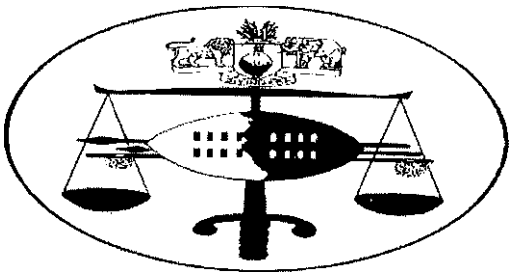

# IN THE HIGH COURT OF ESWATINI

**CASE NO. 1136/2021**

In the matter between:

**HLOBISILE MAGONGO**

**Applicant**

And

**STAR PAINT (PTY} LTD** **1st Respondent**
**HASSO MAGAGULA N.O** **2nd Respondent**

**NEUTRAL CITATION:** ***Hlobisile Magongo VS Star paint (pty) ltd*** *( 1136/21) [2021] SZHC* 30 *(02/03/2022)*

**CURUM:** BW MAGAGULA- AJ

**HEARD:** 24th February 2022

**DELIVERED:** 2nd March 2022

***Summary:*** ***Application to invoke section 152 of The Constitution Act (2005) 1aw- the issue has been settled by the constitutional Court- The Industrial Court has been declared by the Supreme Court not to be a subordinate Court nor a tribunal and as such the High Court does not have supervisory powers over those special Courts - The structure which the Applicant seeks this Court to review is a disciplinary tribunal. This places the matter squarely within the jurisdiction of the Industrial Court as per section 8 of the Industrial Relations Act of 2000 (as amended). Held; point in limine of jurisdiction upheld. Costs to follow the event.***

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**Judgment**

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**Introduction**

[1] The Applicant is former employer of the first Respondent, she was employed as personal assistant of Mr. Russo, the managing director. The latter also doubles up as the Italian Consular in the Country.

[2] The 2nd Respondent was tasked to chair the disciplinary appeal hearing emanating from the dismissal of Applicant. This is subsequent to the chairman of the of the disciplinary hearing recommending that the Applicant be dismissed. The l st Respondent obliged and implemented the recommendation.

[3] The chairperson of the disciplinary hearing was Ms. Hillary, it is her decision which the Applicant sought to challenge, hence she lodged an appeal which was heard by the 2nd Respondent.

[4] . Whilst the 2nd Respondent was seized with the matter, the Applicant approached the Industrial Court. It is the decision of that Court, in which Nkonyane J, as he then was, allegedly pronounced in his judgment, that the Appellant had infact been employed by the 1st Respondent, regardless of the fact that she performed duties of the Italian Consulate as assigned to her by the MD, Mr. Alberto Ruso .

[5] It appears that the reason which eventually led to her dismissal, pertained to certain responsibilities that she performed for the
. consular, not necessarily the 1st Respondent (Star Paint).

[6] It is worthy of mention though, that the Industrial Court declined to entertain her prayers, it granted her leave to approach the Court, once the 2nd Respondent had finalized the appeal

hearing.

[7] When the 2nd Respondent eventually delivered his judgment, he took a position that the decision of the chairman of the disciplinary hearing was correct in her findings for a guilt verdict and the sanction of a dismissal. He dismissed the point challenging jurisdiction. It is the finding of the 2nd Respondent that is dissatisfactory to the Applicant. She is of the view that at the time the 2nd Respondent chaired the Appeal, the Industrial Court had already made a final and definite finding of fact being, that there existed no employer -employee relationship
between Applicant and the Italian consulate. Consequently, the l st Respondent lacked jurisdiction to charge and prosecute the Applicant for misconduct emanating from acts she performed for the Italian consulate.

[8) The current application before Court is predicated on the Courts review and supervisory powers over tribunals and lower adjudicating bodies. S152 of the Constitution Act of 2005.

