IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO. 1119/2020**

In the matter between:

KUKHANYA (PTY) LTD. t/a KUKHANYA CIVIL ENGINEERING CONTRACTORS Applicant

vs

MCINISELI MATSEBULA Respondent

Neutral Citation: *Kukhanya (Pty) Ltd. t/a Kukhanya Civil Engineering Contractors v Mciniseli Matsebula (1119/2020) [2023] SZHC 85 (13 April 2023)*

CORAM: **N.M. MASEKO J**

FOR THE APPLICANT: **ATTORNEY F.M. TENGBEH**

FOR THE RESPONDENT: **ATTORNEY M.D. MOTSA**

DATE OF HEARING: **01 February 2021**

DATE OF DELIVERY: **13 April 2023**

Preamble

Labour Law – Industrial Relations Act – Employment Act – Review proceedings brought about by the Applicant after the ICA upheld the decision of the IC to allow Respondent's motion proceedings in this matter.

Part VIII of the industrial Relations Act discussed together with Rules 8 and 14 respectively of the Industrial Court Rules.

Legal precedent on the subject also discussed and referred to.

Held: The ICA correctly upheld the decision of the IC in allowing these proceedings to be prosecuted on motion proceedings owing to their peculiar nature and circumstances; there being no reasonable foreseeability of the existence of material disputes of facts in the dispute, motion proceedings in terms of Rule 14 (1) and (6) (a) are permissible and correctly permitted by the IC and the ICA

JUDGMENT

MASEKO J

[1] On the 17th June 2020, the Applicant launched these proceedings for an order in the following terms:-

1. Reviewing and setting aside the judgment of the Industrial Court of Eswatini under Case Number 124/2019 and the

judgment of the Industrial Court of Appeal under Case Number 14/2019.

2. Declaring that the Respondents claim for payment of terminal benefits is a dispute envisaged by Section 2 of the Industrial Relations Act warranting compliance with Part VIII of the Industrial Relations Act 2000 (as amended).

3. Dismissing the Respondent's pending application under Industrial Court Number 124/2019 for failure of the Respondent to comply with Rule 14 (6) (b) of the Industrial Court Rules.

4. Staying of the proceedings under Industrial Court Case Number 124/2019 pending finalization of these review proceedings.

5. That prayer 4 operates with immediate effect from the first date of enrolment of this matter.

6. Costs of suit.

7. Further and/or alternative relief.

[2] It is common cause that the Founding Affidavit and Replying affidavit of Sibusiso Ngcamphalala are used in support of the Applicant's case.

[3] On the other hand the Answering Affidavit of the Respondent Mciniseli Masilela 1st Respondent is used in opposition to the Applicant's case.

SUMMARY OF THE CASE

[4]

(i) The 1st Respondent was employed by the Applicant in March 2006 on a permanent basis until December 2016 when his employment services were terminated by the Applicant.

(ii) Subsequent to the termination of the 1st Respondent's employment in December 2016, the Applicant engaged the 1st Respondent on a fixed term contract which commenced on 1st February 2017 until 31st December 2018. The aforesaid fixed contract of employment was duly signed by the parties on the 22nd February 2017 and 23rd February 2017 respectively. It is annexed in these proceedings as **Annexure "MM1"** found at pgs. 37-50 of the Book.

(iii) On the 27th September 2017, the Applicant sent correspondence to the 1st Respondent informing him that his terminal benefits amounting to E132 032-82 were to be payable in two instalments of E39 609-85 by December 2017 and the balance of E92 422-97 to be paid through his bank account by May 2018. This correspondence is titled PAYMENT OF TERMINAL BENEFITS FOLLOWING THE

TERMINATION OF YOUR PERMANENT CONDITIONS OF SERVICE IN DECEMBER 2016. This one is marked as **Annexure "MM3"** found at pg. 52 of the Book of Pleadings (The Book) and is the root cause of those proceedings before the Industrial Court of Appeal, and this Court. The 1st Respondent accepted the terms of payments on 28/09/2027.

