

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 210/2003

In the matter between:

ZEBLON MHLANGA

APPLICANT

and

SWAZILAND GOVERNMENT

RESPONDENT

CORAM

N. NKONYANE: ACTING JUDGE

D. MANGO: MEMBER

FOR THE APPLICANT: MR. N. MTHETHWA

FOR THE RESPONDENT: MR. T. DLAMINI

RULING ON POINT OF LAW - 01/02/07

[1] In this matter the applicant brought an application for the determination of an unresolved dispute in terms of the provisions of the Industrial Relations Act No. 1 of 2000 as amended.

[2] The respondent is the Swaziland Government, it being the employer of the applicant.

[3] The applicant claims in his papers that he was wrongfully, unlawfully and unfairly dismissed by the respondent. He is therefore praying for an order from this court that he be re-instated or alternatively that the respondent pays him maximum compensation and all terminal benefits.

[4] The respondent filed a notice to oppose and thereafter files its reply. The respondent further filed a notice to raise a point of law.

[5] The court is therefore presently called upon to consider the point of law raised and to make a ruling.

[6] The point of law raised by the respondent is that this court does not have jurisdiction to review decisions of other statutory bodies.

[7] It was argued on behalf of the respondent that the grounds for the relief sought by the applicant are grounds for review as the applicant claims that the respondent failed to follow statutory procedures and regulations as laid down in the Civil Service Order.

[8] It was argued by Mr. Dlamini that this court being a creature of statute, has no jurisdiction to review decisions of other statutory bodies.

[9] Mr. Mthethwa, for the applicant, argued to the contrary that this court does have jurisdiction to entertain the application it being a Labour dispute, and that this court has exclusive jurisdiction to hear Labour related disputes.

[10] Both attorneys filed heads of argument and referred the court to a number of authorities.

[11] Mr. Dlamini referred the court to the **Industrial Court of Appeal** case of **Futhi P. Dlamini and Others v Teaching Service Commission (1st Respondent), The School Manager (2nd respondent), The Headteacher / Nkiliji Secondary School (3rd Respondent), The Attorney General (4th Respondent) and Registrar of the Industrial Court of Appeal, case No. 12/2002**, and also to the Industrial Court case of **Moses Dlamini v The Teaching Service Commission and Attorney General Case No. 402/2004** for the proposition that this

court does not have jurisdiction to review decisions of other statutory bodies.

[12] The court will not, however, consider case of Moses Dlamini as it was overruled by the Industrial Court of Appeal in the case of **Mathembi Dlamini v Swaziland Government, appeal case No. 04/2005.**

[13] The Mathembi Dlamini case is a more recent decision of the Industrial Court of Appeal in which a similar point of law was raised and addressed by the court. In that case the respondent also raised a point of law in its heads of argument that **"the Industrial Court does not have jurisdiction to review a decision of an employer."**

[13] The Industrial court of Appeal pointed out at pages 16-17 that:

*"The respondent apparently lost sight of the enabling provisions of sections 6(1), 8(1) and 8(3) of the Act. Thus, in discharging its functions under the Act, the Industrial Court may exercise the power to review decisions of statutory boards and bodies **acting qua employer**, provided, in terms of section 8(1) of the Act, that the decision related to an infringement of Labour legislation or 'any matter which may arise at common law between an employer and employee in the course of employment'". (my own emphasis).*

This court is bound to follow this latest decision of the Industrial Court of Appeal and will accordingly come to the decision that it does have jurisdiction to entertain the applicant's application as the applicant alleges that there was an infringement of a Labour legislation when he was dismissed by the respondent.

It was also argued on behalf of the respondent that this court does not have jurisdiction because the matter does not 'arise at common law' as envisaged by section 8(1) of the Industrial Relations Act.

The respondent's attorney relied on the Supreme Court of Appeal case of Swaziland Breweries Limited and Sicelo Mabuza v Constantine Ginindza Civil Appeal Case No. 33/2006 for his proposition. In paragraph 16 of the judgement the following statement appears;

".....It has not been suggested, nor could it be, that the first appellant is a subordinate court or a tribunal. Nor, still less, is it an adjudicating authority. On the contrary, it is common cause that it is a private body which is for that matter not constituted by statute."

Mr. Dlamini argued based on this passage, that the Supreme Court of Appeal put clear the

position that the review of decisions or acts of statutory bodies fall under the provisions of the constitution which gives the High Court "*review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority....*"

The court is unable to agree with Mr. Dlamini. Mr. Dlamini seems to rely on a statement made *obiter* by the Supreme Court of Appeal.

The *ratio decidendi* of the Supreme Court case was that the Industrial Court has exclusive jurisdiction in all Labour related matters in the country. I cannot see how, nor is it to be found in the judgement that the Civil Service Board is exempt.

Those bodies that are excluded from the jurisdiction of the Industrial Court are expressly mentioned in the Employment Act under Section 5. That section provides that:

"Act binds Government

5. Subject to section 6, the provisions of this Act shall apply to employment with, by, or under the Government, other than to employment in the Royal Swaziland police Force, the Umbutfo Swaziland Defence Force and the Swaziland prison Service."

Section 6 of the Employment Act makes provision for exemption of any person or public authority from the operation of all or any of the provisions of the Act. it was not argued that the Civil Service Board is also exempt from the operation of the Act.

Under Section 8(1) of the Industrial Relations Act, the Employment Act is one of the Acts mentioned whose operation is under exclusive jurisdiction of the Industrial Court.

Contrary to Mr. Dlamini's submissions, the effect of the Supreme Court decision is that it puts to rest any doubt regarding the exclusive jurisdiction of the Industrial Court in Labour matters. The High Court can only entertain such matters when they come before it in review proceedings in terms of Section 19 (5) of the Industrial Relations Act.

[25] It is clear to the court as to what led to the point of law being raised by the respondent. There is a serious failure by litigants to discriminate between the powers of this court when it sits to determine whether an employer acted fairly or lawfully and/or procedurally when it dismissed an employee, and the functions of the High Court when it sits to determine a review application brought in terms of Rule 53 of the High Court Rules.

[26] When this court sits down to determine whether an employee was fairly dismissed, it must consider, *inter alia*, whether a fair procedure was followed before the dismissal was effected. If it finds that it was not, it would have to find that the dismissal was not fair. In the context of the present case, it means that the court will have to consider if the Regulations laid down in the Civil Service Order were followed before the applicant was dismissed.

[27] The present application is not an application for review. It was not brought in terms of Rule 53 of the High Court Rules. To the contrary, it was brought in terms of the provisions of the Industrial Court Act and is accompanied by a certificate of unresolved dispute. The applicant seeks a relief that this court is competent to grant in terms of the Industrial Relations Act.

[28] When one takes into account the head under which the present application was brought, and also the relief sought by the applicant, there is no way that anyone can successfully argue that this court does not have the jurisdiction to entertain the application.

[29] Taking into consideration all the above observations and submissions made before the court, the court will dismiss the point of law raised.

[30] No order for costs is made.

The matter is referred to the Registrar's office for trial date allocation.

NKOSINATHI NKONYANE A-J
INDUSTRIAL COURT