IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.2/00

In the matter between:

SECRETARY TO CABINET 1st APPELLANT

PRINCIPAL SECRETARY 2nd APPELLANT

(PRIME MINISTER'S OFFICE)

SWAZILAND GOVERNMENT 3RD APPELLANT

VS

BEN M. ZWANE RESPONDENT

CORAM: : BROWDE J A

: STEYN J A

: BECK J A

FOR THE APPELLANT: : MS. V.D. WALT

FOR THE RESPONDENTS: : MR. DUNSEITH

JUDGMENT

Steyn J A;

Respondent sought an order in the High Court declaring his interdiction by the Appellants unlawful and consequently null and void. He also sought a similar declarator in respect of an interdiction in terms of which his salary was reduced by half. Consequential relief; viz, the refunding of all

the deductions made from his salary in terms of the interdiction and costs of suit were also claimed. The order sought was granted by the High Court (Sapire CJ presiding) and it is the granting of this Order which was the subject matter of this appeal.

Both in the High Court and before us the Appellants raised a point in limine, challenging the jurisdiction of the High Court to hear the matter. In this regard the Appellants contended that by virtue of the provisions of the Industrial Relations Act, 1 of 1996 which was in force at the time the only Court which had jurisdiction to hear the matter was the Industrial Court.

In so far as it is relevant Section 5(1) of the Act reads as follows:

"The (Industrial) Court shall have exclusive jurisdiction to hear, determine and grant appropriate

relief in respect of an application, claim or complaint or infringement of the provisions of this Act, an employment Act, a workmen's compensation Act, or any other legislation which extends jurisdiction to the Court in respect of any matter which may arise at common law between an employer and employee in the course of employment, or between (collective bodies)"

The question of the respective jurisdictions of the Industrial Court and the High Court in terms of these provisions was the subject of a considered but unreported judgment of this Court in NXUMALO AND OTHERS V. ATTORNEY GENERAL AND OTHERS; APPEAL CASES 25,28,29 and 30 of 1996.

This Court, per Tebbutt J A, (Kotze and Browde J J A concurring) said the following at page 15 of the judgment:

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"Sapire A C J found that the Industrial Court had jurisdiction "to the exclusion of all other courts" to deal with "what may loosely be referred to as "labour matters" inelegantly defined in the section, where Labour Law would be applied. Broadly speaking Labour Law is to be understood as the common law of master and servant as expanded and otherwise modified by Industrial Legislation.

For the reasons set above, this, in my opinion, is not the position created by the Industrial Relations Act. It confines the Industrial Court's jurisdiction solely to those matters set out in the Act, to those disputes which have run the gauntlet of the disputes procedure, and to those issue arising from the other legislation specifically set out in Section 5(1), Having regard to the principle that in order to oust the jurisdiction of the ordinary courts, it must be clear that the legislation intended to do so and that any enactment which seeks to do so must be given a strict and restricted construction, it is in my view clear that save for the specific provisions mentioned, Section 5(1) does not disturb the common law of master and servant.

The present claims by the appellants are ordinary common law claims made by an employee against an employer for payment of wages allegedly unlawfully withheld from him or her. The reason for the employer's having done so may flow from a strike but that does not bring the matters within the jurisdiction of the Industrial Court or make them ones properly before the Court."

Ms. van der Walt who appeared for the Appellants conceded, in my view correctly, that the High Court was bound by the decision in Nxumalo's case. She urged us, however, to find that it was wrongly decided and that we should not follow it.

Counsel could not point to any fallacious reasoning by the Court in its judgment. Neither could she advance any convincing reasons why or grounds upon which this Court should depart from the views expressed in Nxumalo's case concerning the respective jurisdictions of the two courts (the Industrial and the High Court) to hear matters involving industrial

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disputes. As was pointed out by Mr. Dunseith the judgment was not only well-reasoned but was also enriched by reliance on decisions in the House of Lords in England, by previous judgments of this Court per Isaacs J and Dunn J, as well as a judgment in the Botswana Court of Appeal and decisions in other Commonwealth countries that had created specialist courts to deal with industrial disputes.

I am therefore of the view that not only should we not depart from the decision in Nxumalo's case, but that it was correctly decided.

As indicated above it was common cause that, should I hold as set out above, this Court would be obliged to find on the facts in casu that the court a quo was correct in holding, as it did, that it was the appropriate Court to adjudicate upon the dispute.

I should point out however that the Industrial Relations Act No.1 of 1996 has been repealed by the provisions of the Industrial Relations Act No.1 of 2000. One of the changes that has been brought about in the new Act is the deletion of the words "any matter properly brought before it including..." As can be seen from the terms of the Nxumalo judgment, it was infer alia the use of these words by the legislature that motivated the court to decree as it did. It is not necessary or advisable for this Court to comment on the effect of this and other changes to the Act save to say that they will undoubtedly have an impact on the jurisdiction of the High Court to hear industrial disputes in matters falling under that Act. It was common cause that the present appeal was not one that was to be decided in terms of its provisions.