(iv) On the 28th November 2018, the Applicant addressed correspondence to the 1st Respondent advising him of its intention to renew the fixed employment contract by January 2019. This Notice of Intention to Renew Employment Contract was duly accepted by the 1st Respondent on the said 28th November 2018, and is marked herein as **Annexure "MM 2"** found at pg. 51 of the Book.

(v) On the 10th January 2018, the Acting Principal Labour Officer – Manzini Mr. Gcina Nxumalo addressed correspondence to the Applicant's Human Resources Manager confirming a discussion held between him and the Applicant's Human Resources Manager concerning the Applicant's letter of the 18th December 2017 wherein the subject matter is the **"restructuring and retrenchment exercise"** being conducted by the Applicant, for ease of reference, this correspondence is reproduced herein below; it is marked **Annexure "MM 4"** found at pgs. 54-55 of the Book:

"RE: KUKHANYA RESTRUCTURING AND ETRENCHMENT

1. *This refers to your letter dated the 18/12/2017 and to our discussion yesterday.*
2. *Please be advised that the computation of terminal benefits as submitted by yourselves to this office, are in line with statutory requirements.*
3. *We have noted with concern that you have not honoured, your agreement with the retrenched employees to pay the first part of the terminal benefits by December 2017. It is in this regard therefore that we are mandated to advise you to honour the said agreement.*
4. *In light of the aforementioned, kindly pay the said terminal benefits by the end of 31/01/2018, failing which we will have no option but to prosecute this matter.*
5. *For any further information and or clarification please do not hesitate to contact this office.*

   Your soonest attention to this matter will be most gratefully received as this has become a dire situation.

Yours faithfully,

GCINA NXUMALO (signed)
ACTING PRINCIPAL LABOUR OFFICER – MANZINI

cc: Commissioner of Labour – Mbabane"

(vi) On the 28th February 2018, the Applicant addressed correspondence to the Commissioner of Labour, Ministry of Labour and Social Security Mbabane, herein marked **Annexure "MM 5"** and found at pg. 56 of the Book. For ease of reference, it is reproduced herein below:

"RE: *KUKHANYA CIVIL ENGINEERING CONTRACTORS RESTRUCTURING EXERCISE:*

Further to our request with the Commissioner of Labour to issue us with the Labour Compliance Certificate after our non-compliance to the statutory obligation due the ongoing fiscal challenges with our clients, Kukhanya Civil Engineering Contractors undertake to clear all outstanding defaulted statutory obligations by August 2018.

We acknowledge to the Department of Labour the outstanding items as follows:

- *Security of Wages*
- *Terminal Benefits of Employees*

We trust that you will find the above in order and looking forward to your favourable responses.

Yours faithfully,

PETER NGWENYA (signed)
CHAIRMAN FOR AND ON BEHALF OF KUKHANYA CIVIL ENGINEERING CONTRACTORS."

(vii) On the 14th September 2018, the Applicant's General Manager Mr. Sibusiso Ngcamphalala addressed correspondence to Alexander Forbes Swaziland (Tibiyo Insurance Group), herein marked **Annexure "MM 7"** found at pg. 59, and herein reproduced below for ease of reference:-

"RE: *KUKHANYA CONSTRUCTION – SIBAYA PROVIDENT FUND LIQUIDATION:*

Reference is made to the above mentioned subject:

As finalization of the liquidation of the Kukhanya Construction Sibaya Provident Fund, this letter serves as a undertaking by

Kukhanya Construction that all its members will be paid their outstanding Sibaya monies for the period starting September 2017 to May 2018 as per the attached schedule.

We trust you will find the above in order.

Yours faithfully,

MR. SIBUSISO NGCAMPHALALA (signed)
GENERAL MANAGER"

At page 60 of the Book there is a schedule containing the list of all the affected employees with details of their salary structures and eventual terminal benefits payable to them. There are thirty (30) employees who are entitled to their respective terminal benefits, and the 1st Respondent is number seven (7) from the top of the list.

