IN THE HIGH COURT OF SWAZILAND

JUDGMENT

In the matter between: Case No.722/2017

MBONGISENI DLAMINI	**1st Applicant**
GCINA MASEKO	**2nd Applicant**
THABISO SIMELANE	**3rd Applicant**
SIMON DLAMINI	**4th Applicant**

and

SWAZILAND ELECTRICITY COMPANY	**Respondent**

In re:

SWAZILAND ELECTRICITY COMPANY	**Applicant**

And

MBONGISENI DLAMINI	**1st Respondent**
GCINA MASEKO	**2nd Respondent**
THABISO SIMELANE	**3rd Respondent**
SIMON DLAMINI	**4th Respondent**
SWAZILAND ELECTRICITY COMPANY SUPPLY MAINTENANCE AND ALLIED WORKERS UNION	**5th Respondent**
JUSTICE NKOSINATHI NKONYANE N.O	**6th Respondent**
GILBERT NDZINISA N.O	**7th Respondent**
SIMON MVUBU N.O	**8th Respondent**

Neutral citation: ***Mbongiseni Dlamini and Others v Swaziland Electricity Company (722/2017) [2018] SZHC 105 (30th May, 2018)***

Coram : M. Dlamini J.

Heard : 18th May, 2018

Delivered : 30th May, 2018

Civil procedure ***- an exception to the general rule that a party may choose a court where two enactments allow for the same jurisdiction - the exception is defined by the learned Justice as "derogation allowed by the constitution" itself - section 151 ss (1)(a) read with and ss (2) of the Constitution itself allow for this derogation - Section 8 (3) of the Industrial Relations Act provides that in discharge of its functions, the Industrial Court shall have all the powers of the High Court. In other words, it shall apply and uphold the provisions enunciated under Chapter III of the Constitution.***[1]

Summary: Under a certificate of urgency, the applicants sought for orders, *inter alia*, declaring the decision of the respondent to terminate their services as unconstitutional, unlawful, invalid and null, and interdicting respondent from evicting them from respondent's houses. The respondent has ferociously opposed the application both on procedural aspect and merits.

The Parties

[1] The applicants have described themselves as Swazi males of Manzini and employees of the respondent. Although the founding affidavit is silent on who the respondent is, and I must caution that this is un-procedural, it is common cause that respondent is a company duly incorporated and registered in terms of the Company laws of the kingdom of Eswatini and has its principal place of business at Eluvatsini House, Mhlambanyatsi Road, Mbabane, Hhohho region.

[1] See Stanley Matsebula v Under Secretary – Ministry of Education and Others Industrial Court Case No. 50/2007; The Attorney-General v Stanely Matsebula Industrial Court of Appeal No. 4 of 2007

Brief resume

[2] The matter serving before me has its own chequered history. Various disciplinary charges ranging from negligence or failure to implement safety work cautions, which resulted in the death of three individuals and dishonesty tainted with fraud were preferred against the applicants by respondent. Each appeared before a different panel. Upon prosecution, the applicants each pleaded guilty to their respective charges. With the exception of 3rd and 4th applicants who were sentenced to an additional three and one month's suspension without pay respectively, they were all given a final written warning by their respective chairs. Respondent's management viewed the sentences as lenient. By correspondence the applicants were invited to show cause why their sentences should not be reviewed. They duly responded. Applicant proceeded to review their sentence by substituting it with a penalty for dismissal.

[3] Applicants lodged a challenge to the Industrial Court for their substituted sentences. The Industrial Court as per **Nkonyane J** ruled in their favour. Under a certificate of urgency, the respondents filed a review of **Nkonyane J'**s judgement in this Court and the matter was enrolled before my brother **Mamba J** who dismissed the review application more particularly on urgency. The matter took its normal cause and it appeared before the Principal Judge **Mabuza PJ** who set aside **Nkonyane J's** judgement by judgment of 30th April, 2018.

[4] On the 4th instant, respondent served upon the applicant notice of termination of their employment and eviction from the compound of the respondent. These notices have precipitated the present application.

