *court a quo* at its paragraph 18 and that was that the Industrial Court ought to have declined to entertain the matter on the basis that the respondent had not followed the provisions of Part VIII of the Act.

[62] This glaring misunderstanding of the issue led to the *court a quo* in its next paragraph to make a determination which was completely out of the contentions outlined by the applicant as quoted by the *court a quo* at its paragraph 18. In its quest to determine whether the Industrial Court ought to have followed the procedure laid down in Part VIII, the *court a quo* then turned to Rule 14 (1) of the Industrial Court Rules of 2007 and cited as follows:

[20] See paragraph 18 of the impugned judgment

"*Where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of notice of motion supported by affidavit.*"[21]

[63] From the above Rule, it then concluded:

"*The above cited rule is clearly designed to give the court some <u>discretion to determine whether a matter should be referred to the procedure laid down in Part VIII of the Act or dealt with through motion proceedings. The court will be guided by the existence or non-existence of foreseeable material dispute of fact."</u>*

[64] Having reached the above conclusion, it then stated:

"***In casu*** *the crisp issues for determination were whether the 26th May 2017 had been fixed by the Chairperson of the disciplinary inquiry and whether or not the chairperson ever concluded the hearing and made a recommendation for dismissal of the Respondent.*

As demonstrated above these issues were easily determinable from the papers filed in court. No further evidence was needed to prove such. It is abundantly clear <u>ex facie</u> the papers filed that no proper hearing, if any was held at all, on the 26th May 2017 and that the chairperson never made a finding nor a recommendation pursuant to the hearing."

[21] See paragraph 19 of impugned judgment

[65] No wonder the *court a quo* then proceeded to refer to Plascon-Evans case for the guiding principle on whether a matter is fraught with dispute of fact or not. It concluded that the respondent's case could be decided on motion proceedings.

[66] Needless for me to highlight that when the applicant in the *court a quo* raised as a ground for appeal which was correctly cited by the *court a quo* that: "T*he Court a quo erred and misdirected itself in law by making a determination of unresolved dispute without following the procedures laid down in Par VIII of the Industrial Relations Act of 2000 as amended,'*[22] called upon the *court a quo* to make a determination on whether the respondent was entitled to bring proceedings before the Industrial Court without having first to appear at CMAC. Part VIII is headed under the Act, "*Dispute Procedure.*" This heading has nothing to do with whether a matter is fraught with dispute of facts or not. All that the Legislature provided for under Part VIII was the different forums a litigant intending to challenge its dismissal would have to resort to first before filing an application before the Industrial Court. To associate the heading of Part VIII of the Act with the Plascon- Evans Rule as it were was a misdirection resulting in gross miscarriage of justice to the applicant which calls for a review and setting aside of the judgment.

[67] The *court a quo* did however, deal with the question of jurisdiction in the following manner:

> "*As regards lack of jurisdiction the court a quo found that it had such jurisdiction in the circumstances since internal processes were incomplete. Respondent was contending that he had not been given*

[22] Para 18 of court a quo's judgment

the results of the hearing and therefore had not exercised his right to appeal. The disciplinary process provided for by the Appellant in its establishment was not finalized. The court was intervening merely to direct that the internal processes should first be exhausted so that the Respondent exercises his right to appeal. The court was not reviewing the decision of the employer as such, it was saying let it be exercised at the right time, that is, after completion of the disciplinary hearing. In or view the court a quo correctly intervened in the matter for this purpose. "

[68] From the above excerpt, I understand the *court a quo* to be saying that because the respondent came to court and based his prayers on circumstances whose effect were that the internal proceedings were not completed and therefore there was no need for the respondent to comply with the provisions of Part VIII of the Act but could come to the Industrial Court direct for redress. I say this because it must be understood that when the applicant raised the issue on jurisdiction, it was still pursuing its point on the failure of the respondent to follow Part VIII of the Act.