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I come to deal with what was referred to as "the merits" of the matter. The court a quo granted the relief sought inter alia because the appellants had not afforded the Respondent an opportunity to be heard before interdicting him. Appellants challenged the correctness of this decision. It was contended on their behalf that the relevant legislative enactments did not in casu oblige the authorised official who decreed the interdiction to grant the respondent a hearing. In order to determine the validity of the challenge I summarise the facts.

On 5th February the first Appellant addressed a letter to the Respondent which concludes as follows: "In view of this gross misconduct on your part, permission has been obtained from the Principal Secretary of Public Service and Information to interdict you and you are hereby interdicted from the performance of your duties in terms of &.O. A929."

(The misconduct complained of, in essence, was failure by the Respondent to attend meetings with the Prime Minister.)

General Order A929(1) reads as follows:

"If a Head of Department considers that an officer shall be interdicted from the performance of his duties because of alleged misconduct, he shall make a full report to the Principal Secretary, Ministry of Public Service recommending the interdiction of the officer, and the amount of salary (being not less than one half of the officer's normal emoluments) which shall be paid to him during the period of interdiction. After due consideration of the recommendation the Principal Secretary shall direct accordingly."

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On 11th February 1999 the second Appellant addressed a letter to the Respondent requiring him to exculpate himself as to why disciplinary action should not be taken against him. (The misconduct complained of was the same as stated above.)

On 2nd March 2000 the Respondent, through his attorneys, responded to the above letter in writing and demanded that the interdiction be lifted. On his behalf a detailed explanation for his absences was advanced.

On 24th March 1999 the second Appellant addressed the letter to the Respondent commencing as follows:

"Further to my letter of the 11th February 1999 I wish to inform you that your interdiction is in terms of the Public Service Act, Act 34 of 1963(1) Clause 39 subsection (3) of the Public Service Act, Act 34, 1963(1) your emoluments will, from the 11th February 1999, be half the normal emoluments until such time as the disciplinary proceedings have been concluded."

The following should be noted:

The reference to the "Public Service Act" is a reference to the Civil Service Board (General) Regulations, contained in Act 34 of 1963(1).

Regulation 39(1) reads as follows:

"If the Prime Minister considers that the interest of the service requires that an officer should cease forthwith to exercise the powers and functions of his office, he may interdict him from the exercise of those powers and functions, if disciplinary proceedings are being taken or are about to be taken or if criminal proceedings are instituted against him."

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Regulation 39(3) reads as follows:

An officer who is interdicted shall, subject to Regulation 38(4), 38(5) (criminal charges) receive such emoluments, being not less than one half of his normal emoluments as the Prime Minister thinks fit.

It is apparent from the brief summary of the various attempts at interdiction by the Appellants that they relied on different enactments to validate their executive disciplinary actions. Prima facie it would seem to me that there was only one interdiction that should be considered. This is the first interdiction in terms of the letter of the 5th February 1999. It was common cause that this interdiction was null and void. The officer who purported to exercise the power to interdict the Respondent was not authorised to do so. Counsel for the Appellants was therefore obliged to rely on subsequent interdiction(s), and on the enactments that purported to authorise those disciplinary steps.

It was her contention that Regulation 39(1) makes provision for the cessation of an officer's exercise of the powers of his office (his interdiction) forthwith. This would in her submission mean without first hearing the person affected by the administrative decree such as the Respondent in casu.

Ms. van der Walt sought to distinguish the decision in MHLAULI V MINISTER OF HOME AFFAIRS AND OTHERS 1992(3) SA 635(S.E.) relied on by the Chief Justice on the ground that the statutory instrument in that case did not empower the authorised officer to act "forthwith." (See also MULLER AND OTHERS V CHAIRMAN,

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MINISTERS' COUNCIL, HOUSE OF REPRESENTATIVES, AND OTHERS 1992(2) SA 508©.

As indicated above I am of the prima facie view that the only relevant interdiction was that which was purported to have been exercised in terms of General Order A929 which contains no power

to act "forthwith." However, in view of our decision which follows hereunder, it is not necessary for us to decide whether any of the subsequent attempts at interdiction superceded the first and were properly authorised. I proceed therefore to determine whether the statutory instruments in casu - including Regulation 39 - either expressly or by implication exclude a "right to be heard." In saying this, I rely on and adopt the approach of Corbett CJ in ADMINSTRATOR TRANSVAAL AND OTHERS V TRAUB AND OTHERS 1989(4) SA 731 (A) at 748, (G - H), when the Court held as follows:

"The maxim expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter) unless the statute expressly or by implication indicates the contrary."

