



IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 2211/2020

In the matter between:

SIZWE M. SIMELANE

Applicant

and

KUSA KUSILE INVESTMENTS (PTY) LIMITED

Respondent

In Re:

KUSA KUSILE INVESTMENTS (PTY) LIMITED

Applicant

v

**THE PRESIDING COMMISSIONER
CONCILIATION, MEDIATION
AND ARBITRATION COMMISSION**

First Respondent

SIZWE M. SIMELANE

Second Respondent

Neutral Citation: *Sizwe M. Simelane vs Kusa Kusile Investments (Pty) Ltd and Another (2211/2020) [2025] SZHC 20 [21st February 2025]*

Coram: **C. MAPHANGA J**

Date Heard: 25/07/2023

Date Delivered: 21/02/2025

Summary: *Civil Law – Civil Procedure – Application for special leave to appeal a judgment of the High Court from review proceedings – Conduct of Review proceedings in exercise of the Courts inherent jurisdiction over orders and judgments of lower courts and tribunals;*

Civil Procedure – Application for special leave to appeal brought in terms of Section 147 of the Constitution of Eswatini – Review jurisdiction of the High Court over causes initiated or litigated in the lower courts or tribunals in their original jurisdictions as courts or fora of first instance envisaged in the Section; Section 147 of the Constitution requiring a party of show existence special circumstances or that the envisaged appeal raises a matter of public interest as conditions precedent for grant of leave;

Civil Procedure –Industrial Relations Act 1 of 2000 providing legal framework and mechanisms for settlement of employment disputes - statutory arbitral jurisdiction conferred on CMAC under the Industrial Relations Act co-extensive with the remedial and enforcement mechanisms of the Industrial Court in terms of Section 17(1) and (2), as read with Section 8 (8) of the Act;

Civil Procedure – Section 147 of Constitution prescribing mandatory condition for applicants seeking leave to show the matter involve a ‘substantial question of law or that the matter is in the public interest;

Civil Law – as to what constitutes ‘a substantial question of law is a concept closely related to the merits and substantive rights of the parties concerned – Held; Application for leave and the grounds relied on by Applicant do no raise a substantial point of law nor demonstrate a matter of importance in the public interest susceptible for consideration of the Supreme Court on account of the exclusive nature of the Industrial Courts and institutions on those matters; Application dismissed with costs.

**RULING ON AN APPLICATION FOR SPECIAL LEAVE TO APPEAL IN
TERMS OF SECTION 127 OF THE CONSTITUTION**

MAPHANGA J

[1] This matter came to me by way of an application for leave to appeal a judgment of this court made by me on the 25th October 2021. That judgment concerned the adjudication of an application for review of an arbitrator's award brought in terms of Rule 53 of the Rules of the High Court.

[2] In the outcome of the review proceedings I found that there were sufficient grounds for the review and setting aside of the arbitrator's award. In the event the present applicant, invoking Section 147 of the Constitution of brought this application for special leave to appeal my decision on the review. I understand the specific relevant subsection of the cited constitutional provision is subsection 147(b) which reads thus:

Section 147

“An appeal shall lie to the Supreme Court from a judgment, decree or order of the High Court-

- (a) as of right in a civil or criminal cause or matter from a judgment of the High Court in the exercise of its original jurisdiction; or*
- (b) with the leave of High Court, in any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest”*

(My emphasis)

[3] The parties after filing their respective heads of argument applied for the court to consider the written submissions only *sans* oral arguments. I agreed to this arrangement and reserved judgment. It is regrettable that unfortunately the matter fell through the system for tracking purposes. What follows is my ruling.

[4] It is common cause proceedings whence the application for review arose did not originate from the High Court or from formal court proceedings for that matter but from arbitral proceedings under the statutory mechanism of the arbitration of labor or employment disputes in terms of section 8 (8)

of the Industrial Relations Act No.1 of 2000. It was thus dealt with under the auspices of the Conciliation, Mediation and Arbitration Commission (CMAC). An arbitration tribunal is not a 'court' however the applicant approaches this court on the premises that the reference to a 'court' lower than the High Court applies equally to proceedings before an arbitrator appointed within the CMAC framework'. That stands to reason regard being had to Section 17 as read with Section 8(8) of the Act in so far as by dint of the provisions therein decisions of an arbitrator appointed in terms of the legislation are equally appealable, reviewable and enforceable in much the same way as a judgment of the Industrial Court.

