



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

Civil Case No. 1105/2017

In the matter between

Dr Thulile Sigwane

Applicant

And

University of Swaziland

1st Respondent

Dr DMN Mthiyane

2nd Respondent

Neutral citation: *Dr Thulile Sigwane v University of Swaziland & Another*
(1105/17) SZHC-118 [2021] (2021)

Coram

: D Tshabalala **J**

Heard

: 14/03/2018

Delivered

: 28/07/21

Summary: Application for an order declaring decision of the employer suspending the employee, to be unlawful and unconstitutional for failure to afford the applicant a/air hearing in contravention of Chapter III of the Constitution.

Jurisdiction: Preliminary issue for determination, whether the High Court has jurisdiction as a court of first instance, or the Industrial Court has exclusive jurisdiction to hear and determine the matter.

Constitution and Industrial Relations Act: Sections 151, 152 of the Constitution and Section 8 of the Industrial Relation Act considered.

Held: The clear intention of the legislature to create the Industrial Court as a specialist court on employer-employee disputes per the provisions of section 8(1) of the Industrial Relations Act 2000 as amended, supported by section 151(3)(a) Constitution, must be respected and given effect to. This is an appropriate case for the exclusive jurisdiction of the Industrial Court to hear and determine.

JUDGMENT

Points in *limine* on jurisdiction

[1] The Applicant, a lecturer, employed by the University of Eswatini, based at Luyengo Campus, brought an application under a certificate of urgency, dated 2 August 2017, seeking the following orders:

- 1) *Dispensing with the Rules of Court in relation to service, form and time limits and hearing this matter on the basis of urgency;*
- 2) *Declaring the suspension of the Applicant as head of the Department of Animal Science, unlawful, unconstitutional, invalid and/or of no force or effect;*

- 3) *Declaring the appointment of the 2nd Respondent as acting Head of the Department of Animal Science unlawful, invalid and/or of no force or effect;*
- 4) *Declaring the 1st Respondents decision to prohibit Applicant from teaching the AS 304-Nutritional Feeds and Feeding Course, unconstitutional, unlawful, invalid/and or of no force or effect.*
- 5) *Interdicting and Restraining the Respondents from interfering in any manner whatsoever with the Applicant's execution of her lawful duties as a lecturer of the AS 304-Nutrition, feeds and feeding Course and/or any other course pending the finalization of this application.*
- 6) *Directing the P' Respondent to furnish the Applicant with written reasons for her suspension as head of Department of Animal Science;*
- 7) *Directing the 1st Respondent to furnish the Applicant with written reasons for the decision to prohibit students from writing the main and supplementary examination papers that were set by the Applicant and prohibiting Applicant from taking the AS304-Nutrition Feeds and Feeding examination paper.*
- 8) *Directing; the 1st Respondent to furnish the Applicant with the completed record of the proceedings of the committee that was commissioned to deliberate on the dispute between the Applicant and the 3rd year students of the AS304-Nutrition, Feeds and Feeding Course and such record to include the committee's terms of reference.*

9) *Directing prayers 5, 6, 7 and 8 to operate, with immediate interim effect pending the finalization of the entire application.*

JO) *Permitting the Applicant to supplement and/or otherwise amend the notice of Motion upon being furnished with the written reasons and record as stipulated in prayers 6, 7 and 8.*

11) *Directing the P¹ Respondent to pay the costs of this application and such costs to include costs of counsel duly certified in terms of Rule 68 (2) of the High Court Rules.*

12) *Granting Applicant further and/or alternative relief*

[2] The 1st Respondent opposed the application and filed a notice to raise points of law, and subsequently filed its answering affidavit.

[2.1] The Applicant in turn filed her replying affidavit and simultaneously, an application to amend its notice of motion. The Respondent opposed the bid to amend and raised points of law on the application to amend.

[3] The Applicant's interlocutory application to amend, seeks to abandon prayers 5-10¹ of her notice of motion. This seems to suggest that prayers 1-4, 11 and 12 are to remain intact. The sought amendment and rearrangement of prayers is set out thus:

1. *Prayer (5) interdicting and restraining the Respondents from interfering in any manner whatsoever with the execution of Applicant's duties as a*

¹ See paragraph [1] above.

substantive head of department of animal science pending the finalization of the matter;

