IN THE HIGH COURT OF ESWATINI

JUDGMENT

CIVIL CASE NO: 2258/20

In the matter between:

GODFREY EXALTO **APPLICANT**

And

ROYAL ESWATINI NATIONAL AIRWAYS **1ST RESPONDENT**

SIKHUMBUZO SIMELANE **2ND RESPONDENT**

Neutral Citation: *Godfrey Exalto vs Royal Eswatini National Airways and Another (2258/21) [2022] SZHC (40) 25th March, 2022*

Coram: **MABUZA PJ, MLANGENI J. AND FAKUDZE J.**

Heard: **3rd December, 2021**

Delivered: 25th March, 2022

Summary

Applicant is an employee of the First Respondent. Employer instituted disciplinary charges against employee, alleging that employee had brought disrepute upon the employer through the use of social media. Employee had posted on his facebook page that ***"We can go on and on but nothing will change, because there is no will to change, because kutokhala umzaqa. Dictactorship 101."*** *This post was in the backdrop of a public concern about expenditure by the Government on luxury motor vehicles.*

Applicant approached the Industrial Court to interdict the disciplinary hearing, and in the process invoked Section 35 (3) of the Constitution to have the matter referred to this court for a declaratory order to the effect that in publishing what he did he was exercising his constitutional rights to freedom of speech and opinion under Section 23 and 24 of the Constitution. The Industrial Court duly referred the matter to the High Court for determination of the constitutional issue.

In opposing the application for declaratory relief before this court the respondent raised a two – pronged objection as follows: -

i) that the dispute being a pure labour matter, the High Court has no jurisdiction to deal with it;
ii) that the dispute is resolvable without reference to constitutional provisions, hence the doctrine of avoidance is applicable.

Held: The matter having been referred to the High Court by a competent court, and that order having not been challenged in any way, there is no sound basis to decline hearing the matter.

Held further: A determination whether the doctrine of avoidance is applicable or not requires an assessment of the merits of the matter, even if cursorily, and this is beyond the mandate of this court.

Held further: On the facts, even if the court adopts the doctrine of avoidance the constitutional issue is bound to arise again in the Industrial Court, or even before the disciplinary chairperson, as the applicant canvasses his defence, and such futility is undesirable.

Held further: Ex facie, the applicant's facebook page is well-within the ambit of the constitutional rights of freedom of speech and opinion under Section 23(1) and (2) and Section 24(1) and (2).

Held further: The clawback clauses in Section 23(2) and 24 (2) and (3) allow hindrance on the exercise of those rights under exceptional circumstances.

Held further: The facts in casu fall outside of the exceptional circumstances recognized by the Constitution, hence the post complained of was in exercise of the applicant's freedom of speech and opinion.

Held further: The rights in Section 14, 23 and 24 of the Constitution are not derogable except to the extent that the constitution expressly provides.

1) Application is granted.
2) Matter referred back to the Industrial Court for determination of merits.
3) No order for costs.

JUDGMENT

MLANGENI J.

[1] This matter emanates from an employer – employee relationship. The applicant is employed by the first respondent as an accountant in terms of a comprehensive written agreement dated February 2019. The second respondent has not participated in the proceedings before this court, hence I will refer to the parties as applicant and respondent. On or about the 10th December 2019 the respondent instituted disciplinary charges against the applicant, alleging that he had brought his employer into **"gross disrespect"** and that he had used social media irresponsibly.

[2] The cradle of these charges is a facebook post dated 7th and 8th November 2019. At the disciplinary hearing the employer abandoned the charges based on the facebook post dated 7th November and placed its focus on the post dated 8th November 2019 at 7:53 pm. I capture the full text of the post below: -

> **"We can go on and on but nothing will change, because there is no will to change, because *kutokhala umzaqa.* Dictatorship 101."**

It is common cause that the applicant does not disavow the facebook post which is the subject matter of these proceedings.