(viii) In February 2018, in the midst of its financial challenges, the Applicant addressed a Memorandum to its salaried staff. For ease of reference, it is captured herein below, and marked **Annexure "MM 9"** found at pg. 65 of the Book:-

"DATE: *February 2018*
TO: *Kukhanya Salaried Staff*
SUBJECT: *Personnel*
FROM: *Chairman*
CC: *Management*

The company is undergoing a transitional period, from JAN 2017 we have been experiencing serious cash flow challenges due to our major clients defaulting in payment.

We are working around the clock in trying to mitigate the on-going concern, however desperate times call for desperate measures. We

have been together in this journey and we appreciate your continuous hard work, commitment and dedication to the company.
Shareholders and Management have come to a decision to implement a further cost cutting exercise to navigate the ship to continue sailing until such time payments are received from our clients.

- *We have implemented a salary adjustment in the month of February across the board including management (reimbursement will be done in due course)*
- *We will implement layoffs as of March 1, 2018, all employees will be affected including management, (we will rotate staff to allow functionality and operation to all department) we apologize for putting you in this difficult scenarios which requires convectional ways of thinking and adjustments.*

We request your full cooperation on this matter and assure you, we will soon be out of these challenges.

Yours faithfully

(signed)
CHAIRMAN"

(ix) On the 28th February 2018, the Applicant's Salary Payroll indicated that the 1st Respondent's salary was E10 800-00. This is **Annexure "MM 10"** found at pg. 66 and corresponds with the memorandum **Annexure "MM 9"** herein referred to above.

(x) On the 18th March 2019, the Applicant terminated the 1st Respondent's employment, for ease of reference the correspondence is captured herein below and is marked **Annexure "MM 11"** found at pg. 67 of the Book:-

"18 March 2019

Mr. Mciniseli Matsebula

C/O Kukhanya Civil Engineering Contractors

P. O. Box C73

Hub Manzini

SUBJECT: NOTICE OF LAY OFF DUE TO TEMPORARY CESSATION OF OPERATIONS

We refer to your employment with Kukhanya Civil Engineering Contractors. Due to temporary cessation of site operations and unavailability of work, it is with regret that we inform you that you are being laid off from your position as Senior Human Resources Officer, effective 19 March 2019 for 30 days.

We would like to assure you that you will be informed within a period of 30 working days on the availability of work if any.

A handover meeting has been scheduled for (19.03.2019 at 10.30am) with Siphilile Mthethwa.

For further clarity on the above please contact the undersigned.

Yours sincerely,

(signed)
MR. SIBUSISO NGCAMPHALALA
GENERAL MANAGER

Received –(signed)----Date: --18/03/2018"

[5] I have taken time in referring to the various correspondence as contained in the Summary of Facts herein above. I do not intend for moment to analyze that evidence as contained in various documentation herein referred to in the Summary, the reason being that it is not the duty of this

Court to adjudicate on this matter on the merits and demerits as it were. That is the exclusive statutory mandate of the Industrial Court.

[6] It is common cause that when the 1st Respondent *in casu* instituted the proceedings in terms of Rule 14 (1) before the Industrial Court to compel the Applicant to pay the terminal benefits, as per the undisputed undertakings by the Applicant, the Applicant raised points *in limine* on the basis that the matter was prematurely before the Industrial Court because the 1st Respondent did not follow the procedure laid down in Part VIII of the Industrial Relations Act No. 1/2000 (as amended) (the Act) wherein the matter which is a dispute ought to have been referred to the Conciliation, Mediation and Arbitration Commission (CMAC) and thus only be referred to the Industrial Court after the Certificate of Unresolved Dispute had been issued.

[7] It is further common cause that the Industrial Court dismissed this point *in limine* and upheld the other point on joinder of the Fund Manager. The Applicant then launched an appeal before the Industrial Court of Appeal which also dismissed the appeal and upheld the decision of the Industrial Court, and referred the matter to the Industrial Court to hear the matter on the merits, since the appeal before the Industrial Court of Appeal stayed the proceedings of this matter on the merits before the Industrial Court.