Courts Jurisdiction on Review

- [5] It is trite that the common law review jurisdiction of the High Court is broad in ambit - in its full extent it encompasses the power to review and set aside decisions of administrative statutory bodies as well as subordinate courts exercising judicial function. On the outer end of the scale this also includes the review of decisions and conduct of various tribunals and arbitration panels.
- [6] In its supervisory jurisdiction over the subordinate courts the Courts power of review regulates the regularity of the conduct of lower courts and tribunals as courts of first instance (original jurisdiction) Thus far the import of S147 (a) and (b) is clear. It follows matters coming to this Court on review of decisions of the subordinate courts; an appeal arising from the determination of such matters in the High Court is only permissible on specified grounds upon an application for leave to lodge such appeal.
- [7] The Conciliation, Mediation and Arbitration Commission of labor disputes is a statutory institution for *inter Alia*, the arbitration of employment and labor disputes. Section 17 of the Industrial Relations Act, 2000 (The Act) provides an alternative mechanism to litigation in the Industrial courts for the settlements of such disputes. The arbitral jurisdiction conferred under that section is co-extensive with the remedial powers and jurisdiction of the industrial court. This is in terms of section 17 (1) and (2) of the Act. This framework enables the arbitrator's settlement of disputes and provides him with the efficacy and enforcement mechanisms for arbitration awards equal to the system of enforcement of orders, and judgments of the Industrial Court. In addition it provides the parties with appellate and review remedies with which to challenge those awards.

Review

- [8] Pertaining review the legislators saw it proper that arbitral awards of the commission's arbitrators be and a subject to review by the High Court in terms of the common law on the same terms as judgments or orders of the Industrial Court. Section 19(5) makes plain that a decision or order of the industrial court or arbitrator appointed in terms of Section 8 8) of the Act, is susceptible to review. Reading the provisions of Section 17 (1) and (2) with section 19(5) of the Act with Section 147(b) of the constitution leaves scarcely any doubt that leave of the High Court on the prescribed conditions is a pre-requisite for an appeal from a review order or judgment by the self-same High Court.
- [9] Evidently the matter at hand as much as the award was initiated from a tribunal whose standing is deemed to be that of a court subordinate as contemplated by section 147 of the constitution and consequently the subsection applies. To this end I am in agreement with the Applicant's submission that the review proceedings are susceptible to the requirements for special leave being first obtained to appeal this court's judgment.
- [10] This leaves the question whether the conditions precedent of either the matter involves a substantial question of law or public interest are fulfilled or demonstrated by the applicant.

A Substantial Question of Law

- [11] As to what constitutes the special circumstances of the existence of substantial point of law, for guidance I am inclined to approach explained in ***Cook v Morrison [2019] 3 All SA 673 (SCA)*** where the court held that:

"The existence of reasonable prospects of success is a necessary but insufficient pre-condition for the granting of special leave. Something more, by way of special circumstance is needed. This may include that the appeal raises the 'substantial points of law'; or that the prospects of success are strong that a refusal of leave would result in a manifest denial of justice' or that the matter is of

great importance to the parties or to the public. This is not a closed list"

[12] I think that substantial questions of law is integral to the age-old distinction as to what matters are subject or susceptible to review as opposed to appeal. It is trite law that generally speaking review proceedings are concerned with matters of the legality or jurisdictional questions as well as the excess to statutory authority as in cases where the allegation is that the adjudicating authority has travelled outside the remit of his mandate.¹ That is a matter that relates to the scope and exercise of authority such as that of a tribunal that grossly misdirect itself as opposed to an error on a matter turning on the merits or an error of law in arriving at a judgment or order. The latter relates to correctness of a judgment or order going to issues of substantive law and rights. I think that is the vital distinction that the courts dictum in Cook adverts to.

[13] In so far as substantial matters of law and errors arising therefrom the Industrial Relations Act makes it clear that those matters lie within the purview of the Industrial Court of Appeal as set out in the terms of Section 19(1) of the Act 1, 2000. So where a matter, cause or complaint relates to a question of law the section provides that:

"There shall be a right of appeal against a decision of the Industrial Court or of an arbitrator appointed by the President of the Industrial Court under Section 8(8) on a question of law to the Industrial Court of Appeal"

[14] There should be no ambiguity over the proposition that matters involving the adjudication of substantive law issues or substantial questions of law are to be settled before the special courts within the institutional framework of the Industrial court division - the parties rights to appeal lying with the Industrial Court of Appeal as the apex court in that system. That is, in my view, the contextual backdrop to the correct approach in construing the provisions of Section 147(b) of the Constitution.