**POINT IN LIMINE**

[9) The l st Respondent has elected not to respond to the merits of the Applicant's application, but has taken legal points to the Applicant's application. It is worthy of mention that the l st Respondent also seeks that this Court must dismiss the

Applicant's application and order punitive costs. In the 1st Respondent's notice to raise points of law, the 1st Respondent asks for costs at an attorney and own client scale against the 1st Respondent. However, in it's heads of arguments it escalated the issue that the costs must actually be borne by the Applicant's legal representative on the basis that he was earlier on forewarned that the application is a nonstarter. The rational being that a cautious, collegial correspondence was dispatched and the Applicant's legal representative is however relentless in his pursuit of this matter before Court. Consequent thereto she has unjustifiably made the 1st Respondent to be out of pocket, in defending an application that is frivolous. During the oral arguments, Mr B Ngcamphalala however abandoned the prayer in respect of the punitive costs, both against the Applicant and his learned friend Mr. L Dlamini.

[9] The points of law are framed as follows:

***The High Court does not have jurisdiction to review an employer's decision terminating any employee's contract of employment.***

***The present application seeks to undermine the provisions of part VIII of the Industrial Relations Act, which establishes CMAC, a commission, tasked with the resolution of disputes before the Industrial Court being the specialised Court*** **can** ***take***

*cognisance of.*

*The jurisdiction of this Honourable Court* in *relation to labour matters, especially reviews, comes into play only where* a *litigant feels that the Industrial Court has committed reviewable errors when adjudicating upon any matter placed before it. The review* is *only limited to a question of fact.*

*The procedure and/or step that should have been taken by the Applicant* in *this matter,* is *that of reporting* a *dispute at CMAC* as *opposed to coming to Court for* a *review. The Applicant has* a *remedy at CMAC and the Industrial Court* in *the event the matter remains unresolved at CMAC.*

*Furthermore, section 2* of *the Industrial Relations Act defines dismissal* as a *dispute and the High Court does not have jurisdiction to deal with* a *dismissal. Furthermore, section* 8 *[1] of the Industrial Relations Act OF 2000 gives the Industrial Court exclusive jurisdiction to determine labour matters.*

*Section 8[ 1] of the Industrial Relations Act as follows;* " *The Court shall, subject to section 17 and 65, have exclusive jurisdiction to hear* , *determine and grant any appropriate relief* in *respect of an application* , *claim* or *complaint* or *infringement of any of the provisions of this, the Employment Act, the Workmen's*

*Compensation Act, or in respect of any matter which may arise at* common *law between an employer and employee in the cause of employment or between an employer or employee's Association* , *trade Union,* a *staff Association, a federation and* a member *thereof".*

*The High Court's jurisdiction where there has been a pronouncement of a termination is ousted by the provisions of Section* 8 *of the Industrial Relations Act 2000 as amended. The Act provides that the matter should* be *reported as* a *dispute at CMAC and if not resolved, then the Industrial* Court *will assume jurisdiction.*

*The Industrial Relations Act provides for a review under Section 19 [5] of the Act. The Act states as follows;* "a *decision or order of the* Court *or arbitrator shall, at the request of any interested party,* be *subject to review by the High* Court *on grounds permissible at* common *law"*

*The only time the High* Court *can exercise its powers which are both contained in the constitution and the Industrial Relations Act is only when the matter has been dealt with under part* 8 *and later has gone through a trial at the Industrial Court does not have jurisdiction to deal with this matter.*

**APPLICANT'S RESPONSE TO THE POINTS OF LAW**

[1 O] The Applicant insists that she is moving this application on the strength of **S152 of The Constitution Act of (2005)** requesting that this Court should exercise its supervisory powers to correct an act which if allowed, will perpetrate an injustice and/or undermine the integrity of our Courts.

[11] The basis of the Applicant's case is that it was incompetent for the 2nd Respondent to dismiss the Applicant's Appeal in the face of the judgment of Nkonyane J at the Industrial Court, as he had already ruled that there was no· employer -employee relationship between the Applicant and the Italian consular. On that vein, the 1st Respondent lacked the requisite jurisdiction to prosecute the Applicant for any transgression emanating outside the scope of her employment agreement with the 1st Respondent. The Applicant argues ferociously that, it was improper for the 2nd Respondent to make a contrary finding to that of the Industrial Court, which had already made a finding of fact and a conclusion of law with regard of the status of the Applicant being employed by the 1 st Respondent and not the Italian consular. The argument is that, the 2nd Respondent, sitting as chairman made a finding that the employer was entitled to charge and dismiss the Applicant. He lacked powers the to do so, as he was subordinate to the Industrial Court. He

could not then make a finding that is contrary to the sentiments.