[8] It was during this period that the Supreme Court ruled that this Court does not have jurisdiction to review decisions of the Industrial Court, and it has only been recently as at 27th February 2023 that the Supreme Court in its second review on this sensitive issue, ruled that this Court should proceed with these matters which had been held in abeyance pending the outcome of the review proceedings before the Supreme Court.

ISSUE FOR DETERMINATION

[9] The issue for determination *in casu* is whether this matter premised on its particular circumstances as outlined in the Summary of Facts herein above, qualify to be dealt with in terms of Rule 14 of the Industrial Court Rules or to be dealt with in terms of Part VIII of the Industrial Relations Act No.1/2000. The Applicant argues strongly that this matter ought to have been referred to CMAC in terms of Part VIII of the Act, whereas the 1st Respondent argues that the matter was correctly enrolled in terms of Rule 14 of the Rules of the Industrial Court, hence the review should be dismissed and the matter referred to the Industrial Court for adjudication on the merits.

THE ESTABLISHMENT AND JURISDICTION OF THE INDUSTRIAL COURT

[10] The Industrial Court is established by Section 6 of the Act as follows:-

> *"6 (1) Industrial Court is hereby established with all the powers and rights set out in this Act or any other law, for the furtherance, securing and*

maintenance of good industrial or labour relations and employment conditions in Swaziland.

(2) The Court shall consist of:-

(a) a Judge, who shall be the President

(b) as many judges as the President may consider necessary; and

(c) two or more members or their alternates –

(i) who possesses special skills and knowledge in industrial relations matters, and

(ii) who are nominated and appointed in terms of subsection (4)."

[11] Section 8 confers jurisdiction on the Industrial Court in the manner herein stated below:-

"Jurisdiction:

8 (1) The Court shall, subject to sections 17 and 75, 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 course of employment or between an employer or employers' association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof.

(2) (a) ***An application*** *claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, staff association, an employers' association, an employees' association, a federation, the Commissioner of Labour or the Minister.*(my emphasis)

(b) The Court may consolidate claims for the purpose of hearing witnesses, as appropriate.

(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 will promote the purpose and objects of this Act.

(5) Any decision or order by the Court shall have the same force and effect as a judgment of the High Court and a 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 questions 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.

(7) In the exercise of its powers under this Act, the Court shall take into consideration any guidelines relating to wage and salary levels and other terms and conditions of employment that may from time to time be prevailing in government and other related or relevant industries or enterprises."

[12] I have deliberately quoted almost all the subsections under Section 8 which confers unlimited and original jurisdiction on the Industrial Court in all industrial and or employment related matters.

[13] Of particular note and importance *in casu* is Section 8 (2) (a) which I am requoting and which provides as follows:-

> *"**An Application**, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, staff association, an employers' association, a federation, the Commissioner of Labour or the Minister"* .(underlining and bolding my emphasis)

[14] I have quoted Section 8 (2) (a) to demonstrate that application or motion proceedings are permissible at labour law before the Industrial Court, as clearly defined therein they are sanctioned by the Act and are designed as such to promote the purpose and objects of this Act per Subsection 4.

[15] It is my considered view that Section 8 of the Act be read together with Rule 14 (1), (2), (3), (4), (5) and (6) of the Rules of the Industrial Court. For ease of reference, I shall capture in full Section 14 up to subsection 6 (a) (b). This is how section 14 is worded:-

> *"(14) (1) Where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of notice of motion supported by affidavit.*
>
> *(2) An application on Notice of Motion shall be brought on at least fourteen (14) days' notice to all persons who have an interest in the application.*

(3) *The notice of application shall be signed by the person bringing the application.*

(4) *The notice of application shall be delivered and shall contain –*

(a) *the title of the matter;*

(b) *the case number assigned to the matter by the Registrar;*

(c) *an address of the party delivering the document at which that party shall accept notice and service of all documents in the proceedings;*