¹ The terms 'substantial question of law' in relation to the prerequisites of the Constitutional section, has not received an exact definition in our case law in the matters where it has come under consideration. *Black's* definition of the term '*substantial*' in relation to rights adverts to that which denotes an essential right that potentially affects the outcome of a lawsuit and is capable of enforcement or protection in contrast to a mere technical or '*procedural*' right. See *Black's Law Dictionary* 8th Edition. 1999(Thompson West.)

[15] Seen in this light 'substantial questions of law' as relates to parties rights in an employment or labor dispute arising from review proceedings for adjudication by the Supreme Court are inconceivable. In my view the central issue grounding the review application did not involve a substantial matter of law in the sense of consideration of merits. I cannot conceive of how such questions can arise or can be said to have emerged in a judicial review enquiry that fall for adjudication by the Supreme Court. Equally I am not satisfied that on the Applicant's papers a matter worthy of public interest is disclosed for consideration and settlement by the Supreme Court. Had the issues in the matter presently, concerned a fundamental matter to do with substantial rights of the parties, the 2nd Respondent was at liberty to object to the matter coming on review and favored an appeal to the Industrial Court of Appeal as it was entitled to. No such point was taken when the matter served before me.

[16] The determination of what the applicant terms '*a question of fact*' in his written heads of argument - as distinct from that of law - and as to whether an employee is entitled to the claim of overtime pay, is a substantive matter of contractual and statutory rights or interests in terms of the prevailing minimum conditions of employment in our law. The substantive issues attendant on those aspects are matters falling within the exclusive ambit of the labour court's jurisdiction and not the superior courts in their review jurisdiction. These are not matters susceptible to appellate review in the Supreme Court.

[17] In the context of the review and the crucial issues pertaining to the grounds for review and setting aside of the arbitrators award, which fell for decision before me, the central enquiry does not turn on the correctness or otherwise of the arbitrators award on the merits but the regularity of the award on account of an alleged error going to the reference or the alleged excesses committed in the conduct of the enquiry before him. No substantial questions of the nature concerning the merits may be litigated further on appeal to the Supreme Court. There lies the applicant's misconception and for that reason the application lacks merit.

Prospects of Success

[18] I am inclined to agree with the Respondent's attorney that the question of prospects of success not primary consideration and if a consideration at

all which is in doubt, would only be a subsidiary one. This is so simply because the remedy in Section 147 does not include that factor as a pre-condition for the grant of special leave to appeal. The primary if not the sole test for this court in exercising its discretion whether to grant the special leave under the provision is the existence of a substantial question of law for adjudication by the Supreme Court or whether the applicant has demonstrated that there is a compelling matter of public interest warranting the grant of special leave to the Applicant.

[19] I note that to litigants often the nuanced distinction between a review and appellate jurisdiction when matters come to the courts is blurred and not always appreciable. In the present matter the raft of issues that the applicant cites as his prospective appeal grounds in his written submissions, illustrate the stark need for litigants to be mindful of the parameters of the High Courts and labor court's jurisdiction and their relatively discrete areas of competence. This regards the question of what decisions of the labor courts and tribunals are appealable as distinct to matters that may be taken up on review.

[20] By way of slight digression it warrants mention, albeit *in obiter*, that perhaps the law and policy makers may consider broadening the remit of the Industrial Court's powers in the Kingdom to include review of decisions of the Industrial Court and Arbitrators. That would achieve streamlining and a long way to achieving the grand statutory objects of the dispute settlement systems under the Industrial Relations Act. That in my view would bode well for expeditious and cost-effective resolution of employment disputes and would aid in averting the temptation to parties of using judicial review as a diversionary tactic. There is also the ever-present challenge posed by forum shopping.

Disposition

[21] The circumstances of this application for special leave leads to the conclusion that in his stated grounds for the envisaged appeal, the applicant misconstrues the very narrow scope of the appeal mechanism set out in the pre-requisites of Section 147 of the Constitution. I am of the settled view that the issues germane to review proceedings are not of the nature contemplated in the requirement as to constitute 'questions of law' or matters in the public interest. For the reasons set out in this judgment I am not satisfied that the Applicant has demonstrated the existence of the

conditions set out in the constitutional provision of the grant of leave to appeal.

The application is accordingly dismissed with costs.



MAPHANGA J

JUDGE OF THE HIGH COURT

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