IN THE HIGH COURT OF SWAZILAND

CASE NO 2378/98

IN THE MATTER BETWEEN:

MEMORY MATIWANE	APPLICANT
AND	
THE INDUSTRIAL COURT OF APPEAL	1ST RESPONDENT
THE CENTRAL BANK OF SWAZILAND	2ND RESPONDENT

CORAM	:	MASUKU J.
For the Applicant	:	MR A.S. SHABANGU
For 2nd Respondent Betram)	:	MR P.E. FLYNN (Instructed by Robinson

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JUDGEMENT
8/03/2000

This is an application for the review of a decision of the Industrial Court of Appeal. In his Notice of Motion, the Applicant prayed for *inter alia that:-*

1. A *rule nisi* do hereby issue calling upon the Respondent's (sic) to show cause on Friday 30th October, 1998 why an order should not be made in the following terms:-

2. The proceedings of the Applicant and Second Respondent culminating in the order of 1st July, 1998 involving the case number 110/93 by First Respondent be reviewed, corrected and /or set aside.

3. Costs of this application.

It is clear that the application is made in terms of the provisions of Rule 53 of the High Court Rules as the Notice of Motion called for the dispatch of the record of proceedings and the taking of steps within the time limits set out in Rule 53.

In his Founding Affidavit, the Applicant states that in October, 1993, he initiated proceedings before the Industrial Court for unfair termination against the Central Bank of Swaziland. The Industrial Court gave the Applicant an award of E25,663.00. The Central Bank of Swaziland then lodged an appeal against that award to the Industrial Court of Appeal. This appeal was successful. The Applicant has launched these proceedings to review, correct and/or set aside the decision of the Industrial Court of Appeal. (hereinafter referred to as the "I.C.A.").

In opposition to the Application for rescission, the Second Respondent issued a Notice in terms of the provisions of Rule 6 (12) (c) in which the following points of law were raised, namely;-

1. That this Honourable Court has no jurisdiction to review the proceedings of the Industrial Court of Appeal in that the said Court is neither an inferior Court nor a tribunal nor board within the meaning of Rule 53 (1) on (sic) the High Court Rules.

2. Alternatively, and only in the event of this Honourable Court deciding that it has jurisdiction to review a decision of the Industrial Court of Appeal of Swaziland, the 2nd Respondent raises the following question of law:-

2.1. That the decisions of the Industrial Court of Appeal herein, in the exercise of its Appellate jurisdiction, on a points (sic) of law are not reviewable on the basis set out in the founding affidavit. The allegations in the founding affidavit that the said decisions are grossly unreasonable do not, in law, constitute proper grounds for review.

2.2. That the findings of the Industrial Court of Appeal on issues of law do not, in law, constitute irregularities as alleged in the Applicant's Founding Affidavit and the said findings are accordingly not reviewable.

Mr Flynn raised certain arguments in support of the above points of law. Firstly, it was his contention that this Court cannot review the proceedings of the Industrial Court of Appeal because the Industrial Court of Appeal is not an inferior court, tribunal or board as envisaged in the provisions of Rule 53 (1) of the High Court Rules as amended. Mr Flynn argued that it is an appellate Court exercising appellate jurisdiction only and is not therefore a Court of record, whose record of proceedings would be required, in terms of Rule 53 (3).

Mr Flynn drew this Court's attention to the provisions of Section 4 (1) of the High Court, which sets out this Court's powers of review. According to that Section, this Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Swaziland. It was Mr Flynn's argument that the Industrial Court of Appeal is not such a subordinate court of justice and is therefore not subject to this Court's power of review.