(d) *a notice that advises the other party that if the party intends to oppose the matter, that party shall attend the Court on the date stated in the notice of motion to deliver an answering affidavit failing which the matter may be heard in the absence of the party and an order of costs may be made; and*

(e) *the relief sought.*

(5) *The affidavit shall clearly and concisely set out –*

(a) *the names, description and addresses of the parties.*

(b) *a statement of the material facts, in chronological order, on which the application is based, which statement shall be sufficiently particular to enable any person who opposes the application to reply to the documents;*

(c) *a statement of the legal issues that arise from the material facts, which statement shall be sufficiently particular to enable any party to reply to the document.*

(6) *The Applicant shall attach to the affidavit –*

(a) *all material and relevant documents on which the Applicant relies; and*

(b) *in the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a Certificate of Unresolved Dispute issued by the Commission, unless the application is solely for the determination of a question of law*"(my emphasis)

[16] Rule 14 needs no interpretation because it is worded so simple such that its purpose and object are clearly articulated. This rule permits application proceedings to be instituted before the Industrial Court.

[17] Rule 14 (1) states clearly that where there is no reasonably foreseeable material dispute of fact, a party may institute an application by way of notice of motion supported by an affidavit.

[18] For purposes of the proceedings *in casu* Rule 14 (1) must be read together with sub-rule 6 (a) which provides that the applicant shall attach all relevant material and relevant documents on the affidavit on which the Applicant relies. Rule 14 (6) (a) is a stand-alone provision which caters for an application where there is no reasonable foreseeable material disputes of fact. *In casu* when the 1st Respondent launched the proceedings before the Industrial Court, there was no reasonably foreseeable material dispute of facts, for the simple reason that, the figures which formed the subject matter of the claim were all prepared and quantified by the Applicant itself. These are the benefits which were prepared by the Applicant and a schedule of the thirty (30) employees of the Applicant who were affected by the retrenchment and restructuring is attached in the pleadings marked **Annexure "MM 7"** found at pgs. 60-61 of the Book, and which were

approved by the Labour Commissioner as per Section 40 (2) of the Employment Act No.5/1980 which provides as follows:-

> *"40 (2) Where an employer contemplates terminating the contracts of employment of five or more of his employees for reasons of redundancy, he shall give not less one month's notice thereof in writing to the Labour Commissioner and to the organization (if any) with which he is a party to a collective agreement and such notice shall include the following information –*
>
> *(a) the number of employees likely to become redundant;*
> *(b) the occupations and remuneration of the employees affected;*
> *(c) the reasons for the redundancies; and*
> *(d) the date when the redundancies are likely to take effect;*
> *(e) the latest financial statements and audited accounts of the undertaking (Added A.5/1997)*
> *(f) what other opinions has been looked into to avert or minimize the redundancy. (Added A.5/1997)."*

[19] The 1st Respondent's name appears in line No. 7 from the top of the schedule. These figures reflected against the names of each of the employees were calculated and submitted by the Applicant who seeks for permission from the Labour Commissioner to declare redundancies and pay terminal benefits. I am trying to demonstrate that in all these instances when the Applicant launched the application before the Industrial Court there was no reasonably foreseeable material dispute of

fact simply because the retrenchment packages and other outstanding benefits for each employee had been calculated by the Applicant and the figures were not contested by the 1st Respondent, but all what the 1st Respondent is seeking is payment of his terminal benefits in terms of the Applicant's calculations.

[20] My considered view is that Rule 14 (6) (b) would only qualify and be applicable if the 1st Respondent challenged the quantity of his retrenchment package, then the matter would be deemed as having a reasonably foreseeable material dispute of fact requiring the matter to be first reported to CMAC in terms of Part VIII of the Act and consequently resulting to the issuance of a certificate of unresolved dispute if the parties couldn't agree on the aforesaid retrenchment package. If this was the position then this matter *in casu* wouldn't qualify to be dealt with through motion proceedings before the Industrial Court.