[12] The Applicant further argues that the point of law raised by the 1st Respondent cannot stand and has to be dismissed by virtue of the fact that, the Constitution is an Act of parliament which was promulgated after the Industrial Relations Act of 2000. The rationale being that the Constitution was promulgated in 2005, whereas the Industrial Relations Act of 2000 was promulgated in 2000. I understand the argument to be that the constitution deals with the protection of the integrity of justice whereas the Industrial Relations Act deals with disputes between employer and employee. Since the constitution was promulgated after the IRA Act, its sentiments must trump those of the IRA Act.

[13] The, /\pplicant further argues that the jurisdiction of the above Honourable Court as set out under section 152 of the constitutive Act is not ousted by S8 of the Industrial Relations Act. The argument advanced on behalf of the Applicant is **that** the supervisory intervention as sanctioned by section **152** of the constitution, only kicks in, when the High Court is called upon to correct and/or set aside an act which has an effect as argued above where it undermines the integrity of judicial administration.

[14] The Applicant argues strongly that her case is one of those

matters where this court must intervene and correct an untenable situation which has been caused by the 2nd Applicant making a ruling which is contrary to an order that the Industrial Court has already pronounced with finality on the same issue. The Industrial Court reigns higher than a chairman of a disciplinary hearing. The long and short of the argument is that at the time the 2nd Respondent who is the chairman of the disciplinary appeal made the decision that the employer had jurisdiction to charge the Applicant, the Industrial Court had actually made a contrary finding.

**RELEVANT LAW APPLICABLE**

[16] In light of the fact that the Applicant has premised it's application on Section 153 of the Constitutive Act of 2005. It is proper that I examine this section amongst other relevant law in this matter.

[17] Section 152 deals with the review and supervisory powers of the High Court, it state as follows;

The High court shall have and exercise review and supervisory jurisdiction over all subordinate Courts and tribunals, or any lower adjudicating authority, and may in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of it's review supervisory powers.

[18] During the arguments, Mr. L Dlamini counsel for Applicant, submitted that the High Court is empowered to exercise review and supervisory powers in terms of S152 on lower adjudicating authorities. In other words, the argument is that the 2nd Respondent when chairing the disciplinary appeal qualifies to be referred to as a lower adjudicating authority. By implication, then the 2nd Respondent's decision subject to the review and supervisory powers of this court.

***[19] Section 8(1) of Industrial Relations Act of 2000 as amended state as follows:***

***The Court shall, subject to section 1 land 65 have exclusive jurisdiction to hear, determine and grant any· appropriate relief in respect of an application claim or complaint or infringement of 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 cause of employment or between an employer or employer's association and Trade union, or Staff Association or between an employees' Association, a Trade Union, a staff Association, a Federation and a member thereof".***

***S(2) (a)- an application, claim or complaint may be lodged with the Court by or against an employee, an employer or trade***

***union, staff association and employer's Association and employee association, federation, the commissioner of labour or the Minister*** ;

***(3.3) In the discharge of its functions under this Act, the court shall have all the powers of the High Court, including the power to grant injunctive relief***

***(4) In deciding a matter, the Court may make any other order it deems reasonable which should promote the purpose and objects of the Act.***

***(5) Any decisions or order by the Court shall have the same force and effect as a judgment of the High Court, the certificate signed by the Registrar shall be conclusive evidence of the existence of such decision or order.***

***(6) Any matter of law arising for decision at a sitting of the Court and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the presiding judge of the Court provided that on all other issues, the decision of the majority of the members shall be the decision of the Court.***

**COURT'S ANALYSIS AND FINDINGS**

[20] The Applicant's application does not address the crucial legal point raised by the Respondent being that section 8 of the Industrial Relations Act 2000 (as amended) provides a remedy to the Applicant's complaint. Even if I could agree that the chairman of the disciplinary hearing made a contrary finding to

a pronouncement of a Court of law. He did so within the realm of an employer -employee setting, whilst chairing a disciplinary appeal hearing against a decision of an employer. That setting places the matter squarely, within the ambit of section 8 of the Industrial Relations Act of 2000. Section 8 confers to the Industrial Court all labour matters obviously after part 8 of the Act has been followed in reporting the matters to CMAC.