[69] **Mabuza PJ**[23] articulated a similar question on whether the respondents were obliged to comply with the provisions of Part VIII of the Act as follows:

"*The first ground of review is that the Industrial Court did not have jurisdiction to deal with an Application that effectively sought to set aside a termination of services without there having been an*

[23] See Swaziland Electricity Company v Mbongiseni Dlamini and 7 Others (722/2017) [2017] SZHC 271 (30 April 2017) at page 9 paras 19 and 20

adherence to the peremptory provisions of Part VIII of the Industrial Relations Act."

[70] In the case serving before **Mabuza PJ** the Industrial Court had found that it had jurisdiction by virtue of the existence of exceptional circumstances in that the termination challenged was not final following that the applicant had created an irregular and grossly unjust procedure *viz*., the applicant had substituted the chair recommendation of a fine and suspension with termination and that "*this sham of a process was still on-going making it perfectly in order for the Industrial Court to intervene, there being exceptional and peculiar circumstances that justify the waiver of the provisions of Part VIII."*[24]

[71] The learned Justice meticulously held:

> "*In the present matter, the Respondents did not follow the peremptory requirements of Part VIII of the Industrial Relations Act, and accordingly the Court did not have jurisdiction to deal with the termination of the Respondents' services. The Industrial Court does not sit as a court of review of an employer's decision to terminate the services of an employee. It must conduct its own enquiry into the lawfulness, fairness and appropriateness of the termination, only once there has been compliance with the peremptory requirements of Part VIII of the Industrial Relations Act.*[25]

[72] The learned Justice highlighted further:

[24] See para 22 of N[22]
[25] Para 27 of N[22]

"*The Industrial Court both in terms of the Industrial Relations Act and its own rules, did not have jurisdiction to entertain the matter. By assuming jurisdiction that it did not have, the court a quo committed an error of law which gave rise to a reviewable irregularity. It assumed powers that had been specifically excluded by the enabling statute. The Industrial Court as a creature of statute, does not have original jurisdiction, but can only act within the confines of the Industrial Relations Act*."

[73] From the above excerpts by the honourable **Mabuza PJ,** it is clear that the Industrial Court's jurisdiction is, after the employer has terminated the services of its employee, to hold its own enquiry and assess the evidence upon which the employer relied upon to terminate the services of its employee with a view to ascertaining whether the termination was justifiable in the circumstances of the evidence presented before it and not the disciplinary hearing or tribunal as the case may be. It is not to ascertain whether the procedures following the termination were justiciable in law. That is a question reserved for the structures created under Part VIII of the Act by reason that the Industrial Court is not a review court. Questions for instance on whether the dictates of natural justice were complied with would call for a review of the internal structures of the employer and this must first lie within the ambit of the forums established under Part VIII of the Act. In as much as in its inquiry, it considers both the procedural and substantive aspect of the termination of services, it cannot be a court of first instance in such matters. To sum the position of the law on termination of contracts of employment, it is that the Industrial Court, as much as it holds exclusive jurisdiction on such contracts or matters, it is not ceased with original jurisdiction. The first port of call for a litigant in seeking redress for termination of his contract of employment is to approach the structures

described under Part VIII of the Act. The rationale for this peremptory requirement is that the forums established under Part VIII are firstly composed of labour experts and secondly timelines are defined for purposes of dealing with the cases in a less costly and expeditious manner. The Industrial Court would be inundated with labour cases were the provisions of Part VIII not peremptory.

[74] **Maphanga AJA**[26] in upholding the point on lack of jurisdiction, eloquently articulated on the position of the law where a litigant challenges his termination of the contract of employment:

> *"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 (sic) such matters in terms of the procedural and remedial provisions under Part VIII of the Act; its procedural prescripts must be followed."* (My emphasis)

[75] I appreciate the principle that the Industrial Court may entertain a litigant who has not followed the provisions of Part VIII provided the litigant established exceptional circumstances. *In casu*, the Industrial Court justified its decision to grant the respondent audience on the basis that there were exceptional circumstances. The *court a quo* did not interrogate this

[26] In Nedbank Swaziland Ltd v Sylvia Williamson and SUFIAW (17/2017) SZHC sic (SZICA) 02 [2017] (03/2018) at para 48

finding except that it agreed with the view of the Industrial Court on the presence of exceptional circumstances. Adjudicating on the question of exceptional circumstances, **Farlam JA**[27] with reference to **Ogilvie Thompson JA**[28] pointed out:

> "*While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained… In general, however, it will hesitate to intervene; especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress by means of review or appeal will ordinarily be available.*" (My emphasis)

[76] In the determination on whether there were exceptional circumstances, one must first have regard to the term "exceptional circumstances." This term is associated with a peculiar or one of its kind circumstance. In the words of **Farlam JA** (*supra*), it refers to a "*rare case where grave injustice might otherwise result or where justice might not by other means be attained*."