[21] It is therefore not correct for the Applicant to argue that the only avenue for bringing matters before the Industrial Court is by invoking the provisions and procedures of Part VIII of the Act. This is because Rule 14 clearly sets the tone on what circumstances are permissible for a party to institute motion proceedings without going through the provisions of Part VIII of the Act. Adopting the provisions of Part VIII is another option which

involves a dispute which requires it to be dealt with in terms of the aforesaid Part VIII, therefore the aforesaid procedures as laid down in Part VIII are not compulsory but are dependent on the particular circumstances of each case. *In casu* there is no reasonably foreseeable material dispute of fact regarding the 1st Respondent's package. The Industrial Court shall make the appropriate order after dealing with the merits of the matter. I outlined the aforesaid summary of facts simply to demonstrate that in my view the motion proceedings adopted by the 1st Respondent before the Industrial Court is the correct and appropriate procedure in these circumstances, and also that the Industrial Court was correct in dismissing the point *in limine* as raised by the Applicant (Respondent before the Industrial Court) that the proceedings should have been instituted via CMAC per the provisions of Part VIII of the Act. There is no misdirection on the part of both the Industrial Court and the Industrial Court of Appeal in the manner in which they ruled in this matter.

[22] These being review proceedings it is the duty of this Court to ascertain whether there exist grounds upon which the judgments of both the Industrial Court and Industrial Court of Appeal deserve to be reviewed, corrected and/or set aside. I must point out though that all matters that come before CMAC and eventually adjudicated by the Industrial Court, or those matters brought direct before the Industrial Court through motion

proceedings are all classified as disputes. Therefore the interpretation of dispute in section 2 of the Act must not be limited to matters to be dealt with only in terms of Part VIII of the Act.

[23] In the case of **Adventures in Missions Swaziland v Wisile Langwenya No. 18/2019** M. Dlamini AJA (as she then was) sitting with C. Maphanga AJA (as he then was) and J.S. Magagula AJA (as he then was) both concurring, stated as follows at paras 23-25:-

> *'[23] Rule 14 (1) reads:-*
>
> > *"Where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of notice of motion supported by affidavit."*
>
> *[24] In brief, the Rule (14) allows a party to apply direct to the Industrial Court in matters where there are no reasonably foreseeable material disputes of facts. To me, it is not always the orders sought that determine the forum between the Industrial Court and CMAC. There are a number of factors influencing the decision on the appropriate forum. One of which is a question of whether in the eye of a reasonable litigant (usually the applicant), there are reasonably foreseeable material disputes of facts. If the answer is "yes" the matter should start at CMAC. If the answer is in the negative, the applicant may come by way of motion. Sub-rule 6 of Rule 14 (b) fortifies this position of the law as it reads:-*
>
> > *"In the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission, unless the*

application is solely for the determination of a question of law."

[25] *My considered view is that matters which require arbitration, conciliation or mediation are one falling within the category of material disputes of facts. In other words where the material circumstances alleged are contested, the Industrial Court may decline to hear the matter without evidence that it has been referred to the Commissioner of CMAC unless the matter is brought for determination on a question of law* ***strict sensu****. It is on this note erroneous to say that every matter of dismissal must commence at CMAC. Each case must be scrutinized in terms of the underlying yardstick of whether there are reasonably foreseeable material contentions."'*

[24] The well-reasoned remarks of Her Ladyship M. Dlamini AJA clearly distinguish the circumstances upon which application proceedings can be instituted before the Industrial Court, as well circumstances calling for a matter to be reported to CMAC first in terms of Part VIII of the Act. I must state that even though the argument was made on behalf of the Applicant that there was no certificate of urgency and that this matter was not moved in terms of Rule 15 of the Act, it is my considered view that Rule 15 is clearly distinguishable from Rule 14. The proceedings *in casu* were instituted in terms of Rule 14 (1) read together with Rule 14 (6) (a), which sanctions motion proceedings to be brought before the Industrial Court where there are no reasonably foreseeable material disputes of fact. This is the

jurisdiction that is conferred on the Industrial Court by Section 8 (1) and (2) (a) of the Industrial Relations' Act.