[3] To give a fuller background to the matter before court, I reproduce below the charges that were put to the applicant.

> **"1. BRINGING RENAC INTO GROSS DISREPUTE – In that on or about the 8th November 2019 you posted statements on your facebook page labelling the Eswatini systems of government as a dictatorship which have brought the corporation into disrepute in the mind of her shareholders."**
>
> **2. "IRRESPONSIBLE USE OF SOCIAL MEDIA – In that on or about the 8th November 2019 you posted statements to your Facebook page which have brought the corporation into disrepute."**

[4] The hearing before the disciplinary chairperson was quite eventful, producing no less than three interlocutory rulings which, it is apparent, the applicant refused to accept. The ultimate ruling is dated 27th July 2020. Its effect was that the hearing was to proceed on future dates to be agreed upon by all the stakeholders. It is this ruling that precipitated an urgent application before the Industrial Court, dated 6th August 2020, in which the applicant sought to interdict the

disciplinary hearing as well as to review and set aside the chairperson's ruling dated 27th July 2020. The prayer that is relevant to these proceedings is in the form of a declarator and, verbatim, it is as follows: -

> **"The disciplinary charge faced by me does not disclose any misconduct in respect of my employment, such conduct even if proven would constitute an exercise of my constitutional rights to freedom of thought and/or conscience and/or expression."**

[5] While the application was pending before the Industrial Court the applicant then moved another application before the same court, in terms of Section 35(3) of the Constitution, to have the matter referred to the High Court for determination of the declarator, on the basis that the declarator being sought raises constitutional issues. Section 35 (3) is in the following terms: -

> **"If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of this chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the**

judgment of that person, which shall be final, the raising of the question is merely frivolous or vexations."

[6] By order dated 9th October 2020 the Industrial Court stayed the main application before it, which sought a declarator, and referred the constitutional question to the High Court for determination. In the context of this referral the phrase **"subordinate to the High Court,"** as used in Section 35 (3) of the Constitution, deserves a fleeting comment. At that point in time there was a lively debate in this jurisdiction about whether the Industrial Court is subordinate to the High Court or not. In this respect see the case of DERRICK DUBE v EZULWINI MUNICIPALITY & 6 OTHERS.[1] That debate saw some dogmatic scholarship that ignored unmistakable international trends and sought to create, of this jurisdiction, an island of Labour Law jurisprudence. Until the High Court judgment in SWAZILAND REVENUE AUTHORITY & 3 OTHES v PRESIDING JUDGES OF THE INDUSTRIAL COURT & 2 OTHERS[2] the preponderance of opinion was that the Industrial Court and the Industrial Court of Appeal are subordinate to the High Court. In the said judgment the High Court, sitting as a full bench, came to the conclusion that the High Court was not qualified to review judgments of the Industrial Court and

[1] (91/2016) [2018] SZHC 49, 30th November 2018.

[2] Swaziland Revenue Authority and 3 Others v Presiding Judges of the Industrial Court and 2 Others (1742/17) [2018] SZHC 209, 26th September 2018.

the Industrial Court of Appeal. It is well documented that the said judgment was not spared from challenge. Order was finally created on the 9th December 2021 when a Full Bench of the Supreme Court emphatically decreed, by majority, that the Industrial Court is a specialized court parallel to the High Court and therefore not subordinate to it. See CASHBUILD SWAZILAND (PTY) LTD v THEMBI PENELOPE MAGAGULA.[3]

[7] It follows, therefore, that if the referral by the Industrial Court was after the 9th December 2021 it would have been irregular and inconsequential. Coming as it did before the momentous judgment of the Supreme Court in CASHBUILD, referred to above, it is competent.

[8] Whilst the matter was pending in the High Court the prayer for a declarator was amended to read that: -

> **"The conduct complained of by the 1st Respondent falls within the exercise of the freedoms guaranteed under Section 24(1) and (2) and or Sections 23(1) and (2) of the Constitution of the Kingdom of Eswatini."**

[3] (26B/2020) [2021] SZSC 31, 9th December 2021,

For the sake of completeness I will, in due course, reproduce the constitutional clauses that the applicant is relying upon.

