

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGEMENT**

**CASE NO. 393/2016**

In the matter between:-

**STEPHEN ZUKE**

**APPLICANT**

AND

**SWAZILAND ENVIRONMENTAL  
AUTHORITY**

**1<sup>ST</sup> RESPONDENT**

**MINISTER OF TOURISM AND  
ENVIRONMENTAL AFFAIRS**

**2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL N.O.**

**3<sup>RD</sup> RESPONDENT**

**Neutral citation** : *Stephen Zuke v Swaziland Environmental Authority  
& 3 Others (393/2016) [2017] SZIC 23 (30 March  
2017)*

**CORAM** : **DLAMINI J,**  
*(Sitting with D. Nhlengethwa & P. Mamba  
Nominated Members of the Court)*

**Heard** : **28 MARCH 2017**

**Delivered** : **30 MARCH 2017**

**Summary:** *Administrative Law – Industrial Relations – Applicant seeks to review and set aside the 2<sup>nd</sup> Respondent’s unilateral decision of not renewing his contract of employment without affording him a right to be heard. Respondents raising point in limine on jurisdiction of the Industrial Court to determine the present application. Held – In the exercise of his statutory powers in terms of the Public Enterprises (Control and Monitoring) Act 1989, the 2<sup>nd</sup> Respondent exercises administrative powers derived from the Act. Held Further – Constitutionally it is only the High Court which has*

*original jurisdiction to hear and determine any application in pursuance of section 35(1) of the Constitution of the Kingdom of Swaziland.*

1. This matter serves before this Court on a certificate of urgency, and the Applicant, Stephen Zuke, principally seeks the following prayers;

- *That the unilateral decision of the second respondent of not renewing the applicant's contract of employment without the consultation with the Cabinet Standing Committee is set aside and declared unlawful;*
- *That the second respondent is directed to refer the issue of the renewal of the applicant's contract of employment to the Cabinet Standing Committee;*
- *That the decision of the second respondent with regards to reasons for the non-renewal of the applicant's employment contract contained in the letter dated 23<sup>rd</sup> of November 2016 is hereby reviewed and set aside as the applicant was not afforded the right to be heard before the adverse decision was taken.*

2. The Applicant also sought an order that pending the finalization of the matter, the recruitment of a Chief Executive Officer of Swaziland

Environmental Authority be interdicted and/or restrained. He also seeks costs against the Respondents.

3. Gleaned from his papers, the Applicant's main complaint is that the second Respondent, the Minister of Tourism and Environmental Affairs, unilaterally took a decision not to renew his contract of employment without taking the matter to the Cabinet Standing Committee, which, he says, he has no right to do. He states that in terms of section 8(1) of the Public Enterprise (Control and Monitoring) Act, 1989, the Minister has to take the decision of whether or not to renew his contract of employment in consultation with the Cabinet Standing Committee.
  
4. The Applicant further states that the decision of the Minister is reviewable on a number of grounds in that he was denied a hearing before the decision not to renew his contract was taken and that the adverse findings and/ or conclusions made against him, which informed the decision not to renew, cannot be supported. Hence now this present application.

5. The relevant background history of this matter, according to the Applicant is as follows; the Applicant was employed by the Swaziland Environmental Authority under a written contract of employment on 21 August 2013. This contract was to run for an effective period of 3 years up to 21 August 2016, after which it would lapse. In this regard however, the Employer had a duty to notify the Employee of such termination six (6) months before the termination date. The contract of the parties was also subject to a renewal of a further 36 months (3 years) on terms and conditions agreed upon between the Applicant and the first Respondent.
  
6. Some three and a half months before the expiry of the contract, on 02 May 2016, the Applicant received correspondence from the Principal Secretary in the Ministry of Tourism and Environmental Affairs, effectively reminding and notifying him that his contract of employment would automatically terminate on 21 August 2016. The Applicant though penned his own letter a week later, on 09 May 2016, directed to the Chairperson of the Swaziland Environmental Authority Board indicating his intention to have the contract renewed.