Applicants' prayers

[5] For reasons that shall be apparent later in this judgment, it is imperative that I quote the applicants' main prayers *ipsissima verba*:

> "3. *Declaring the decision of the Respondent to terminate the services of the Applicants with Respondent as contained in the letters dated the 4th May 2018, annexed hereto as "A", B","C" and "D" respectively to be unconstitutional, unlawful, invalid and of no legal force or effect.*
>
> *4. Setting aside the decision of the Respondent to terminate the services of the Applicant with Respondent as contained in the letters dated the 4th May 2018 respectively.*
>
> *5. Interdicting and restraining the Respondent from evicting the Applicants from the respective staff houses they presently occupy pending the finalization of this application and the main matter.*
>
> *6. Directing prayer (5) to operate with immediate interim effect pending the finalization of this application and the main matter.*
>
> *7. Cost of suit including certified costs of counsel in terms of Rule 68(2) of the High Court Rules."*

Respondent's points *in limine*

[6] The respondent has raised two points of law, *viz.,* that this court has no original jurisdiction and that the matter is not urgent. I shall address these points in their sequence.

[7] **Jurisdiction - Parties' contentions:**

Learned Counsel, **Mr. Z Jele** referred the court to the applicants' prayers, more particularly prayers 3, 4 and 5 as cited above. From these prayers, he submitted that the applicants were challenging the respondent who was their employer from terminating their employment contract. This was therefore a labour matter, deserving to be determined firstly before labour forums. **Mr. Jele** then supported his submission by referring the court to various statutory provisions and decided cases on this point.

[8] Learned Counsel on behalf of applicants, **Advocate L Maziya** submitted that there was nothing irregular about the applicants filing their application before this court. **Mr. Maziya** meticulously raised a very interesting argument and I intend to deal with it in depth.

[9] Firstly and foremost, it was so contended on behalf of the applicants that the applicants were lamenting their denial to a right of fair hearing. This violation to their right of fair hearing was in twofold. Firstly, the respondent, by serving them with the letters terminating their services and evicting them from the staff houses were violating their right to appeal. The Rules of the Appeal Court granted them four weeks upon which to file their appeal following **Mabuza PJ's** judgement in favour of the respondent. Instead of respondent waiting for the lapse of their appeal period, on the 4th May, 2018, barely four days after the would be impugned judgment, respondent served them with the letters of termination and eviction. This was a gross violation of their right of appeal which they intend to exercise. Secondly, the respondent did not invite them to a hearing before terminating their employment contract. They simple served them with letters of termination and eviction without first inviting them to show cause

why their services should not be terminated and therefore evicted from the respondent's compound.

[10] The totality of the above twofold violation of their right to a hearing was a contravention of Chapter III of the Act No.1 of 2005 (the Constitution) as enshrined in sections 35(1) read with 35(2). In brief, the applicants' application raises a human rights issue in as much as it raises a labour issue, **Mr. Maziya** argued *in contra* to **Mr. Jele**'s submission. For this reason, a litigant may choose between the Industrial Court and the High Court for a determination of its matter. To fortify the right to select between the two forums, learned Counsel on behalf of applicants referred the court to section 151 sub-sections (ss) (1) and (2) of the Constitution. The effect of section 151 was therefore to amend all legislations which provided that the Industrial Court has exclusive jurisdiction.

Adjudication

Legislative enactments

[11] The question for determination on jurisdiction is, "Does section 151 ss (1) and (2) of the Constitution strips the Industrial Court of its exclusive jurisdiction in labour related matters?" For a second, I considered referring the matter to the honourable Chief Justice for a full bench. I was however, persuaded away from this thinking by virtue of the plethora of decided cases on this issue.

[12] In respondent's double violation of the right to hearing, the applicants deposed:

> "10.1.1 *We are advised, and verily believe, the legislating authority could not have stipulated the time limit within which to appeal an unfavourable judgment if*

the successful party could execute that judgment almost immediately upon delivery. The right to appeal against that judgment, I am further advised, and verily believe could thereby be rendered nugatory and ineffective much against the intention of such legislating authority. The right to a fair hearing, which includes the right to appeal an unfavourable judgment pre supposes the right to be afforded a reasonable time within which to exercise such right. It is that right that the Respondent has violated in the present matter as we have a settled intention to appeal against ***Mabuza, PJ****'s judgment.*

10.2 *It is our further contention that before terminating our services on the 4th May 2018, the Respondent had a legal duty to invite us to make representation and show cause why this step should not be taken against us, more so because whatever right the Respondent may perceive itself to have had to terminate our services arising from the outcome of the disciplinary process had by operation of the legal doctrine of preemption been forfeited by the Respondent. Had we been invited to a hearing we would have demonstrated either personally or through our freely chosen representative, that by reinstating us on the 23rd May 2018, the Respondent had demonstrated an unequivocal intention not to challenge* ***NKONYANE, J's*** *judgment. This is more so because our letters of reinstatement were not conditional upon the*

finalization of future legal action that the Respondent may have been contemplating against us. In fact, we would have argued that it would be legally wrong to place any reliance on ***MABUZA, PJ's*** *judgment in terminating our services inasmuch as she was totally unaware of reinstatement letters given that the Respondent did anything at its disposal in the review proceedings not to bring their existence and contents to her attention. We would have placed heavy reliance on* ***MAMBA, J's*** *judgment of the 2nd June 2017 (Annexure "MD3 attached) which made a hint of the defense of peremption or acquiesce."*