2. *Prayer (6) interdicting and restraining the Respondents from interfering in any manner whatsoever with the execution of Applicant's duties as a lecturer for AS304 and all the other undergraduate courses which she has always been teaching pending the finalization of the matter;*
3. *Prayer (7) directing that prayer 5 and 6 above to operate with immediate interim effect pending finalization of the matter;*
4. *Prayer (8) directing the 1st Respondent to pay the costs of this application on attorney-client scale including costs of counsel calculated on the same scale. Alternatively directing the 1st Respondent to pay the costs of this application on the ordinary scale but such costs to include costs of counsel duly certified in terms of Rule 68 (2) of the High Court Rules;*
5. *Prayer (9) granting Applicant further and/or alternative relief*

[4] The 1st Respondent filed a notice to strike out certain averments in the Replying affidavit-paragraphs 6, 7.2, 7.3, 18.2.2(a)-185, 19.1, 19.2, 19.3, 19.4, - 19.4.3, 19.5-19.5.1, 19.6 on the grounds that they respectively, were new material, scandalous, vexations and/or irrelevant. Alternatively, if the application to strike out was unsuccessful, that the Respondent be granted leave to file further affidavit in answer to the Replying affidavit.

[5] Despite that the Application was brought under a certificate of urgency, it

was conducted by the Applicant's side in a manner that defeated the alleged urgency. Apart from seeking extensive amendments of prayers of the notice

of motion filed at Replying stage, there were delays to file heads of argument and the matter was postponed on many occasions for want of heads on the part of the Applicant. Setting the matter down for arguments was likewise aborted on many occasions. After the matter was finally argued in 2018 it emerged that documents in the bulky file were incomplete. When these were eventually located the matter had inevitably taken a backseat in the highly congested roll engulfing the court. This briefly explains the delay in delivery of this judgment.

The facts

- [6] A brief summary of the facts of this matter is that the Applicant was Head of Department of Animal Science under Faculty of Agriculture, and lecturer of one of under graduate courses - Nutrition Feeds and Feeding (AS 304), until developments that unfolded in April - May 2017, leading to this application. These events included complaints formally lodged against the Applicant by AS 304 students which escalated to violent protests, Applicants suspension from the head of department position and rearrangements made concerning examination papers for AS 304.
- [7] It is common cause that on Wednesday 3rd May 2017 the Applicant was invited to a meeting convened by Dean of Faculty of Agriculture Professor Masuku, together with many others.² The meeting was informed about complaints made against the Applicant³ by AS 304 course students.
- [8] The students' complaint was articulated in a memorandum from Student Representative Council (SRCL) accompanied by over 66 signatures, titled COMPLAINTS OF THIRD YEAR STUDENTS ABOUT LECTURER OF

²Dr MM Mkhwanazi, faculty Tutor, Assistant Faculty Tutor, Dr MV Diamini, Assistant Dean of Students

Affairs, Mrs Gumede, Mrs T Mamba and two other staff members for Applicant's department.

³ See TSS8, Applicant's letter to ALAP at page 22 of Book of Pleadings.

AS 304. It was addressed to the DSA, dated 28 April 2017. A similar memo addressed to Senate was dated 25 May 2017. The allegations contained in the two memos stated that the Applicant:

- **Does not provide a friendly learning environment;**
- Required submission of personal photos when submitting seminar/presentation;
- Does not consider the students as sound students;
- Imposed fear that she was ready to teach more than 200 students next academic year for the **same course and same students.**

[9] The outcome of the said meeting of the 3rd May 2017 was relayed by SRC chairperson to the concerned students who reacted violently by capsizing the Applicant's motor vehicle, vandalizing university property, spraying Applicant's office with water, among other acts of violence. The students' representative feedback to the meeting was that students were unhappy with responses to their grievance.

[10] Subsequent steps taken by the 1st Respondent to address escalating volatile situation included suspension of the Applicant as Head of department by Acting Vice Chancellor's Memo of 29 May 2017⁴ addressed to the Applicant. The Applicant queried her suspension as unlawful by her letter to the Vice Chancellor dated pt June 2017. The Vice Chancellor responded to the query by letter of 16 June 2017 withdrawing the initial suspension letter. Curiously the said 16 June letter informed The Applicant in modified terminology that "you are hereby notified o(your temporary relief of your position as Head of Department o(Animal Science Department until further notice. Such relief shall be deemed to have come into effect for the 29th May

⁴ Annexure TSS 1 to founding affidavit. The letter was titled SUSPENSION OF APPOINTMENT AS HEAD OD DEPARTMENT and read in part: "*...you are hereby notified of your immediate suspension as Head of Department od Animal Science Department until further notice...*"

2017. Notwithstanding you will still be entitled to your benefits that accrue for the Headship position. "⁵ [Emphasis added]