[77] It is apposite to highlight that in the present case that firstly, there was nothing peculiar or rare in the respondent's allegation that the letter of termination was based on unterminated disciplinary proceedings. The Industrial Court would bear testimony to this that almost every second

[27] N[15] at paras 10 and 11
[28] In Wahlhaus v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A)(

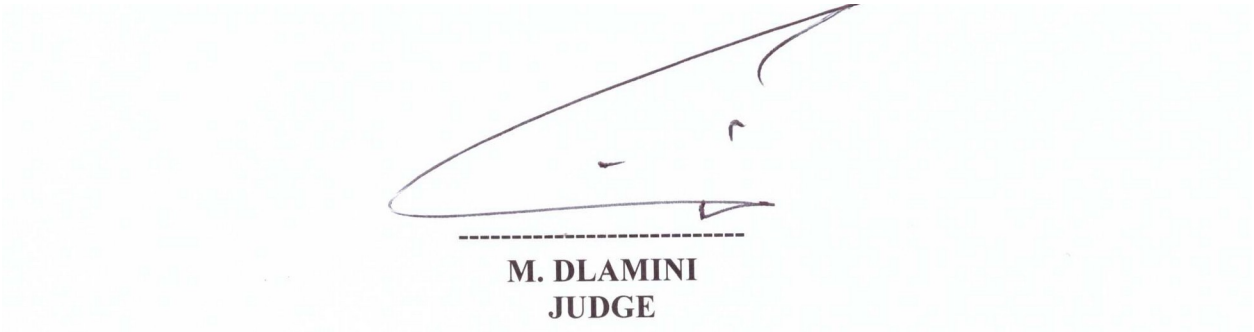
litigant challenging its termination of the contract of employment would alleged that the proceedings have not terminated in one way or the other. Secondly, the allegation by respondent that the disciplinary hearing had not been terminated was challenged by the applicant. It called for a determination and this consideration was to be before the structures envisaged under Part VIII of the Act as demonstrated above. Thirdly and foremost, as well propounded by **Farlam JA**, there was no enquiry or allegation on why the respondent would not have redress before the structures under Part VIII of the Act. In brief, there were no exceptional circumstances warranting the Industrial Court to intervene in the respondent's case thereby bypassing the provisions of Part VIII of the Act.

[78] In the analysis, I see no justiciable reason why the *court a quo* deviated from the above well-reasoned judgments on the point on jurisdiction by the Industrial Court. The prayers by the present respondent before the Industrial Court were to have the letter of termination of his services dated 31 May, 2017 set aside for an alleged irregularity by the employer on the basis that the disciplinary hearing were incomplete. This allegation was challenged on behalf of applicant. The Industrial Court lacked the requisite jurisdiction to entertain such a matter without compliance with the provisions of Part VIII of the Act. The respondent's application ought to have been dismissed on this point. The Industrial Court of Appeal ought to have applied the same principle of law as in the Nedbank's case.

[79] Having reached the above conclusion, I must clarify that the applicant having tendered to purge its contempt which commenced on 22nd September 2017, it ends on the date of judgment of this present review application following that the outcome is in applicant's favour.

[80] In the final analysis, I enter the following orders:

1) Applicant's review application succeeds;
2) The order of the Industrial Court of Appeal is substituted to read: The appeal is upheld.
3) Applicant is ordered to purge its contempt by paying respondent arrear salary as per the consent order of 4th instant viz. 50% by 7th June, 2018 and balance by 5th July, 2018
4) No order as to costs.



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