[13] Following **Mr. Maziya's** submission to the effect that the first port of call culminating to section 151 ss (1) and (2) is section 35 of the Constitution, it is apposite to quote section 35 which stipulates on "*Enforcement of protective provisions*":

> *(1) Where a person alleges that any of the foregoing provisions of this Chapter* (Chapter III) *has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.*
>
> *(2) The High Court shall have* ***original jurisdiction*** *–*

(a) To hear and determine any application made in pursuance of subsection (1);

(b) To determine any question which is referred to it in pursuance of subsection (3);

And may make such orders, issue such writs and make such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement any of the provisions of this Chapter. (my own and emphasis)

[14] It is trite that the term "original jurisdiction" referred to under section 35(2) of the Constitution means "court of first instance". Now if we accept the argument advanced on behalf of the applicants that the High Court has jurisdiction as well as the Industrial Court and a litigant may select a court of its own choice especially where it raises grounds falling under Chapter III of the Constitution, a litigant who chooses to institute or file its action or application as the case maybe at the Industrial Court would firstly be confronted by section 35(2) of the Constitution to the effect that the High Court is the court of original jurisdiction. Its application or action would stand to be dismissed on this point of law alone.

[15] Secondly, and foremost, a litigant who is dissatisfied with the judgment of the court of first instance will have to lodge an appeal or a review. It is settled that following section 139(b) of the Constitution, the Industrial Court is a specialised tribunal exercising judicial functions and therefore subordinate to the High Court. It goes without saying therefore that a litigant who wishes to appeal or review a judgment of the High Court being a court of first instance, following section 35(2) of the Constitution will have to do so at the Supreme Court. The obvious result is that the Industrial Court will have no cases to determine. The repercussions of such

a procedure would be to strip the Industrial Court and its appellant structure of its jurisdiction completely. This would not only lead to a mayhem as the High Court would be inundated with labour cases over and above its own but also defeats completely the intention of the Legislature who by establishing the Industrial Court sought to ease the High Court of its workload. One of the cardinal canons of interpretation is that the courts should avoid an interpretation that would lead to absurdity.

[16] It was submitted further that section 151 ss (2) and (3) lends credence to applicants' case that the High Court may entertain matters of contract of employment where the *causa* is the violation of human rights as is the case at hand. Section 151 ss (2) and (3) reads:

> "(2) *Without derogating from the generality of subsection (1) the High Court has jurisdiction –*
> *(a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution; and*
> *(b) ……..*
>
> *(3) Notwithstanding the provisions of subsection (1), the High Court-*
> *(a) has no original or appellant jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;*
> *(b) ……."*

[17] From the above quotation, **Mr. Maziya** urged the court to compare and contrast ss (2) with ss (3) and pointed out that had the Legislature intended that the Industrial Court maintains its exclusive jurisdiction after the advent of the Constitution, it would have enacted under ss (3) "*Notwithstanding the provisions of subsections (1) and (2) the High Court (a) has no original*

or appellant jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction." Clearly from the reading of ss (3), the Legislature cautiously left out ss (2) and only referred to ss (1). This therefore translates into reinforcing that all matters mentioned under ss (2) *viz*., fundamental human rights such as in the case at hand where applicants were denied their rights to appeal and fair hearing, this Court therefore is endowed with jurisdiction to entertain applicants' application.

[18] With due respect to Counsel on behalf of the applicants, the submission loses sight of the prefixing wording under ss (2) which reads, "*Without derogating from the generality of subsection (1), …..*" These prefix must be considered in interpreting the whole ss (2). In other words, one should not simple read ss (2) to say "*the High court has jurisdiction – to enforce the fundamental human rights and freedoms guaranteed by this Constitution*." One should however read the prefixing wording first before reading about the High Court's jurisdiction to entertain human rights issues. Now the prefixing words' interpretation are that before the High Court may entertain issues pertaining to human rights and freedoms guaranteed by this Constitution, it must bear in mind, conform or do not deviate from the provision of ss (1).