- [11] Applicant's temporary suspension was immediately followed by appointment of the 2nd Respondent by Memo of 1st June 2017 as Acting Head of Department of the Animal Science Department.⁶
- [12] The Applicant states in her founding affidavit that from numerous meetings that were held by the 1st Respondent's various committees following her suspension, she got a distinct impression that the 1st Respondent was desirous of removing her as a lecturer of AS 304 course to appease the students at her expense. She cited examples that the examination paper that she had set was replaced without her involvement, the marking of the scripts, and her exclusion on setting and marking supplementary examination papers.
- [13] She avers that if she were to be removed as a lecturer, she would suffer irreparable harm because she invested financially in pursuing the Master's degree in Australia from her own funds.
- [14] On urgency, the Applicant states that it is unsettling for her not to know what she is expected to do when the University reopens in August 2017.
- [15] In its Answering affidavit deposed to by the Registrar, the 1st Respondent raised two points *in limine*, firstly that the Applicant failed to meet peremptory requirements of temporal interdict - prima facie right; reasonable apprehension of irreparable harm if interim relief is not granted;

⁵ TSS 3, Likewise the Applicant wrote back to the Vice Chancellor on the 22 June 2017 to protest her suspension with pay, pointing out that she was not afforded a hearing prior.

⁶TSSA

that a balance of convenience was in favour of the interim relief being granted; and that the Applicant had no other satisfactory remedy.

[16] The second point raised is that the High Court has no jurisdiction to entertain the matter in terms of Section 8(1) of the Industrial Relations Act 2000, as amended (IRA), read together with Section 151(3)(a) of the Constitution. In other words that the Industrial Court had exclusive jurisdiction to hear the matter.⁷

[17] The court considers that the points raised in *limine* by the 1st Respondent, in particular the point relating to want of jurisdiction by this court ought to be considered at the outset. This is so because if a finding is made that the court has no jurisdiction, that would dispose of any further need to hear the matter. The Court notes in this regard that the interlocutory application to amend prayers in the Notice of Motion, even assuming it were to be successful, does not seek to alter the nature of the main application nor affect the question whether the court has jurisdiction or not. It was indeed the attitude expressed by both Counsels that arguments should focus on the issue of jurisdiction and that it be determined first.

Jurisdiction

[18] The 1st Respondent argues that while there is provision in the Constitution which expressly reserves constitutional matters for the exclusive jurisdiction of the High Court, Counsel submitted that the Industrial Court does have jurisdiction over constitutional matters in relation to labour disputes otherwise within its jurisdiction.

⁷ Paragraph 5 of 1st Respondent's answering affidavit.

- [19] The 1st Respondent's contention is further that the High Court has no power or jurisdiction to entertain issues or disputes between employer and employee and that this is the preserve of the Industrial Court.
- [20] The 1st Respondent further submitted that High Court jurisdiction arises in instances where interpretation of the Constitution was at issue, or where the decision sought to be declared unlawful and unconstitutional was made by a public functionary in exercise of administrative powers, which the Respondent argues are not under consideration in the present matter.
- [21] The Applicant disagreed with preliminary points of law that the court has no jurisdiction. In her Replying affidavit,⁸ the Applicant denies that Section 151 (3)(a)⁹ of the Constitution gives the Industrial Court exclusive jurisdiction over matters like hers. She avers that the said Section 151(3) (a) must be read in the context of Section 151(2),¹⁰ the preamble and Chapter III¹¹ in order to appreciate that the Constitution does confer jurisdiction to the High Court in labour matters wherein violations of human rights and fundamental freedoms are alleged.
- [22] In the brief heads, with no authorities cited, the Applicant submits that the authorities relied upon by the Respondent are misplaced. However, no compelling argument is offered on why for instance, the plain meaning of Section 151(3)(a) should be departed from.

⁸ Paragraph 4.

⁹ Section 151(3)(a): *"Notwithstanding the provisions of subsection (1) the High Court (o) Has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction."*

¹⁰ Section 151(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 (b) to hear and determine any matter of a constitutional nature."*

¹¹ Of the Constitution

[23) It is submitted on behalf of the Applicant that it is not her case that the Industrial Court does not have jurisdiction to hear and determine the matter. Rather her case is that the Industrial Court does not have exclusive jurisdiction in the light of the provisions of Sections 35¹² and 151(2) of the Constitution. Counsel submitted that Applicant's case involved allegations of violations of human rights and fundamental freedoms enshrined in Chapter III of the Constitution, and that such matters may be heard and determined by the High Court.

[24] Applicant's Counsel submits that a close reading of the cases cited by the 1st Respondent, namely, **Stanley Matsebula v Under Secretary Ministry of Education and Others**¹³ and **Attorney General v Siphon Dlamini and Another**¹⁴ show that the High Court and the Industrial Court have concurrent jurisdiction in matters involving allegations of Chapter III contraventions.