Mr Flynn further drew the Court's attention to the provisions of Section 17 of the Industrial Relations Act, 1 of 1996, which established the Industrial Court of Appeal. In his compelling argument, Mr Flynn argued that the Parliamentary intention apparent from the provisions of this Section was that the Court was to be in the same position as the Court of Appeal for Swaziland. This he argued, could be ascertained from the provisions of Section 17 (2) and (3), which state that the Judges of the Industrial Court of Appeal shall have the same qualifications and be appointed in the same manner as Judges of the Court of Appeal. Furthermore, it provides that the tenure of such Judges of Appeal, shall be similar to that of the Court of Appeal Judges continued Mr Flynn. In this regard, Mr Flynn referred the Court to **VER VAN BO-GRONDSE MYNAMPT v PRESIDENT OF THE INDUSTRIAL COURT 1983 (1) SA 1143.**

On the other hand, Mr Shabangu argued that it is a fallacy to say that the jurisdiction of the High Court is governed by the Rules of Court. He argued that the High Court's jurisdiction is set out in the Constitution of 1968, which was repealed with savings. He argued therefore that in order to determine whether this Court has the jurisdiction to review the decisions of the Industrial Court of Appeal one's attention must not solely be focussed on Rule 53 but on the Constitution Law Act.

Mr Shabangu continued to argue that the Industrial Court of Appeal is an inferior Court because it's nature and the extent of its powers are defined by Statute . In this regard, the Court was referred to certain authorities, which include Baxter, "Administrative Law", Juta & Co. page 244, **NAPOLITANO v DE WET, N.O. AND OTHERS 1964 (4) S.A. 337 and NAPOLITANO v COMMISSIONER OF CHILD WELFARE, JOHANNESBURG 1965 (1) S.A. 742 (AD).** In sum, Mr Shabangu argued that because the High Court can, in exercise of it's unlimited original jurisdiction review the proceedings of the Industrial Court of Appeal.

Rule 53 which deals with the question of review, and under which the application was brought, provides as follows:-

> (1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial *quasi* judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer as the case may be, and to all other parties affected ...(my own emphasis).

From a proper reading of the provisions of Rule 53, to which the Applicant confined himself, it is abundantly clear that the High Court will review proceedings of bodies or persons who are circumscribed. These include inferior courts, tribunals, boards or officers performing judicial *quasi – judicial* or administrative functions. Any notice of motion in respect of review proceedings must be delivered to the magistrate, presiding officer or chairman of the Court, tribunal or board or to the officer, depending on the circumstances of the case.

The question to be decided is whether it can be stated that the Industrial Court of Appeal falls within the category of any of the bodies set out in Rule 53. In my view, the Industrial Court of Appeal is not inferior court, tribunal or board. It is a Court of law which exercises appellate powers only and is not a court of record, it being confined to the record of proceedings of the Industrial Court.

Mr Shabangu argued that the I.C.A. is an inferior court and at some stage stated that it is a public body. In **NAPOLITANO v DE WET, N.O. AND OTHERS 1964 (4) S.A. 337 at 342 A – B,** Marais J. analysed the provisions of the Children's Act to determine if the Courts created thereunder were courts of law or merely an administrative or semi-judicial institution. His Lordship had this to say:-

> *"The mere description of the tribunal in question as "court" is a strong indication that we are not dealing with an administrative or semi-judicial institution but a court of law, which, failing contrary indications, has to conduct its proceedings in substantial conformity with the manner in which other courts of law in this country are .....to function. As a matter of fact, the Act contains many provisions indicating that the Legislature did regard a children's court as a court of law and not an administrative tribunal. It is presided over by a trained lawyer (mostly magistrates appointed commissioner of child welfare)... A record of proceedings has to be kept, parties to proceedings before the court are allowed legal representation. In sec. 7 cross-examination is mentioned. The court is authorised to make and issue orders, and it has the right to punish for contempt of court. From certain decisions there is a right of appeal to the Supreme Court."*

In view of the foregoing excerpt it therefor behoves one to have regard to the legislative nomenclature in order to ascertain whether it was the Legislature's intention to regard the I.C.A. as an inferior court or tribunal, thereby rendering its decisions or proceedings amenable to review by the High Court.

Section 17 (1) established the I.C.A., which, according to the provisions of section 17 (2), shall consist of a Judge President and two Justices of Appeal "all of whom shall have the same qualifications and be appointed in the same manner as judges of the Court of Appeal but in consultation with the Minister and the Minister of Justice."

Section 17 (3) provides as follows:-

> *"The tenure of office of the Judge President and the Justices of Appeal shall be similar to the tenure of the Judge President and Justices of Appeal of the Court of*

Appeal."