7. Indeed on 21 August 2016, the contract of the parties automatically came to an end through the effluxion of time. It would seem though that a month after the expiry of the Applicant's contract of employment the Board of the first Respondent took a resolution for the renewal of the Applicant's contract of employment for a further 3 years. To that end therefore the Chairperson of the Board duly wrote to the second Respondent, the Minister, communicating the Board's recommendation for a renewal of the Applicant's contract for a further 3 years.
8. The Minister, on receipt of the recommendation, wrote back to the Chairperson of the Board raising a number of issues pertaining to the Applicant's employment. These issues were classified as follows by the Minister; *false statements to the Board/Fraudulent Appraisal, Backdated letter to the Chairman, and PEU Circular/Exclusive Motor Vehicle/ Car Allowance/Tax.*
9. The Applicant states that the Board responded comprehensively to the Minister's concerns by return correspondence on 17 November 2016. Then on 23 November 2016, the Minister wrote back to the Board

making allegations of fraud, dishonesty and deceit against the Applicant. As a result the Minister declined to accept the recommendation of the Board for the renewal of the Applicant's contract and instructed it (Board) to initiate the recruitment process to fill the Applicant's position. On 02 December 2016, the Chairman of the Board wrote to the Applicant advising him that his request for renewal of the contract had been unsuccessful. As a result of which the matter is now before this Court for determination.

10. The Respondents oppose the application by the Applicant. In opposition thereto, and before answering to the merits the Minister raised a point *in limine* to the effect that this Court lacked the requisite jurisdiction to determine this matter. The Minister also gave a brief background of the matter before answering to the allegations of the Applicant in his founding affidavit.
11. According to the Minister, on 09 October 2016, after his appointment but before he was officially sworn in as Minister of Tourism and Environmental Affairs, he was approached by the Applicant and the 1<sup>st</sup> Respondent's Chief Financial Officer and the Legal Advisor over

the renewal of his (Mr. Zuke's) expired contract of employment. The Applicant, supported by the two former colleagues, apparently tried to convince the Minister that Mr. Zuke had been employed by the 1<sup>st</sup> Respondent and that he was frustrated by the delay in the renewal of his contract of employment. The Minister informed the trio that the matter needed to be dealt with by the Board of the first Respondent.

12. The Minister goes on to submit that upon assumption of office, he received communication addressed to his predecessor on the request for the renewal of the Applicant's contract of employment and a draft cabinet paper. Attached to these documents was also a separate brief on a list of alleged dishonest acts and breach of contract committed by Mr. Zuke. The Minister sought clarity from the Board on the contents of the brief and it would seem that the information he received from the Board revealed that Mr. Zuke had committed certain acts of misconduct, hence his decision that the Applicant's contract would not be renewed. He states that it was impractical for him as Minister to forward a recommendation that lacked appropriate justifications as required by Cabinet procedure. He also states that the

recommendation of the Board was clouded by contradictions as well as proof of misconduct on the part of Mr. Zuke.

13. When the matter served before this Court on 28 March 2017, for hearing, Attorney Mr. N. Manzini informed the Court that his clients, the 1<sup>st</sup> Respondent, would abide by the decision of the Court. Attorney Mr. N. Dlamini on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents then addressed the Court on the point of law he had raised. He submitted that this Court lacks the necessary jurisdiction to hear and determine the matter, firstly on account of the fact that the decision of the Minister not to renew the Applicant's contract of employment is an administrative one hence it falls outside of the purview of matters this Court can determine. Secondly, even if it could be said that the decision of the Minister is a contractual one because it emanates from the contract of employment, still this Court lacks jurisdiction to determine same because this Court has no review powers. In this regard the Court was referred to the constitutional court decision in the *Alfred Maia v The Chairman of the Civil Service Commission and 2 Others (Unreported High Court case No. 1070/2015)*.