[9] In a matter such as this it is easy to gravitate towards the merits of the case. It is imperative to avoid that temptation, because the merits are not for this court but for the Industrial Court to determine. Ours is to make an abstract determination, as it were, whether the words used in the facebook post do or do not fall within the exercise of constitutional rights by the applicant. There is, however, a threshold issue that has arisen and which requires preliminary interrogation.

[10] In its opposing papers, heads of argument and during legal arguments the respondent submits that the High Court does not have jurisdiction to deal with the matter because it is **"purely a labour dispute between an employer and an employee well capable of being resolved in terms of the legal principles of Labour Law."**[4] This is famously known as the exclusivity argument and it is based on Section 8 of the Industrial Relations Act as amended. In the same breath the respondent invokes the doctrine of avoidance and submits that the dispute is resolvable without the need to resort to constitutional provisions. On the basis of this, goes

[4] Opposing Affidavit (OA), para 7 at p87 of Book of Pleadings (BoP).

the argument, this court must decline jurisdiction and send the matter back to the Industrial Court for determination of the merits. This, of course, is what this court will do irrespective of the outcome on the constitutional issue. The Industrial Court will then be enjoined to deal with the merits on the basis of the outcome on the constitutional issue.

[11] The matter is before this court by order of a competent court, the Industrial Court. That order was not appealed against or challenged in any other way, hence it remains valid and binding. Is the respondent entitled to challenge it through the back door, as it were? The respondent relies on the case of MINISTRY OF TOURISM AND ENVIROMENTAL AFFAIRS AND ANOTHER v STEPHEN ZUKE AND ANOTHER[5]. In this case the employee's complaint was that he had not been afforded administrative justice in terms of Section 33 of the constitution and the court, invoking the principle of avoidance, held that the matter was resolvable without reference to the constitutional provision, in that *audi alterum patem* is part of Labour Law, the dispute being between an employer and an employee.

[12] I am in respectful agreement with the Zuke judgment, but to what extent does it assist the respondent on the present

[5] (96/2017) [2019] SZSC 37 (2019)

facts? If we accede to the respondent's submissions and send the matter back to the Industrial Court without determining the issue that is being canvassed, the applicant is entitled to and would certainly again raise the constitutional issue in defence. This would result in circuitous and back-and-forth process that should not be countenanced in litigation.

[13] Earlier on I mentioned that the merits of the matter are not before us, and that we must consciously eschew venturing into same. To do so would be in breach of the exclusivity principle which is now entrenched in our law. A determination that the doctrine of avoidance is applicable or not cannot, in my view, be made without an evaluation of the merits by this court, even if only cursorily.

[14] Perhaps more significantly, Section 151(2) (a) of the Constitution places responsibility upon the High Court **"to enforce the fundamental human rights and freedoms guaranteed by this Constitution"** and **"to hear and determine any matter of a constitutional nature."** What this suggests to me is that this court is enjoined to embrace every opportunity to breathe life into this relatively new constitution and give meaning to the rights that it confers. To routinely uphold the doctrine of avoidance

merely because it is applicable may, in some cases, amount to a veiled dereliction of duty and this, in my view, is one such a case. I mention in passing, that the doctrine of avoidance has come under scrutiny. In the Namibian case of MONICA GEINGOS (born KALONDO) v ABEN LINOOVENE (BISHOP) HISHOONO, (HC-MD-CIV-ACT-OTH-2021/00538 [2021] NAHCMD 48 (11TH FEBRUARY 2022) Sibeya J. posits that the doctrine of avoidance has the undesired effect of giving precedence to the Common Law and Statutory Law when the opposite should be the case. At paragraph 44 of his judgment His Lordship states the following: -

> **"The constitution is therefore the point of departure in a quest to protect the fundamental rights and freedoms. The supreme law, in my view, serves as the foundation on which all laws are based. It further serves as the yardstick where the validity of common law or statutory law is measured,"**

and continues at paragraph 45 in the following manner: -

> **"The constitution, in my view, is the starting point to enforce the guarantee provided therein…".**

[15] On the basis of the foregoing I find that the jurisdictional objection is unsustainable. I therefore proceed to deal with the main matter of a declarator.