Regarding the jurisdiction of the I.C.A., Section 19 (1) and 19 (3) provide as follows:-

> *"(1) The Industrial Court of Appeal shall have power to hear and determine any appeals from the Industrial Court and such appeal shall lie to the Industrial Court of Appeal only on a point of law."*
>
> *(3) "After hearing an appeal, the Industrial Court of Appeal may confirm, amend or set aside the decision or order against which the appeal has been noted or make any other decision or order including an order as to costs, according to law and fairness".*

In my view, it is clear form the foregoing that even the most benevolent interpretation given to the legislative language above cannot lead to a conclusion that the Legislature intended creating an inferior court which is subject to review by the High Court. The Judges who sit in that Court according to Section 17 shall have the same qualifications and be appointed in the same manner as Judges of the Court of Appeal. Furthermore, their tenure shall be similar to that of the Judges of the Court of Appeal. It is therefore abundantly clear that the Legislature intended to create a Court which is on a similar standing with the Court of Appeal in so far as matters of Industrial relations are concerned. The I.C.A. cannot be regarded as an inferior court or tribunal, regard being had to the legislative nomenclature. To do so would cause serious violence to the expressed legislative intent.

Mr Shabangu further argued that the jurisdiction to review the decisions of the I.C.A. does not depend upon any special machinery created by the Legislature but is a right inherent in the Court i.e. the High Court. In this regard, the Court was referred to the case of **JOHANNESBURG CON. INVESTMENT CO. v TOWN COUNCIL 1903 TS.** There, Innes C.J. propounded the law as follows at page 115;-

> *"But there is a second species of review analogous to the one with which I have dealt, but differing from it in certain well-defined respects. Whenever a public*

body has a duty imposed upon it by statute, and it disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court, which has jurisdiction to entertain all civil causes and proceedings within the Transvaal. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the Court."

I regard this excerpt as good law emanating from an eminent judge and jurist. In considering the dictum of Innes C.J., sight must not be lost of the use of the words "public body", occurring in the second sentence. A court of law is not and cannot be regarded as a public body. It is just a court of law. The species of review in issue does not in my view apply in this case but is confined to public bodies, and only in cases where gross irregularity or clear illegality in the performance of duties imposed by the Legislature has been alleged.

Mr Shabangu further stated that the power of this Court to review the decisions of the I.C.A. is given by the Constitution of Swaziland. I propose to consider the applicable provisions, accepting that due to the appalling state of our statutes, one cannot be certain that the conclusion is correct, as there are some amendments that may have not been considered. However, my research revealed that Parts 1 and 2 of Chapter IX of the Constitution were saved.

The High Court is established by the provisions of Section 97 (1) of the Constitution, which reads as follows:-

> There shall be a High Court for Swaziland and subject to the provisions of this Chapter the judges of the High Court shall be the Chief Justice and such number of puisne judges as may be prescribed.

Section 104 deals with the jurisdiction of the High Court and reads as follows:-

(1) 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;

(c) such revisional jurisdiction as the High Court possesses at the commencement of this Constitution in accordance with the provisions of this Constitution and any other law then in force in Swaziland; and

(d) such revisional 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.

In my view, the use of "revisional jurisdiction", occurring in (c) and (d) above must be taken to include the power to review decisions and proceedings. With regard to (c) above, the revisional jurisdiction which the Court had at the commencement of the Constitution in accordance with any other law then in force is to be found in the provisions of Section 4 (1) of the High Court Act 20 of 1954 which read 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".

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. The reference to subordinate courts 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.

From the aforegoing, I come to the view that the Constitution of Swaziland does not in terms of Section 104 (1) (c) clothe the High Court with jurisdiction to review decisions of the I.C.A., which was in any event not then in existence.

I now turn to consider the implications of the provisions of Section 104 (1) (d) of the Constitution which refer to "such revisional 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".

One such law, which is for the time being in force in Swaziland and which confers "additional revisional jurisdiction" to the High Court is the Industrial Relations Act No. 1, 1996, which is the same enactment that established the I.C.A. Section 11 thereof provides 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.

(5) 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.