[25] In the landmark case of **Ministry of Tourism and Environmental Affairs and Another v Stephen Zuke and Another (96/2017) [2019] SZSC 37 (2019)** MCB Maphalala CJ sitting with SP Dlamini JA, SKJ Matsebula JA both concurring, stated as follows at paras 36 and 53

> *'[36] When the Industrial Court executes its mandate in accordance with its jurisdiction as reflected in the Industrial Relations Act, it does not sit in a review capacity but as a Court of first instance determining a labour dispute between an employer and employee ----'*
>
> *'[53] Notwithstanding the dispute procedure provided in Chapter VIII of the Industrial Relations Act establishing the Conciliation, Mediation and Arbitration Commission, the Industrial Court Rules provide for urgent applications brought on notice of motion. During the hearing of the matter before this Court, the appellants' lawyer indicated that the first respondent was bound to follow the procedure laid down in Chapter VIII of the Industrial Relations Act. This contention cannot be sustained in law. In addition the Industrial Court Rules provide for the application of the High Court Rules where the Industrial Court Rules do not make provision for the procedure to be followed. The Industrial Court Rules provide as follows:-*
>
> > *"28. Subject to the Act and these Rules –*
> >
> > *(a) Where these Rules do not make provision for the procedure to be followed in any matter before the Court, the High Court Rules shall apply to these proceedings before the Court with such*

qualifications and adaptations as the presiding Judge may determine; and

(b) Where in the opinion of the presiding Judge, the High Court Rules cannot be applied, in the manner provided for in paragraph (a), the Court may determine its own procedure."'

[26] These Review Proceedings are premised on the Applicant's mistaken contention and belief that the matter was irregularly enrolled before the Industrial Court contrary to the peremptory dictates as provided for in terms of its Rules, and that the said Industrial Court ought not to hear the matter. The Applicant contends further that the Industrial Court misdirected itself and acted *ultra vires* when it heard and determined the matter contrary to its own very Rules. Further that the Industrial Court misdirected itself in law by artificially severing provisions of the Rules of Court, notwithstanding the fact that those provisions are clear and unambiguous in their meaning, interpretation and application. These grounds of review as articulated in the Applicant's Founding Affidavit at paras 8.3, 8.3.1, 8.3.2 found at pgs. 17-18 of the Book of Pleadings **cannot in my view be sustained in law** owing to the available legal precedent which has on numerous occasions pronounced on the subject with particular reference to the enabling statutory provisions as contained in the Industrial Court Rules in particular Rule 14 which makes it very clear when and how motion proceedings are to be instituted, and on the other

hand clarify with certainty what circumstances would dictate that a dispute is first reported to CMAC in accordance with Part VIII of the Act.

[27] In the landmark case of **Nedbank Swaziland Limited and Three Others v Phesheya Nkambule and Three Others (70/2020) [2020] SZSC 04 (27 February 2023)** SP Dlamini JA, sitting with SB Maphalala JA, JP Annandale JA, JM Currie JA and MJ Manzini AJA (all concurring) eloquently stated the position of the law as regards the **"review jurisdiction"** of the High Court over the Industrial Court and the Industrial Court of Appeal at paras 63-67, and I quote:-

