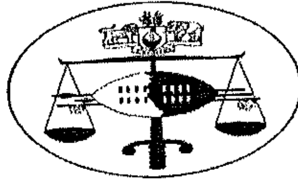

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 85/2021

In the matter between:-

THE JUDICIAL SERVICE COMMISSION	1st APPLICANT
BONGANI MALAMBE	2nd APPLICANT
NONTOBEKO NGUBANE	3rd APPLICANT
NOMBULELO VILAKATI	4th APPLICANT

And

THE CHAIRMAN, CIVIL SERVICE COMMISSION	1st RESPONDENT
THE PRINCIPAL SECRETARY, MINISTRY OF FINANCE	2nd RESPONDENT
THE ACTING ACCOUNTANT GENERAL	3rd RESPONDENT
THE MINISTER OF FINANCE	4th RESPONDENT
THE ATTORNEY GENERAL	5th RESPONDENT

Neutral citation: The Judicial Service Commission and 3 Others v The Chairman, Civil Service Commission and 4 Others (85/2021) [2022] SZIC 65 (25 May 2022)

Coram: **THWALA – JUDGE.** (*Sitting with Mr M. Mtetwa and Mr A.M. Nkambule, Nominated Members of the Court*).

HEARD : 8 October 2021.

DELIVERED : 25 May, 2022

RULING

Introduction

[1] This application was initially set down for hearing on an extremely urgent basis with Applicants asking the Court to dispense with the forms and service timelines that are provided for in terms of the rules and allowing Applicants to cause the matter to be enrolled for hearing within 4 hours of its issue by the Registrar of this Court. We draw this conclusion, firstly, from the Registrar's signature which bears the Date Stamp of the 5th March 2021, as well as those of the Respondents, all of whom are of even date. Most importantly, from the date and time of set down of the matter, i.e Friday, the 5th March 2021, at 12 noon. It is clear from the aforegoing timelines that Applicants afforded Respondents a mere 2 ½ hours within which to consider whether they wanted to oppose the application and another 1 ½ hours within which to prepare and file their opposing affidavits.

[2] Speaking generally, urgent applications are, first and foremost, applications to whom the provisions of Rule 14 of the Industrial Court Rules, 2007, apply, subject to this that where the applicant believes that his case is one of urgency, then he may decide to abridge the timelines to give to affected parties to enter their notice to oppose and for delivering their answering affidavits. **See Rule 15 (1) of the Industrial Court Rules, 2007.**

The Parties

[3] The First Applicant is the Judicial Service Commission, (the JSC), a constitutional body established pursuant to the provisions of **Section 159 (1) of the Constitution of the Kingdom of Eswatini.**

[4] The Second Applicant is Bongani Malambe, an adult male Liswati of Mbabane, who is employed as an Assistant Accountant by the Eswatini Government.

[5] The Third Applicant is Nontobeko Ngubane, an adult female Liswati of Mbabane, who is employed by the Eswatini Government as an Assistant Accountant.

[6] The Fourth Applicant is Nombulelo Vilakati, an adult female Liswati of Mbabane, who is employed as an Assistant Accountant by the Eswatini Government. For convenience purposes, we shall refer to First Applicant as "the JSC", and to Second; Third and Fourth Applicants as "the Applicants".

[7] The First Respondent is the Chairman of the Civil Service Commission, a constitutional body established in terms of the provisions of **Section 186 of the Constitution of the Kingdom of Eswatini.**

[8] The Second Respondent is the Principal Secretary in the Ministry of Finance, cited in her official capacity as such.

[9] The Third Respondent, was at the material time of this application the Acting Accountant General, who was also cited in his official capacity as such.

[10] The Fourth Respondent is the Honourable Minister of Finance, who was also cited in his official capacity as such.

[11] The Fifth Respondent is the Attorney General of the Kingdom of Eswatini who was cited **nominee officio.**

The Relief Sought

[12] When the application was launched, The JSC sought for a *rule nisi*, calling upon the Respondents to show cause, on a date that was to be determined by this Court, why the following orders were not to be confirmed, **to wit**:

[12.1] Interdicting and prohibiting First; Second and Third Respondents from effecting the transfer of Applicants from their positions of Assistant Accountants tenable at the High Court to the same positions then to be tenable at the Ministry of Education and the Treasury Department respectively. The interdict prayed for herein was to be interim in nature pending the final determination of an appeal which was said to have been noted with the Fourth Respondent, by the JSC, on behalf of the Applicants.