Analysis and Findings on Jurisdiction

[25) The 1st Respondent in pursuit of the view that the High Court has no jurisdiction approaches the matter from the stand point that the case is primarily a labour matter involving employment contractual relationship between employer and employee. The fact that there may be an overlap with employees' constitutional rights does not remove it from the exclusive jurisdiction of the Industrial Court conferred by the Industrial Relations Act 2000¹⁵ and the Constitution. ¹⁶ The 1st Respondent submits that since the 1st Respondent's decision under attack was not an administrative decision per

¹² Section 35 of the Constitution details enforcement of its protective provisions.

¹³ Industrial Court case No 50/2007

¹⁴ Case No 4/2013

¹⁵ Section 8 (1)

¹⁵ Section 151 (3) (a)

se but employer and employee contractual decision, then it becomes a labour dispute in which the High Court has no jurisdiction in terms of Section 151 (3) (a) of the Constitution.

[26] The Applicant's approach on the other hand is that the High Court's jurisdiction hinges on the fact, as seen by the Applicant, that her case involves violations of Chapter III rights, that is human rights and fundamental freedoms. The argument that the High Court has jurisdiction on the basis that the matter involves allegations of violations of Chapter III rights of the Constitution is, in my view, watered down by the fact that the Industrial Court is clothed, in the discharge of its statutory functions, with powers similar to those of the High Court, including powers to grant injunctive relief.¹⁷

[27] In summary the main prayers or relief sought by Applicant is: declaratory order that her suspension as head of department of Animal Science is unlawful, unconstitutional and invalid and /or of no force or effect; that appointment of the 2nd Respondent as Acting Head of Department of Animal Science is likewise unlawful, invalid and/or of no force or effect; that the 1st Respondent's decision to prohibit the Applicant from teaching AS 304 and other undergraduate courses is unconstitutional, unlawful, invalid and/or of no force or effect. She further seeks an order interdicting and restraining the Respondents from interfering in any manner whatsoever with Applicant's execution of her duties as substantive head of department, and as lecturer for AS 304 etc.

[28] It is not in dispute that the Applicant's cause of action is based on labour dispute as well and that it involves a claim that her constitutional rights were

¹⁷ See Section 8(3) IRA 2000.

infringed. It is a labour dispute in that she is an employee of the 1st Respondent and the latter an employer in terms of the IRA 2000 as amended.¹⁸ IRA interpretation of a dispute as follows -

" ... includes a grievance, a grievance over a practice, and means any dispute over:

a)

b) *Disciplinary action, dismissal, employment, suspension from employment ... "*

c)

d)

e) [Emphasis added]

[29] There is no doubt therefore that this case is a labour dispute covered by the **IRA** 2000 as amended. Section 8 (1) of the **IRA** provides that the 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, complaint or infringement of any of the provisions of this, the Employment Act, the Workman'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 employer and employee in the course of employment. "

[29.1] Section 17 provides for hearing and determination of labour disputes by arbitrator referred to by the Industrial court under Section 8 (8) or any other provisions of the Act.

¹⁸ See interpretation Section 2 of IRA for employer and employee

¹⁹ Section 8 (8) stipulates exception to exclusive jurisdiction of the Industrial Court whereby President of the Industrial court is empowered to direct a dispute to be determined by arbitration under the auspices of Conciliation Mediation and Arbitration Commission (CMAC)

[30] In exercise of its exclusive jurisdiction over labour matters the Industrial Court's powers are enhanced by Section 8 (3) to the effect that *"the Court shall have all the powers of the High Court, including the power to grant injunctive relief"* The import of this provision read with section 8(1) is that the Industrial Court has exclusive powers to hear disputes on any issues arising from employment relationship of employer and employee. This includes issues of a constitutional nature that are steeped in employer - employee relationship.

[31] While the High Court enjoys unlimited original jurisdiction in civil and criminal matters,²⁰ such powers are nevertheless circumscribed by section 151(3) of the Constitution to the extent that it has no original jurisdiction *"in any matter in which the Industrial Court has exclusive jurisdiction. "*

[32] Having found that the application concerns a labour dispute, it follows that this is a matter in which the Industrial Court has exclusive jurisdiction in terms of Section 8(1) of the IRA 2000. This leads to inescapable conclusion that it is a matter in which the High Court's jurisdiction is precluded by Section 151(3)(a) of the Constitution^{21,22} notwithstanding that the matter involves fundamental human rights enforcement enshrined in Chapter III of the Constitution. In this case the fundamental right of the Applicant (to a fair hearing) interfaces with her labour rights within a labour dispute. Determination of labour disputes lies with the exclusive jurisdiction of the Industrial Court as a specialist labour court, conferred by the IRA and the Constitution.