> *'[63] The Court in **Aveng Infraset Swazi** reasoned that the ICA has final jurisdiction over appeals from the IC but has no jurisdiction to review decisions of the IC. Any party thus seeking review of the ICA's decision would do so through the High Court, according to **Aveng Infraset Swazi**. This is based on the conclusion that the ICA is not a superior Court, but a subordinate Court.*
>
> *[64] A major decision of this matter came in **Dube v Ezulwini Municipality and Others (91/2016) [2018] SZSC 49 (30 November 2018)**, wherein the Supreme Court decided that the IC is reviewable by the High Court. The Supreme Court in **Dube v Ezulwini Municipality** reviewed the historical development of the very matter it had to hear; under the IRA of 1980, the decisions of the IC were appealable and reviewable by the High Court and from there to the Court of Appeal. The ICA was established in 1996 so that the decisions of the IC could only be appealable to the ICA, but the review power of the High Court remained unaffected. After 1996, instead of two appeals to the High Court and Court of Appeal, there was one*

appeal route to the ICA. The judgment in ***Dube v Ezulwini Municipality*** *noted that there is nothing that says that the High Court can't review ICA's decisions much like the IC.*

[65] ***Dube v Ezulwini Municipality*** *located the uncertainty in Parliament's silence, for which the Court had to answer. The Court, considering whether Parliament sought finality for the ICA by having decisions of the IC appealable to the ICA but no further, pondered on whether Parliament intended for that to extend to review too. The Court acknowledged that the judges of the IC, ICA, High Court and Supreme Court are recruited from the same law schools and given the same training, thus judges of the High Court and Supreme Court are not unsuitable to hear labour matters. However, the Court found that due to the limited scope of the Industrial Court and Industrial Court of Appeal, they simply cannot be said to be equal to the High Court and Supreme Court.*

[66] The judgment in ***Dube v Ezulwini Municipality*** *concluded that the IC is reviewable by the High Court, and as the ICA and IC are connected conceptually, the ICA too is reviewable by the High Court.* ***Dube v Ezulwini Municipality*** *considered the inherent differences between appeal and review; the former is statutory dependent, and the latter provided for by the common law. Beyond the common law, review is provided for by Section 4 of the High Court Act 20 of 1954 and High Court Rule 53 – providing for the review of all subordinate Courts.*

[67] The Court opined that the High Court had been ousted by Section 151 (3) (a) of the Constitution in terms of original and appellate jurisdiction in matters for which the IC has exclusive jurisdiction. It noted, however, that there is no express ousting of the High Court's review powers for matters in which the IC has exclusive jurisdiction. Further as the jurisdiction of the ICA is predicated on the jurisdiction of the IC, this includes the High Court review of the ICA. The Court found

that the only other way to exclude review is for the ICA to be a superior Court, which it refused to accept.'

[28] I have made this reference to the eloquent remarks of SP Dlamini JA in the **Nedbank Swaziland Limited Case** *(supra)* because *in casu* I am expected to review the decisions of both the ICA and IC simultaneously. It is for that reason why I felt the need to refer to the Appellate Division's position on this sensitive matter which has been of great concern for the judiciary in this Kingdom for a number of years now.

[29] In the premises, and for the reasons herein referred to in the preceding paragraphs where I referred to judicial precedence and in particular provisions of Section 8 of the Act and Rule 14 of the Rules of the Industrial Court which permit a party to launch motion proceedings before the Industrial Court where there is no reasonably foreseeability of material disputes of facts. I state with certainty and without doubt that the dispute between the parties is one that can be appropriately dealt with by the Industrial Court through motion proceedings. In my view this is a point of law which this Court has dealt with i.e. that Section 8 (1) and (2) (a) of the Act and 14 (1) of the Rules permit the Industrial Court to hear and determine motion proceedings where there are no foreseeable material disputes of facts.

[30] Consequently, I hereby hand down the following order:-

1. The application for review in its entirety is hereby dismissed.

2. The judgments of the Industrial Court and Industrial Court of Appeal respectively are hereby upheld.

3. The matter is remitted back to the Industrial Court for it to adjudicate on the matter in the manner it deems fit and proper within its statutory mandate and exclusive jurisdiction as conferred upon it in terms of Section 8 (1) and (2) (a) of the Industrial Relations Act read together with Rule 14 (1) and (6) (a) of the Rules of the Industrial Court.

4. The Applicant is ordered to pay costs of suit on the ordinary scale.

N.M. MASEKO
JUDGE