[12.2] Interdicting and prohibiting First; Second and Third Respondents from taking disciplinary action against the Applicants following their failure to comply with their letters of transfer. This interdict was also to be interim in nature, i.e pending the final determination

of an appeal which the JSC had noted with the Fourth Respondent on behalf of the Applicants.

[12.3] Interdicting and prohibiting First; Second and Third Respondents from suspending Applicants' monthly remuneration pending the final determination of the appeal noted by the JSC, with Fourth Respondent, on behalf of the Applicants.

Background

[13] The facts giving rise to this matter are largely not in issue and are as follows: Applicants are Assistant Accountants who are employed as such by the Eswatini Government under the control of the Third Respondent. At all material times hereto, Applicants were seconded to the JSC, based at its offices at the High Court Building in Mbabane.

[14] On the 4th November 2020, a meeting was held between Third Respondent and the Applicants. The purpose of the meeting was to advise them about their transfer from the JSC to other ministries. It would appear that no effort was made, by Third Respondent, to communicate its intended actions, with the JSC prior to conveying this notification to the Applicants.

[15] Notwithstanding Third Respondent's non-communication of its aforesaid intentions, Applicant, through its Secretary, sprang into action and issued a memorandum on the very same day, in which she raised concerns about the challenges that these transfers were likely to occasion to the operations of the JSC. This memorandum was addressed to the person of the Third Respondent. Here, we pause to mention that the said memorandum was never actioned by Third Respondent until First Respondent's issuance of

the Civil Service Commission's correspondence of the 11th November 2020. It cannot escape the attention of this Court to note further, that the official instrument of Applicants' transfer came and found the parties already drawn into a contest. However, for its part, Third Respondent's reply read as follows:

Our ref: CSC 36592
Date: 11th November, 2020
Post No:....................

Bongani Malambe
Thro' Registrar of the High Court
Judiciary

Dear Sir / Madam

RE: TRANSFER – YOURSELF

I am directed by the Civil Service Commission to inform you that you have been transferred from the Judiciary to the Ministry of Education and Training (Head Quarters) where you will continue to serve as Assistant Accountant, Grade C4 with effect from the date of assumption of duty.

Yours Faithfully

____

CHAIRMAN – CIVIL SERVICE COMMISSION

[16] We note, in passing, that in its said correspondence of the 11th November 2020, the CSC did not refer to any consultations that were held between itself and any of the the Applicants nor the engagements that Third Respondent was already engaged in with the JSC as pertaining to Applicants' transfers.

[17] On the 16th December 2020, Third Respondent responded by affirming the position of his department regarding Applicants' transfer and further cautioned them to report at their new duty – stations as per the CSC's memorandum of the 11th November 2020. It is the evidence from the affidavits as filed of record, that upon receipt of this negative response, First Applicant's Secretary then decided to escalate the matter further by lodging an appeal with the Second Respondent. The said appeal is marked as ***"Annexure LM4"*** in the Book of Pleadings and is perhaps one of the key documents that constitutes Applicants' case before us. (Of course, there were other various memoranda that were dispatched by the JSC, however these were intended to serve as a *sequelae* to the aforegoing annexure).

[18] It would appear that Second Respondent did take action towards addressing the JSC's letter of appeal. This we draw from the contents of ***"Annexure LM7"***, being a Minute, Ref No: TRD/015/08, dated the 19th February 2021. It is common cause that therein, Third Respondent was actually responding to Second Respondent's attempts at facilitating a dialogue between the JSC and Third Respondent's department. It is again needless to state that Second Respondent's attempts could not bring the two to any round table discussions. On the contrary, Third Respondent persisted in holding onto his view to the effect that Applicants' continuing actions were *akin* to acts of misconduct.

[19] Indeed, on the 3rd March 2021, Third Respondent put his words to action by causing ***"Annexure BM2"*** to be served upon all three Applicants. In the said correspondence, Third Respondent gave Applicants an ultimatum to report at their newly designated work stations forthwith, or prepare and file with him, on or before close of business on the 5th March 2021, written reasons as to why they still had not assumed work at their new work stations as per their respective letters of transfer.