[16] At the heart of the applicant's case are two constitutional provisions: -

Section 23 and 24. Below I reproduce texts of the relevant portions.

<u>Section 23</u>

"1): A person has a right to freedom of thought, conscience or religion.

2): Except with the free consent of that person, a person shall not be hindered in the enjoyment of the freedom of conscience, and for purposes of this section freedom of conscience includes freedom of thought…"

<u>Section 24</u>

"1) A person has a right of freedom of expression and opinion.

2) A person shall not except with the free consent of the person be hindered in the enjoyment of the freedom of expression, which includes…

a) freedom to hold opinions without interference."

To the above constitutional provisions I may add Section 14 (3) which provides as follows: -

3): **"A person of whatever gender, race, place of origin, political opinion…shall be entitled to the fundamental rights and freedoms of the individual contained in this chapter…"** (My underlining.)

[18] The issue for determination is aptly crystallised by the applicant in the form of two complementary questions, that is:-

"…if indeed it is assumed that my post, published on my facebook account referred to the Government of the Kingdom of Eswatini as a dictatorship, would this not be an exercise of my rights…under the Constitution…?"[6]

And

"Whether the 1st respondent's policies upon which charges are predicated constitute a

[6] Founding Affidavit, para 25 at page 13 of BoP.

justifiable limitation of the applicant's right to freedom of expression?[7]

[19] I accept the applicant's summary as an accurate reflection of the gist of the issue to be decided by the court.

[20] In dealing with the subject at hand I have benefitted significantly from the erudite work of two UNESWA scholars[8], which they have co-authored, entitled:-

"A BRIEF ON THE ORIGINS, CONTENTS AND LOCALISATION OF FREEDOM OF EXPRESSION AND OPINION IN ESWATINI." In the first paragraph of this work they define the right to freedom of expression and opinion as **"the liberties of an individual or a community to articulate their opinions and ideas without fear of retaliation, censorship or legal sanction."** Put differently, the individual or group of individuals should be free to express their opinions and thoughts without fear of reprisals from those in political authority over them. It is described as **"a democratic ideal,**[9]**"** a foundation upon which democratic society should be based.

[7] Applicant's Heads of Argument at para 15.
[8] M.N. Shongwe and M. Motsa.
[9] See Note 8 above, page 1 at para 3.

[21] In international law human rights are traceable back to the Universal Declaration of Human Rights, 1948. It is true, however, that the notion of human rights pre-dates 1948 by more than a century. In 1776 Thomas Jefferson made a momentous declaration in the following words: -

> **"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness[10]."**

In the contemporary statement of human rights the words **"inalienable"** and **"equal"** are pervasive.

[22] It is said that freedom of speech includes **"political discourse, commentary on one's own affairs and on public affairs, canvassing, discussing on human rights, journalism, cultural and artistic expression, teaching and religious discourse. It also embraces expression that may be regarded by some as deeply offensive"[11].** The net is obviously very wide and has been recently proclaimed to include the internet.[12]

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[10] These words became part of the American Declaration of Independence and have been echoed numerous times, including the 14th Amendment which gave Black Americans full citizenship in the United States of America.
[11] See Note 8 above, at page 2. The authors make reference to the United Nations Human Rights Committee General Comment No. 34 on the ICCPR.
[12] A/HRC/32/ L20 (2016) at para 1.