In Muller's case (supra) and in dealing with the implications of a public service officer's suspension (in that case without pay) the court, per Howie J, says the following:

"Such suspension unquestionably constitutes a serious disruption of his rights. The implications of being deprived of one's pay are obvious. The implications of being barred from going to work and pursuing one's chosen calling and being seen by the community round one to be so barred, are not so immediately realised by the outside observer and appear, with respect, perhaps to have been

underestimated in the Swart and Jacobs cases. There are indeed substantial social and personal implications inherent in that aspect of suspension. These considerations weigh as heavily in South Africa as they do so in other countries."

The learned Judge goes on to say:-

"The Swart and Jacobs cases concerned other statutes but those enactments were not significantly different..." The Court then found that those cases (Swart and Jacobs cases) were wrongly decided.

The Court in the Mhlauli case (per van Rensburg J) agreed with the judgment in the Muller case and held in casu that the Legislature did not intend to deny a right to a hearing prior to suspension and that the interests of fairness demanded a hearing before an officer is suspended.

An interdiction whether on full, half or no pay, does indeed have serious implications for an employee so interdicted. The stigma and, where relevant, the deprivation of all or some of his salary would continue until either uplifted or until the employee is exonerated by a disciplinary enquiry or at the end of criminal proceedings. There are often lengthy delays between the interdiction and such enquiry or proceedings with the ongoing resultant prejudice to the person affected by the interdiction.

On the other hand there could well be circumstances in which the conduct of the employee complained of e.g. is:.

1. Of such a nature as to require his immediate suspension pending an investigation. Thus e.g. a case involving an allegation of theft or fraud and where an investigation into the existence of documentary or other evidence is required, it may well be that the employee concerned may have to be suspended without a hearing pending such an investigation. In

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such a case, however, such an employee may well, depending on the circumstance be given a hearing after the interdiction. In any event and even in such a case, if the disciplinary process is delayed unreasonably and the prejudice sustained is not ameliorated by - where possible - a transfer to some other suitable post - a hearing should be afforded.

2. Is of such a nature that his presence pending disciplinary proceedings would be so prejudicial or disruptive as to merit his immediate interdiction. Thus, for example, summary suspension with pay may not be unfair if the employer has a reasonable apprehension that a legitimate business interest or the workplace amity would be harmed by the continued presence of the employee concerned pending the determination of disciplinary proceedings. See LABOUR RELATIONS LAW; 3rd ED by D. du Toit, D. Woolfrey et al at 469 and Workplace Law by John Grogan at p.87.

I should emphasize, however, that affording a person a hearing does not mean that he is entitled to a hearing in the sense in which it is used in e.g. a court or quasi-judicial process. To afford a person such a hearing with the full panoply of attributes of such a process could well stultify the efficient functioning of disciplinary proceedings.

Such a hearing can be afforded in writing, it can be informal and appropriately circumscribed. But it must be a genuine process designed to give the person affected a proper opportunity to place any evidence or submissions before the authority concerned as to why he should not be interdicted or why his interdiction should not be lifted.

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It was not suggested by Appellants' counsel that such an informal opportunity to be heard was ever afforded the Respondent in respect of his interdiction either before or after the event. Neither could it be held that the alleged conduct of the Respondent was such that his immediate interdiction without a hearing was justified. Indeed, an examination of the record leaves one in considerable doubt concerning the sustainability of the charges levelled at this official.

As indicated above, and in a letter written on his behalf by his attorney and attached to his application, the Respondent set out in great detail exactly what had occurred.

It is clear, and is indeed conceded by the Respondent, that there were serious professional differences of opinion between the Respondent and the Prime Minister regarding the issue of parliamentary meetings and how they were to be convened. The Respondent alleges however that these were no basis for alleging misconduct on his part.

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A full exposition of the events, differences of views and areas of difference of opinion were set out in this letter. Whilst in reply the Appellants contested the correctness of these allegations, no alternative version was submitted by or on behalf of the Appellants.

It would seem to me that it was incumbent upon the appellants, if they wished to rely on the degree or nature of the misconduct as a cause for denying the Respondent a hearing, that they should have placed such evidence before the Court so that a proper evaluation could be made as to whether a summary interdiction was justified or not.

This was certainly not done in this case. For the reasons aforestated, I am therefore of the view

that the interdiction of the Respondent without affording him an opportunity to be heard as to why he should not be interdicted was unlawful. It was therefore correctly set aside by the court a quo. The consequential relief was also correctly ordered.

For these reasons the appeal is dismissed with costs.

J.H. STEYN J A

I AGREE:

J. BROWDE J A

I AGREE:

C. E. L BECK J A

Delivered on this 12 day of December 2000.