[20] It is the receipt of these ultimatums that then prompted the Secretary of the JSC to then approach this Court, on a certificate of urgency. As already alluded to above, urgency depends on the exigencies of each case, such that matters of extreme urgency can be brought before the Court at any time, whether day and/or night. However, as it was held in the case of **East Rock Trading (Pty) Limited and Another v Eagle Valley Granite (Pty) Limited and Others**[1]:

> **[5] The issue of whether a matter should be enrolled and heard as an urgent application is governed by the provisions of 6 (12) of the Uniform Rules. The aforesaid sub rule allows the court or a judge in urgent applications to dispense with the forms and service provided for in the rules and dispose of the matter at such time and place in such manner and in accordance with such procedure as to it seems meet. It further provides that in the affidavit in support of an urgent application the applicant... "*shall set forth explicitly the***

[1] (11/33767). [2011] ZAGP JHC 196 (23 September 2011).

circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.

[6] *The import thereof is that the procedure set out in rule 6 (12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent*". (Italics are ours).

[21] And in the well-known and widely quoted judgement of **Luna Meubel Vervaardigers v Makin and Another**[2], Justice Coetzee (as he then was) lamented that:

> "*Undoubtedly the most abused Rule of this Division is Rule 6 (12)…Far too many attorneys and advocates treat the phrase "which shall appear as far as practicable be in terms of these rules"*, **in sub rule (a) simply** ***pro non scripto*****….Once an application is believed to contain some element of urgency, they seem to ignore;**
>
> **(1) the general scheme for presentation of applications as provided for in Rule 6;**
>
> **(2) the fact that the Motion Court sits on Tuesdays through to Fridays;**
>
> **(3) that, for a matter to be on this roll on any particular Tuesday, the papers must be filed with the Registrar by 12.00 noon on the preceding Thursday;**

[2] 1977 (4) SA 135 (WLD) at Pg 136 B – H

(4) that the time of day at which the Court commences its daily sittings is 10.00 a.m and that, when it has adjourned for the day, the next sitting commences on the next day at 10.00 a.m…

For the sake of clarity I am going to set forth the important aspects of "*urgency*". Urgency involves mainly the abridgement of the times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court". (Underlining is ours).

[22] In abridging the normal time limits and deciding the times for allowing the Respondents to enter their notice to oppose and for preparing and filing their answering affidavits in the manner they did, the JSC and Applicants then "***became obliged to persuade the Court that the matter was of such extreme urgency that their non-compliance with the Rules should be condoned and that the matter should be heard forthwith***"[3]. In the case of **Luna Meubel** cited above, His Lordship further went on to say:

> ***"Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular***

[3] See IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another 1981 (4) SA 108 (C) at 110 G.

extent of the departure from the norm, which is involved in the time and day for which the matter be set down". **At Pg 137 E – F. (Underlining is ours)**

[23] In the instant case, Applicants are employees of the CSC who had been seconded to the JSC. Notice of their de-secondment was orally communicated to them by the Third Respondent at a meeting which was specifically convened for that purpose at Third Respondent's offices on the 4th November 2020. Worthy of note is that Third Respondent's intentions also came to the knowledge of the JSC on the very same day.

[24] One thing is readily discernable from the grounds of urgency as alleged by the Applicants, *to wit*: the fact that more than 4 months had lapsed without either the JSC and/or any of the Applicants instituting any proceedings to challenge their transfer to which the interim relief that they now seek formed a pivotal part. In the case of **Lindeque and Others v Hirsch and Others, In Re: Prepaid 24 (Pty) Limited (2019/8846)[2019] ZAGPJHC 122 (3 May 2019)**, the Court there held that self-created urgency was not acceptable urgency for the purposes of **Rule 6 (12)**. Indeed, in the said case, the Court proceeded to say:

> **[20] On behalf of the applicants it was submitted that the fact that the parties were engaged in settlement discussions explains the failure by the applicants to take action between the 30th November 2018 and the 20th February 2019, when their attorneys demanded an undertaking from the respondents that they (respondents) would not act on the rescission notice of the 30th November 2018.**

[21] **I am of the view that the urgency of this application is self-created. Had the applicants not been tardy in filing their application, urgency would not have been an issue. As soon as the respondents commenced the process of the cancellation of the SLA, (sale of land agreement) it was incumbent on the applicants to as soon as possible thereafter launch proceedings to challenge the cancellation.** [Emphasis has been added].