[23] The issue for determination has no precedent in this jurisdiction. Beyond the borders of this country eminent jurists have had much to say on the subject and below I make reference to some of them. In the case of QWELANE v SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND OTHERS[13]the court, quoting from HANDYSIDE v THE UNITED KINGDOM had this to say: -

> **"…the right to freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or a matter of indifference, but also to those that offend, shock or disturb…such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society…,[14]"**

and, borrowing the almost impudent words of George Orwell, the court posited that **"If liberty means anything at all, it means the right to tell people what they don't want to hear."**

[24] In DIKOKO v MOKHATLA[15] Skweyiya J. described the right to freedom of speech as **"the matrix, the indispensable condition on which nearly every other freedom**

[13] (686/2018)[2019] ZASCA 167.
[14] At paragraphs 42-43.
[15] 2006(6) SA 235 CC, 2007(1) BCLR 1 (CC) para 92.

depends…the lifeblood of an open and democratic society cherished by our Constitution".

[25] The African Charter on Human and People's Rights recognizes the right of every individual to receive information and to **"express and disseminate his opinions within the law[16]."** The African Commission on Human and Peoples' Rights stated, in 2002, that **"any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.[17]"**

[26] Eswatini signed the African Charter on Human and Peoples' Rights in 1991 and ratified it on September 15th 1995. It deposited the instrument of ratification on the 9th October 1995. The result of this is that the kingdom has **"assumed all obligations of states under the charter, in particular the obligation to align its domestic laws with the principles set out in the Charter."[18]**

[27] It is common cause that the applicants' facebook post was in the context of a public debate around new luxury motor

[16] Article 9 (1) and (2).
[17] Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and People's Rights, 32nd Session, 17-23 October, 2002(Banjul).
[18] See Note 8 above, at page 3

vehicles which had been purchased by the state. The applicant's contribution on the subject was that the debate can go on and on but nothing will change **"because there is no will to change, because *kutokhala umzaqa*. Dictatorship 101."** *Kutokhala umzaqa* means **"someone will get hurt."** Undoubtedly, the perceived sting in the post is the reference to dictatorship, the obvious innuendo being that the Government of this Kingdom is a dictatorship. Below I analyse the wording in the facebook post in the context of each of the relevant constitutional provisions.

[28] Section 23(1) creates the right to freedom of thought, conscience or religion. Whichever way one can look at it, the applicant has expressed his thoughts, his views, his opinion. He thinks that there is no will on the part of the Government to change, that someone could get hurt, and that the Government is a dictatorship. He could be right, he could be wrong. As a matter of fact there are many people who may disagree with him. He could, for instance, have said that the Government is democratic, and some people could disagree with that. What this demonstrates is that this is an issue that is open to debate, and in democratic society debate is all but discouraged. It falls squarely within the rubric of the United Nations Human Rights Committee General Comment No.34 on the International Covenant on Civil and Political Rights which sanctions political discourse and commentary on

public affairs among many other themes. It is a public issue how public funds are utilized, and tax payer and non-tax payer is entitled to engage in such a debate in democratic society.

[29] Section 24(1) decrees that a person has a right of freedom of expression and opinion. Substantially, the position expressed in paragraph 28 above obtains in respect of this clause as well. The applicant has expressed his opinion. He may be wrong, he may be right. Indeed, someone might hold no opinion on such matters, or hold an opinion and keep it to himself or herself. Why must he or she deserve applaud or protection better than the person who, through his or her views, contributes to debate that can only benefit nation-building?

[30] Section 14(3), decrees that a person of whatever political opinion shall be entitled to the fundamental rights and freedoms of the individual contained in this chapter. This is a foundation for tolerance, and tolerance is a cornerstone for democratic society. National leaders of this country consistently teach about peace and the tolerance of each others' views. The instructive words of O' Reagan J. in SOUTH AFRICA NATIONAL DEFENCE UNION v MINISTER OF

DEFENCE AND ANOTHER[19] are of relevance to tolerance, and I quote Her Lordshiop below: -

> **"The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views[20]."**

[31] On the face of it the applicant was, in my view, well-within his democratic rights in the comments that he made on his facebook page on the post dated 8th November 2019 at 7:53 pm. I say on the face of it because this discourse cannot end right here.