Section 2 of the Industrial Relations Act defines "Court" as follows:-

"In this Act, unless the context otherwise requires –

"Court" means the Industrial Court established under Section 4 and the Industrial Court of Appeal established under Section 17."

The context of Section 11 referred to 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. 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. This is so regardless of whether some litigants may be dissatisfied with its decisions. This is also the intention of the Legislature apparent from the provisions of the Court of Appeal Act, No.74 of 1954. To render decisions of the I.C.A. reviewable would be tantamount to subverting the intention of the Legislature in my view.

In **EX PARTE MILLSITE INVESTMENT CO. (PTY) LTD 1965 (2) SA 582 at 585 F – H,** Vieyra J stated as follows regarding the use of the Court's inherent power, which Mr Shabangu advocated should be invoked *in casu:-*

> *"The jurisdiction of the Supreme Court is laid down in section 19 of Act 59 of 1959 in terms similar to those to be found in the statute setting up the various pre-Union courts. It is clear from the decided cases that those statutes confer on the Supreme Court the same kind of jurisdiction and powers as were enjoyed by the Courts of Netherlands.... So that, apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at common law it would be entitled to entertain or give. It is to that reservoir of power that reference is made where in various judgements Courts have spoken of inherent power claimed is not merely one derived from the need to make this Court's order effective and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation."*

It is my view that to resort to this repository power in this case would collide with the expressed intention of the legislature. In this case, Parliament did not make provision for the review of the decisions, orders and proceedings of the I.C.A. because it would run counter to the wider objectives of the Act. The use of this reservoir of power should not result in dislocating the Legislative's expressed intention.

Regarding the situations when recourse must be had to this repository power, Hefer J. stated as follows in **MOCH v NEDTRAVEL (PTY) LTD t/a AMERICAN EXPRESS TRAVEL SERVICE 1996 (3) SA 1 (AD) at 7 D – E:-**

> *"The short answer is that the Court's inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice (per Corbett J.A. in UNIVERSAL CITY STUDIOS INC AND OTHERS v NETWORK VIDEO (PTY) LTD 1986 (2) SA 734 (A) at 754 G), does not extend to the assumption of jurisdiction not conferred upon it by statute. As explained in R v MILNE AND ERLEIGH (6) 1951 (1) SA 1 (A) at 5* ***in fin,*** *'this Court was created by the South Africa Act and its jurisdiction is to be ascertained from the provisions of that Act as amended from time to time and from any other relevant enactment."*

It is my view that the above excerpt needs no amplification as it establishes the applicable principles, which are relevant to this case with absolute clarity and devastating candour. The residual power must therefor be resorted to in proper cases, the instant one clearly excepted.

On a practical assessment, the use of the residual power would cause practical and ethical difficulties as well. At the present 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 his Brethren, including the Chief Justice. In other divisions in South Africa, and common sense dictates that it should be the other way round i.e. three Judges reviewing a decision of one of their Brethen. 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.

One of the unfortunate ramifications of reviewing I.C.A. decisions would be that the channels open to dissatisfied litigants would firstly be too long, too costly and also result in considerable delay, regard being had to the notorious fact that there is a serious backlog

in both the Industrial Court and the High Court. A dissatisfied litigant would first have to undergo the conciliation procedures set out in the Industrial Relations Act, approach the Industrial Court, appeal to the I.C.A., review the decision of the I.C.A. and if still dissatisfied, then Appeal to the Court of Appeal of Swaziland. This would indeed be burdensome financially and otherwise and can hardly be said to have been Parliament's intention.

In summary, the Applicant has in his papers evinced a clear intention to submit to and confine himself to the provisions of Rule 53. He cannot now because of the attack on the applicability of Rule 53 ask the Court without amending his Notice of Motion to regard the review to be based on some other foundation. I have also found that the other foundations for this Court's power to review I.C.A. decisions and orders suggested by Mr Shabangu, for reasons above stated, constitute sinking sand as it were.

In view of the conclusion that I have reached, I find it unnecessary to consider alternative points of law raised by the Second Respondent. The first point of law is upheld with costs.

T.S. MASUKU

JUDGE