[21] The Industrial Relations Act does not only grant to the Industrial Court exclusivity of jurisdiction to hear determine and grant appropriate relief in respect of an application or complaint or infringement. But, it further provides in **S2,** that an application, claim or complaint may be lodged with the Court against an employer.

[22] The Applicant's argument that the disciplinary chairman committed an error by not following the guidance of a judgment of the Industrial Court, does not oust the jurisdiction of the Industrial Court from dealing with the very same error allegedly committed by the chairman. The alleged error was still constituted under the confines of the employment arena. The purpose was to hear an appeal from a disciplinary hearing arising from an employee-employer relationship. Whatever decision that the chairman might have reached, still

upholds a position that the employer had taken pertaining to a dismissal.

That speaks to an employment relationship between the parties. This can only point to one direction, that the appeal hearing still fell under the auspices of an employment arena. There is absolutely no reason why the Applicant, if aggrieved by any outcome of this appeal disciplinary hearing, should jump the Industrial Court which is conferred with exclusive jurisdiction to adjudicate on such matters and come to the High Court. I do not see any rationale for that approach. Even if the High Court is conferred with the supervisory powers in terms of S152 of the Constitution of Eswatini.

[21] In my observation, even if for a second, it can be accepted that the chairman of the disciplinary hearing pronounced a decision which was contrary to the position that the Industrial Court, that issue can still be placed before the Industrial Court, when the Industrial Court ultimately deals with the question of fairness of the termination of the employment relationship between the Applicant and the 1st Respondent. It will form part of the issues that the Court is clothed with the appropriate jurisdiction to grapple with. Whatever contribution the 2nd Respondent made in furtherance of the alleged unfairness, at the end of the day, the Applicant's employment relationship was terminated. One of the issues complained of, is the manner and the reasoning of the chairperson. Surely, if in the Applicant's wisdom, that reasoning should be reviewed, then the Industrial Court has the

jurisdiction to do so.

[17] Coincidentally, the issue has been settled once and for all by the decision of ***Cashbuild Swaziland (pty) v Thembi Penelope M a ga gula*** [1]. When one considerers the nature of prayer 1 of the Applicant's application she seeks that this Court must invoke or exercise its review or supervisory powers over a tribunal and/or lower adjudicating body. In other words, the Applicant is of the view that the proceedings of the disciplinary appeal constituted a tribunal and as such this Court has supervisory functions over the proceedings. Although I have already dealt with this issue above, the forum that was chaired by the 2nd Respondent, forms part of the processes to discipline and subsequently terminate the Applicant's employment. That process, is the preview of the Industrial Court as it pertains to an employer and employee relationship. There is no motivation on the Applicant's affidavit why should this Court usurp the function that the legislature places squarely on the Industrial Court.

[18] The Cashbuild judgment has stated in no uncertain terms, that the Industrial Court is not a tribunal nor an inferior Court. It is a specialised Court with full powers of review.

[19] It is unnecessary for me to consider all the other points raised by

[1] Case No.26 (Bf 2020)

the l st Respondent, the Applicant's application has no merit at all. It must accordingly fail.

Order:

19. l The Respondent's point in limine of lack of jurisdiction is upheld, the application is dismissed.

19.2 costs to follow the event

**ACTING JUDGE OF THE HIGH COURT**

*FOR Applicant :* *Mr. L. Dfamini ( Linda Dlamini & Associates)*

*FOR Respondent:* *Mr.* B *Gamedze ( Musa M Sibandze Attorneys)*