[32] Shongwe and Motsa[21] submit that the state has a duty to **"put in place safeguards against reprisal that may be**

[19] 1999(4) SA 469 CC.
[20] At paragraph 8.
[21] See Note 8 above.

directed against a person who has exercised their free speech…and provide legal remedies in the event such reprisal occurs. Failing which, the State may be held responsible for violating its duty to protect the individual." I cannot agree more. Indeed this submission is a wakeup call upon states that may overlook or underestimate the import of their international and constitutional obligations.

[33] Unavoidably, these rights and freedoms are not unbridled. In 2002 the African Commission on Human and People's Rights adopted a Declaration of Principles on Freedom of Expression in Africa,[22] Article 2 of which stipulates that "**any restrictions on freedom of expression shall be provided by Law, serve a legitimate interest and be necessary in a democratic society."** It is in this context that I must now deal with the clawback clauses that accompany the main constitutional clauses that I have discussed above.

[34] The word clawback means **"to regain or recover…power, etc…an act of retrieving…[23]".** A typical clawback clause

[22] See Note 14 above.
[23] Concise Oxford English Dictionary, 10th Ed.

is Section 24 (3) (a) – (c). I reproduce the full text of these provisions below: -

24 (3): Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision: -

a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health;
b) That is reasonably required for the purpose of: -
    i) Protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
    ii) Preventing the disclosure of information received in confidence.
    iii) Maintaining the authority and independence of the courts;
    iv) Regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television or any other medium of communication, or

c) That imposes reasonable restrictions upon public officers,

Except so far as that provision or, as the case may be, the thing done under the authority of that law is shown not to be reasonably justifiable in a democratic society.

[35] In similar vein Section 14 (3) of the Constitution provides that the enjoyment of the rights and liberties shall be subject **“to respect for the rights and freedoms of others and for the public interest.”**

[36] In simple terms, the clawback clauses create exceptions – i.e. situations where the hindrance of the rights is permissible. Earlier on I observed that on the face of it the applicant was exercising his constitutional rights. In the context of the exceptions and or legitimate limitations we need to ask whether or not hindrance of the exercise of this right is justifiable on the basis: -

i) per Section 24(3) (a) – of defence, public safety, public order, public morality or public health?

ii) per Section 24(3) (b) - of protecting the reputations, rights and freedoms of others.

[37] In my view the answer is a resounding **'No'**. To say that someone may get hurt (*kutokhala umzaqa)* and to opine that the governance is a dictatorship does not in any way impact on defence, public safety, public order, public morality or public health; neither does it impact upon anyone's reputation or anyone's rights and freedoms. It is just an opinion, period. I noted earlier on that the applicant could well have said that this is democracy at work, and in that he may have upset somebody else. I reiterate that the words complained of do not fall within the legitimate exceptions. The result of that is that the applicant, in posting the words complained of on his facebook page, acted within his constitutional rights per Sections 14 (3), 23(1) and 24 (1).

[38] Before I conclude this opinion I make a brief reference to Section 23 (2) of the Constitution which stipulates that a person shall not be hindered in the enjoyment of freedom of conscience except with their free consent. It was submitted on behalf of the respondent that through the contract of employment the applicant consented to the hindrance of his constitutional rights. My view is that this court cannot deal with that without reference to the applicant's contract of employment – its terms and conditions. And to do that would

be doing the work of the Industrial Court. Similarly, the legal status and effect of the Respondent's media policy is not for this court. It is for the Industrial Court to consider it in tandem with the applicant's contract of employment.