²⁰ Per Section 151 (1) of the Constitution.

²¹ Section 151(3)(a).

²² See foot note 10 above for text.

[33] This finding disposes of the Applicant's argument that the Industrial Court does not have exclusive jurisdiction in the light of Sections 35 and 151 (2). Section 35 of the Constitution deals with enforcement of Protective Provisions of Chapter III (Protection and Promotion of Fundamental Rights and Freedoms). Section 35(1) provides:

"(1) where a person alleges that any of the foregoing provisions of this chapter has been, is being, or is likely to be contravened in relation to that person, - then without prejudice to any other action with respect to the same matter which is lawfully available, that person ...may apply to the High Court for redress."

Section 35 (2) provides:

"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 make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provisions of this chapter. "

Intention of drafters of the constitution

[34] The fact that Section 8 (1) of the IRA 2000 clothes the Industrial court with exclusive jurisdiction in all labour matters, and in addition to that Section 151 (3)(a) unequivocally states that the High Court has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction, shows a clear intention of makers of the Constitution to reserve the exclusive jurisdiction of the Industrial Court as

conferred by

Section 8 (1) of the IRA. I am persuaded in this regard by the conclusion reached by the Industrial Court of Appeal (ICA) in **Attorney General v Siphon Dlamini**,²³ in the following terms:

"[40] It is important for us to state at this juncture, that the unlimited original jurisdiction in all civil and criminal cases 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.

[41] The reason for this is not far-fetched. This is because Section 8 (1) of the Industrial Relations Act 2000 (the Act), clothes the Industrial Court with exclusive jurisdiction in all labour disputes

"24

[35] The Industrial Court of Appeal in **Siphon Dlamini**²⁵ the ICA noted that the High Court's unlimited civil jurisdiction conferred by Section 151(1) and (2) is nonetheless excluded in respect of any matter in which the Industrial Court has exclusive jurisdiction.

[36] The Supreme Court observed in **Swaziland Breweries and Another v Ginindza**²⁶ and expressed the view that the intention of the Legislature in enacting Section 8(1) of the IRA was to exclude the High Court's jurisdiction in matters provided for under the Act, and thus confer

²³ **Supra.**

²⁴ The Attorney General v Siphon Dlamini & Another Civil Appeal no 4/2013

²⁵ **Supra.**

²⁶ Civ Appeal No. 33/06.

"exclusive" jurisdiction in such matters on the Industrial Court.²⁷ The Supreme Court highlights the importance of recognising the purpose of the legislature in establishing the Industrial Court, which was clearly to create a specialist tribunal which enjoys expertise in industrial matters. To buttress this point, the Supreme Court quoted from **Paper Printing Wood and Allied Workers Union v Pienaar NO and Others**²⁸ at 637 A-B:

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

[37] I entirely identify with the Supreme Court's views that Section 151(1) and (3) of the Constitution does two things: -

"(1) In plain and unambiguous language the Section ousts the jurisdiction of the High Court in any matter in which the Industrial Court has exclusive jurisdiction. To that extent therefore, it stands to reason that there can be no question of the High Court and the Industrial Court enioving concurrent iurisdiction. "

(2)...the inherent original iurisdiction ordinarily vested in the High Court does not detract from the exclusive iurisdiction of the Industrial Court in dealing with matters provided for under the Act."¹⁹

²¹

²⁹ [Emphasis added]

The said Section 151 provides:

²⁷ At paragraph [11] Swaziland Breweries supra

²⁸ 1993 (4) SA 621(A)

²⁹ Swaziland Breweries supra at para [13]

"(1) The High Court has-

- a) *Unlimited original jurisdiction in civil and criminal matters ...*
- b) *Such appellate jurisdiction as may be prescribed by or under this Constitution or any other law ...*
- 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 from the time being in force in Swaziland*

(2)

(3) Notwithstanding the provisions of subsection (1), the High Court

(a) Has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction.

(b)... "

[Emphasis added]

[38] From the foregoing considerations, I come to the conclusion that the Industrial Court is the proper forum and that the High Court has no jurisdiction to entertain the application in its current form and for the relief sought.

[39] The application is therefore dismissed with costs.



D Tshabalala
Judge

For the Applicant : Advocate L Maziya (Instructed by MH Mdluli Attorneys)

For the 1st Respondent: B Gamedze (Musa Sibandze Attorneys)