[19] Now turning to Section 151 ss (1) as per the dictates of section 151 (2), ss (1) provides:

> *"(1) The High Court has –*
>
> *(a) Unlimited original jurisdiction in civil and criminal matter as the High Court possesses at the date of commencement of this Constitution;"*

[20] It is trite that at the date of the commencement of the Constitution, the High Court did not have unlimited original jurisdiction in civil matters pertaining to labour or employment matters. This was by virtue of section 8 of the Industrial Relations Act which provided as follows:

> "(1) *The Court (Industrial Court) shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement or any of the provisions of this, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer's association and a trade union, or a staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof."*

[21] In brief, the Legislature, having prefixed "*Without derogating from the generality of subsection (1)……"*, under section 151 ss (2), it was unnecessary in ss (3) to include ss (2) by reason that ss(2) had referred the reader to ss (1) following the prefix, "*without derogating from the generality of subsection (1)"*. To include ss (2) in ss (3) would be tantamount to tautology, an undesirable practice in drafting legislation or contract. In other words, had the wording of ss (2) simple read, "*The High Court has jurisdiction – (a) ……..*" without the prefixing wording "*Without derogating from the generality of subsection (1)*", the submission on behalf of applicants would stand.

[22] In the totality of the above therefore, the submission that at the advent of the Constitution, section 8 of the Industrial Relations Act No. 1 of 2000 as amended which endowed the Industrial Court with exclusive jurisdiction was by virtue of sections 35 and 151 of the Constitution amended by removing the word "e*xclusive*" thereby conferring jurisdiction not only to the Industrial Court but also the High Court, stands to crumble. In the result, the submission on behalf of respondent that this has no jurisdiction must succeed.

Decided cases on jurisdiction:

[23] I have already pointed out above that there is a plethora of case law on the point of law on jurisdiction. Learned Counsel**, Mr. Maziya** urged this court to ignore the decided cases on the basis that all the litigants therein submitted that the Industrial Court did not have jurisdiction to entertain labour disputes after the coming into force of the Constitution whereas applicants *in casu* contended that both courts have jurisdiction. With due respect to learned Counsel, I must point out that if there is any difference, it is insignificant in so far as the end results are concerned. In fact, **Mr. Maziya** repeatedly pointed out that the basis for the application was that the applicants have been denied their rights enshrined in the Constitution under Chapter III. The decided cases refer to this ground as I would demonstrate hereunder.

[24] I must commence by reference to the wise observation by **Chaskalson J** in **Pharmaceutical Manufacturers of SA; in re: Ex parte Application of President of South Africa 2000 (3) BCLR 241 (CC) at 257**[2] which apply with equal force in our jurisdiction and is as follows:

[2] as cited in Attorney General v Sipho Dlamini and Another Civil Appeal Case No. 4 of 2013 at para 29

> *"I take a different view. The control of public power by the Courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the Interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review have been subsumed under the Constitution and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts…"*

[25] I understand the learned Justice to be saying that even well before the advent of the Constitution, the courts in their review power have been upholding the constitutional principles. The promulgation of the Constitution merely reinforced that which was already on the ground in the name of common law constitutional principles. It is for this reason that **Lord Reid** enumerating some of the common law constitutional principles mentioned, among others, failure to comply with the requirements of natural justice[3] viz., the right to a fair hearing.

[26] Deciding on the exclusive jurisdiction of the Industrial Court, **Ramodibedi JA**[4] (as he then was) having referred to Section 8 of the Industrial Relations Act held:

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[3] See Anisminic v Foreign Compensation Commission [1969] 2 AC 147 or para 31 of n1
[4] in Swaziland Breweries Ltd and Another v Constantine Ginindza, Civil Appeal No. 33/2006 para 12

"*It is important to recognize that the purpose of the legislature in establishing the Industrial Court was clearly to create a specialist tribunal which enjoys expertise in industrial matters. In this regard I am respectfully attracted by the following remarks of* ***Botha JA*** *in* ***Paper Printing Wood and Allied Workers' Union v Pienaar NO and Others 1993 (4) SA 621 (A) at 637 A-B***

'The existence of specialist courts points to a legislative policy which recognizes and gives effect to the desirability, in the interest of the administration of justice, of creating such structures to the exclusion of the ordinary courts.'"