14. The 2<sup>nd</sup> Respondent's Attorney further contended that the Minister is not the Applicant's employer, pointing out that as a matter of fact the Applicant's employer is the 1<sup>st</sup> Respondent's Board. As such, it was further argued, the dispute between the Applicant and the 2<sup>nd</sup> Respondent is not one between employer and employee as contemplated in section 8(1) of the Industrial Relations Act. Attorney Dlamini clarified that the decision of the 2<sup>nd</sup> Respondent is an administrative or executive one, falling beyond or outside of the jurisdiction of this Court.
15. The Court was also referred to Mr. Zuke's founding affidavit where he states as follows at paragraph 31;

*"I respectfully submit that, therefore, the decision of the second respondent as contained in the letter dated the 23<sup>rd</sup> November 2016 is irregular, unlawful, unconstitutional, reviewable and liable to be set aside for, inter alia, the following reasons:*

*The second respondent failed to give me a hearing as required by section 33 of the Constitution of the Kingdom of Swaziland. The second respondent failed to treat me with fairly and justly in accordance with the peremptory requirements imposed by*

*the law including the requirements of fundamental rights and fairness. I ought to have been afforded a hearing in order to defend myself from the serious allegations and/or conclusions which the second respondent took...”*

From this excerpt, the 2<sup>nd</sup> Respondent’s Counsel argued, it is clear that the Applicant is seeking to vindicate his constitutional right, and that this therefore puts his matter beyond the jurisdiction of this Court in terms of section 35(1) and (3) of the Constitution. His matter falls to be determined by the High Court, according to the 2<sup>nd</sup> Respondent’s Counsel.

16. In his arguments *contra*, Attorney Mr. D. Jele, on behalf of the Applicant, submitted that this Court does have the requisite jurisdiction to hear and determine this matter. However, should it the Court decide that it does not have the necessary jurisdiction then it should refer the matter to the High Court for determination.
17. Attorney Jele’s line of argument was that when the Minister decided that Mr. Zuke’s contract not be renewed, he was exercising powers emanating from the contract of employment. He was exercising

contractual powers so to say. Jele further pointed out that the requirements laid down in section 8(1) of the Public Enterprise Act read with section 17(1) of the Environmental Management Act oblige the Minister to make a decision on the renewal (or non-renewal) of the contract in consultation with the Standing Committee and the Board. This constitutes a term implied by law that forms part of the Applicant's contract of employment. In support of this argument this the Court was referred to the South African decision of ***Alfred Mac Alpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A)***.

18. Jele's further contention and submission was the consultation the Minister had to undertake with the Board and the Standing Committee is an implied term of the contract and that as such, it is just as much a part of the contract as the written terms.
19. Perhaps as a starting point one needs to point out that this present application of the Applicant, Stephen Zuke, is one of review. This is clearly demonstrated at paragraph 31 of his founding affidavit which he boldly headed "*Grounds of Review*". He wants this Court to

review and set aside the decision of the Minister of not renewing his contract of employment because he says it is irregular, unlawful and unconstitutional. He also states that the decision of the Minister is reviewable and liable to be set aside on account of the fact that he (Minister) failed to give him a hearing as required by section 33 of the Constitution.

20. Having established that the present application is one of review, the next question is whether this court has the requisite jurisdiction to hear a matter brought before it as a review in pursuit of an enforcement of the Applicant's right to administrative justice as guaranteed under section 33 of the Constitution?
  
21. This question was eloquently interrogated in the *Maia* case by the Constitutional Court. The final decision of the Constitutional Court in the *Maia* case was that this Court has no jurisdiction to entertain review proceedings brought on the basis of the common law for an alleged contravention of an employee's right to be administrative justice under section 33(1) of the Constitution. In arriving at this decision the Constitutional Court took into consideration that this

Court is a creature of statute, and as such it has no inherent power in itself but can only exercise the powers accorded to it by the statute that establishes it – the Industrial Relations Act, 2000, as amended.

22. The Constitutional Court in the *Maia* case also clarified that the jurisdiction of the Industrial Court, in terms of section 8(1) of the Industrial Relations Act, only relates to disputes which may arise at common law between an employer and employee in the cause of employment, and that this did not refer to review proceedings.
23. The present dispute serving before this Court is principally between the Applicant, Stephen Zuke and the 2<sup>nd</sup> Respondent, the Minister of Tourism and Environmental Affairs. Mr. Zuke wants this Court to set aside the unilateral decision of the Minister of not renewing his contract of employment without consulting the Cabinet Standing Committee. He wants the issue of the renewal of his contract of employment to be referred to the Standing Committee.
24. When the Minister made the unilateral decision not to renew the contract of employment of the Applicant after it had lapsed through

the effluxion of time, he did so exercising his powers as Minister responsible for the Tourism and Environmental Affairs portfolio. He was therefore exercising administrative powers in terms of the Public Enterprises (Control and Monitoring) Act 1989. He was exercising the powers accorded to him by enabling statute. The Minister was exercising his statutory powers. It cannot be therefore that the Minister can be said to have been exercising contractual powers. This line of argument is clearly misguided.