[39] What follows is a synopsis of this case in one short paragraph. *Prima facie*, the facebook post that is in the subject of this application is a permissible exercise of the constitutional rights of freedom of speech and opinion. Interference with the exercise of these rights is justifiable only if it falls within the exceptions that are stipulated in the Constitution. In the matter before court it does not, hence it amounts to an infringement of those rights. Whether these rights are derogable or not, it appears to me that they are not derogable except to the extent that the Constitution expressly provides.[24]

[40] I therefore come to the conclusion that the applicant has made out a case for the declarator sought herein. I make an order in the following terms: -

i) It is hereby declared that the conduct complained of by the Respondent falls within the exercise of the

[24] See Moseneke J. in LAUGH IT OFF PROMITIONS CC v SAB INTERNATIONAL (Finance) B V t/a SABMARK INTERNATIONAL [2005] ZACC 1.

freedoms guaranteed under Section 23 (1) and 24(1) of the Constitution.

ii) The matter is referred back to the Industrial Court for determination of the merits of the application that was stayed, taking into account the declarator in (i) above.

iii) No order for costs.

[41] This judgment is by majority of two to one.

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MLANGENI J.

I agree: _____

MABUZA J.

DISSENTING JUDGMENT OF FAKUDZE J.

Dissenting Judgment

[1] I have carefully read the Judgment prepared by My Brother Mlangeni J. and consented to by My Sister, Principal Judge, Mabuza Q.M. and I am in agreement with the way My Brother has ably analysed the issues raised by the parties.

[2] My only discontent is in respect of the fact that Section 24 (2) adequately creates an exception to the enjoyment of the Right to expression by using the words "A person shall not, except with the free consent of the person,……" (my emphasis is on the underlined words).

[3] This simply means that where a person has consented to the deprivation of the enjoyment of the right of expression he cannot then turn around and assert the right. Ironically, the Section of the South African Bill of Rights dealing with freedom of expression is couched differently from our Section 24. It does not create the exception as the case is with our Section 24 (2).

[4] In Interpreting a Constitution His Lordship Zietsman J.A. in the Supreme Court Case of **Khanyakezwe Mhlanga and Another V the Commissioner of Police and Another No. 12 of 2018**, made reference to the Ugandan case of **Rwanyarare and Another V Attorney General (2004) AHRLR 279**, where the Uganda Court observed as follows:

"The Constitution is to be looked at as a whole. It has to be read as an integrated whole with no one particular provision destroying another but each supporting the other. All provisions concerning an issue should be considered together so as to give effect to the purpose of the instrument……."

[5] The background to the Khanyakezwe case was whether Regulation 19 of the Police Regulations and Section 18 of the Prisons Act, 1964, whose effect was to take away the right of police officers and prison officers to form or be part of a trade union, was Constitutional or not. Both the High Court and the Supreme Court emphasised that Article 39 created an exception when it comes to the enjoyment of certain rights by disciplinary forces with the exception of the right to life, torture and protection from inhuman or degrading treatment. See Article 39 (3).

[6] I am inclined to hold the view that Section 24 (2) cannot be interpreted to confer the freedom of expression in an absolute fashion. It says that unless you consent to the deprivation of the right, then you can freely enjoy it. It is this court's considered view that the Applicant's act of accepting the social media policy as part of the contract of employment amounted to him consenting to the deprivation of his enjoyment of the right to freedom of expression; and having done so, he cannot turn around and indirectly challenge it.

[7] In conclusion much as a Constitution creates and confers various rights the very Constitution can create exceptions to those rights which may have a limiting effect on the enjoyment of these rights. This issue was firmly decided by our courts in **Khanyakezwe Mhlanga** (Supra). I am therefore of the view that the issue raised by the Applicant is contractual in nature and can be dealt with by the Industrial Court in terms of Section 8 of the Industrial Court Act. The Applicant's case should therefore be dismissed and the matter be referred back to the Industrial so as to enable that court to determine the merits.

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FAKUDZE J.

For the Applicant: Mr. M. Sibandze

For the Respondent: Mr. Z. Shabangu