[27] In interpreting section 151 ss (1) and (3) of the Constitution, **Ramodibedi JP**[5] authored:

"*It is important for us to state at this juncture, that the unlimited original jurisdiction in all civil and criminal causes in the land, which Section 151(1) of the Constitution, confers on the High Court is excluded by Section 151(3)(a) of the Constitution, which postulates that the High Court has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction."*

[28] **Ramodibedi JP** in the proceeding paragraphs then discussed at length the interpretation of section 151 on the jurisdiction of the High Court and the exclusive jurisdiction of the Industrial Court. He finally and eloquently concluded:[6]

[5] see para 40 of Attorney General n1
[6] Paras 64 and 65 of n1

"*The nature of the matter which is employment based lies within the exclusive province of the Industrial Court as we have already abundantly enunciated in this judgment. The fact that the issue arising therein acquired constitutional hegemony in Section 33 (*Section referring to the right to fair hearing or falling under Chapter III of the Constitution*) of the Constitution cannot change its flavour or remove it from the jurisdiction of the Industrial Court.*

To hold a contrary view will make a mockery of the effort and intent of Parliament in creating in the Industrial Court a specialist Court in the employment context, whilst giving to the High Court review jurisdiction over the decision of the Industrial Court or arbitrator." (my emphasis)

[29] Having espoused the above, honourable **Ramodibedi JP** then expressed:[7]

"*The learning is that where a remedy is provided for by two laws, a party is at liberty to choose to pursue his remedy under any of those laws. If a matter is covered by the Constitution and an Act, even if there is no conflict, the Constitution will still prevail, but this is without prejudice to the right of the party to choose to pursue his remedy either under the Act or the Constitution.* ***Except where the Constitution itself allows its derogation by an Act, it cannot be subservient to an Act.*** *It will therefore be absurd to suggest in anyway, that where the Constitution and an Act have covered the same field, the provisions of the Constitution must remain in abeyance and that only the Act shall remain operational. It cannot*

[7] At para 67

fit into the jurisprudence of constitutionalism. It violates the fundamental doctrine of covering the field. If a party chooses to pursue his remedy under the Constitution, he cannot be precluded from doing so and asked to go and exhaust the mechanism provided in the Act first, although it is generally more desirable that the provisions of the Act should be exhausted before recourse is had to the Constitution.…..…"(my emphasis)

[30] Reading the above very closely, the learned Justice meticulously pointed out an exception to the general rule that a party may choose a court where two enactments allow for the same jurisdiction. The exception is defined by the learned Justice as "*derogation allowed by the constitution*" itself. I have already demonstrated in the preceding paragraphs of this judgment under "**Legislative enactments**" that section 151 ss (1)(a) read with and ss (2) of the Constitution itself allow for this derogation. This derogation by the Constitution itself is to the legislation and common law constitutional principles prevailing at the commencement of the Constitution as per ss (1) (a). This is inclusive of the Industrial Relations Act of 2000 as amended and the Employment Act of 1980 as amended. Section 8 (3) of the Industrial Relations Act provides that in discharge of its functions, the Industrial Court shall have all the powers of the High Court. In other words, it shall apply and uphold the provisions enunciated under Chapter III of the Constitution.[8]

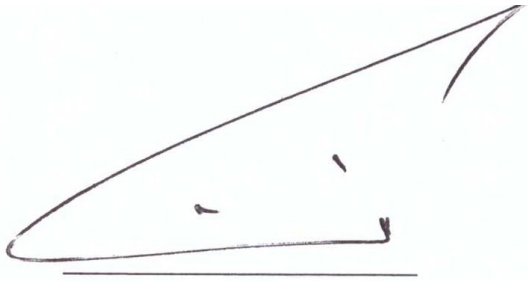
Ancillary matters:

[8] See Stanley Matsebula v Under Secretary – Ministry of Education and Others Industrial Court Case No. 50/2007; The Attorney-General v Stanely Matsebula Industrial Court of Appeal No. 4 of 2007

[31] It would be remiss of me not to mention *orbiter* the basis upon which the applicants have based their relief. The applicants contended that following **Nkonyane J's** judgment in their favour, the respondent reinstated them to work. This therefore translates into respondent acquiesced to **Nkonyane J's** judgment and this was upheld by **Mamba J** when respondent filed their application to review **Nkonyane J's** judgement. I address this point *en passé* by reason that it was referred to several times on behalf of applicants during the hearing on the points *in limine* especially on jurisdiction. Whether there was acquiesce or compliance with section19 (4) of the Industrial Relations Act remains to be determined by the appropriate court.

[32] In the final analysis of the above, this court has no original jurisdiction to entertain labour related matters. It is therefore unnecessary for me to make any determination on the question of urgency, lets I clothe myself with jurisdiction which in terms of the law I do not have. I therefore enter the following orders:

1) Applicants' application is hereby dismissed;
2) No order as to cost.



M. DLAMINI J

For the Applicants : **Advocate L. Maziya instructed by M. Hlophe & Associates**

For the Respondent : **Mr. Z Jele of Robinson Bertram**