25. In the exercise of these powers the Minister was clearly not doing so as an employer of Mr. Zuke, because he was not his employer in the first place. Mr. Zuke's employer was the Swaziland Environmental Authority. In this regard I refer to the contract of employment at page 33 of the Book of pleadings which clearly states that it is between 'Swaziland Environmental Authority, represented by the Chairman of the Board (the Employer) and Mr. Stephen Zuke (the Employee)'. The contract makes no mention of the Minister at all. Instead the Minister's powers in respect of the present matter are derived from the Public Enterprise Act and are therefore administrative.

26. Primarily, and as already alluded to herein above, the complaint of the Applicant is that the Minister failed to give him a hearing as required by section 33 of the Constitution. He complains that the Minister failed to treat him fairly and justly in accordance with the peremptory requirements imposed by the law including requirements of fundamental justice or fairness. He says he ought to have been afforded a hearing in order to defend himself from the serious allegations and conclusions the Minister took.
27. Indeed in terms of our Constitution everyone appearing before any administrative authority has a right to be heard and to be treated justly and fairly. This is in accordance with section 33 of the Constitution. It states that this is accordance with the requirements imposed by law including the requirements of fundamental justice or fairness. Therefore, since this present dispute arises out of the administrative powers of the Minister in terms of a statute, this means that this Court does not have the jurisdiction to determine same. Instead it is the High Court that has the requisite jurisdiction to determine the question of whether the Minister exercised his powers rightly or wrongly. This is in terms of section 35(1) of the Constitution which states thus;

*“Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person...then, without prejudice to any other action with respect to the same matter which is lawfully available, that person...may apply to the High Court for redress.*

*(2) The High Court shall have original jurisdiction –*

*(a) to hear and determine any application made in pursuance of subsection (1);*

*(b) to determine any question which is referred to it in pursuance of subsection (3)...*

*(3) 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 judgement of that person, which shall be final, the raising of the question is merely frivolous or vexatious”.*

28. I must state here that the Applicant’s complaint is not that his contract of employment was terminated unfairly. His contract automatically terminated through the effluxion of time. The Applicant’s gripe is that



the Minister's decision as contained in the letter of 23 November 2016 is irregular, unlawful, unconstitutional, reviewable and liable to be set aside because he was not heard before it was taken. Constitutionally it is only the High Court that shall have original jurisdiction to hear and determine Mr. Zuke's application because he (Mr. Zuke) is alleging that his right to administrative justice, under Chapter III of the Constitution, has been contravened. This in effect means the point in *limine* as raised by the 2<sup>nd</sup> Respondent ought to succeed.

29. For these reasons the Court will accordingly make an order as follows;


***A) The point in limine on the lack of jurisdiction of this Court to hear and determine this dispute be and is hereby upheld.***

***B) The issue of the unilateral decision of the Second Respondent of not renewing the Applicant's contract of employment without affording him (Applicant) the right to be heard in terms of section 33 of the Constitution is hereby referred to the High Court for determination. This is terms of section 35(3) of the Constitution.***

***C) Pending the final determination of the issue referred to the High Court by this Court, the recruitment of the Chief Executive Officer of the Swaziland Environmental Authority is hereby interdicted and/or restrained.***

***D) The Court makes no order as to costs.***

The members agree.



**T. A. DLAMINI**  
**JUDGE – INDUSTRIAL COURT**

**DELIVERED IN OPEN COURT ON THIS 30<sup>th</sup> DAY OF MARCH 2017.**

*For Applicant* : *Attorney Mr. D. Jele (Robinson Bertram Attorneys)*  
*For 1<sup>st</sup> Respondent* : *Attorney Mr. N. Manzini (C.J. Littler & Co Attorneys)*  
*For 2<sup>nd</sup> Respondent* : *Attorney Mr. N Dlamini (Attorney General's Chambers)*