[25] In a nutshell, we are of the respectful view that it was both inopportune and very tardy of the JSC as well as Applicants to run to this Court to pray for some temporary relief (interim interdict) in respect of an occurrence that had taken place more than 4 months ago. From their very nature, interim interdicts require maximum expedition on the part of an applicant[4]. As it is said, **"*any delay by the applicant in asserting its rights… is often called self- created Urgency*".**

[26] It is, however very important to record that neither Mr. Jele nor Mr. Vilakazi addressed the Court on the point of urgency, perhaps on the strength that the question of proof of urgency of the matter was no longer of importance. We dare say though that Counsel may not, whether overtly and/or otherwise, hoodwink the Court into being bound by a preposition which runs *contra* to the law. Indeed, in the **Aroma Inn** case cited above, Fagan J opined thus:

> ***"To ensure the smooth operation of the Courts, a body of adjective law has evolved. Much of this law is contained in the Uniform Rules of Court. The Rules were made in terms of S 43 (2) (a) of***

[4] See Juta & Co. Ltd v Legal and Financial Publishing Co. (Pty) Ltd 1969 (4) SA 443 (C); Also NCSPA v Open shaw (462/07) [2008] ZASCA 78 (RSA).

***the Supreme Court Act 59 of 1959 and, as delegated legislation, are binding upon the Courts*"**. At Page 109 F.

Whilst it can be conceded that the above-captioned passage propagates statutory law of the Republic of South Africa, however, the underlying principle is still the same, *viz*: that the **Industrial Court Rules, 2007**, are delegated legislation which was made by the Judge President of the Court, after consultation with the Attorney – General and the Chief Justice as per the provisions of **Section 9 of the Industrial Relations Act, 2000** (as amended).

[27] It is on the basis of the above analysis of the law and the facts as averred in Applicants' papers, that we hold that there were no grounds of extreme urgency that existed, on the 5th March 2021, to warrant the enrolment of the matter at such short notice, either to the Court and/or to the Respondents.

[28] The above conclusion of the Court does not however, dispose of the matter because having granted the *rule nisi* with interim effect on the 5th March 2021, the *rule nisi* was extended once, after which it was then left to lapse. This point was somewhat faintly canvassed by Mr Vilakazi, who was taken by the Court to also concede that there existed no exceptional circumstances that stopped this case from enrolment as an ordinary opposed matter. Indeed, this is the approach that was eventually taken in going about the conclusion of this case.

[29] The matter was set down for arguments on the 8th October 2021, wherein Mr Jele advised the Court that same was enrolled for the purpose of disposing the points of law that had been raised by the Respondents. And

in his opening submissions, Mr Vilakazi confirmed that Respondents had raised three (3) points *in limine* with only two (2) of them being set for argument, *to wit*: the question of *locus standi* of the JSC to initiate these proceedings as well as the question of the jurisdiction of this Court to hear and dispose of a matter not within the confines of **Section 8 of the Industrial Relations Act, 2000**, as amended.

[30] Regarding his first point *in limine*, Mr Vilakazi submitted that the concept of *locus standi* had two (2) distinct legal meanings, namely; power of a litigant to sue and to be sued in its own name; and the litigant's direct legal interest in the relief sought. Indeed, for purposes of convenience, the Court too shall proceed to deal with these points on the aforesaid fashion.

The JSC's power to sue and to be sued in its own name

[31] As to the JSC's power to sue and to be sued in its own name, Mr Vilakazi submitted that the JSC was a creature of statute and as such only derived its authority to do anything from the legal instrument which created it. And for the aforegoing proposition, Mr Vilakazi referred us to Chapter VIII, Part 4 of the Constitution of Eswatini, which affirms the constitutional existence of the JSC as well as the **Judicial Service Commission Act No. 13/1982**. Mr Vilakazi further contended that neither the Constitution nor the JSC Act, endowed the JSC with the power to sue and to be sued in its own name.

[32] For his foregoing contestations, Counsel for the Respondents relied on the case of **The Chairperson of the Civil Service Commission v Isaac Dlamini ICA Case No. 14/2015**, which he said was authority for the proposition that the JSC, like the Civil Service Commission ("the CSC"),

lacked the power to sue and to be sued in its own name. In his argument herein, Mr. Vilakazi placed much emphasis upon Mamba AJA's judgement where His Lordship said:

> ***"[18] The appellant's third ground of Appeal is that the CSC has locus standi to sue and be sued in its own name. The CSC is established in terms of Chapter X under Part 1 and Par 2 of the Constitution; in particular Section 172 and 182 thereof. Section 178 of the Constitution provides that the CSC "shall be independent of and not be subject to any ministerial or political influence… This does not mean that the Commission just because it is independent, it has the power to sue and be sued in its own name. I have not been able to find any such power in any other law endowing the CSC with such power."***

[33] We readily concede that the principle of *stare decisis* (to stand by decisions and not disturb settled matters) forms a fundamental part of our law. This we do to the extent that in the circumstances of this case, we agree with Counsel for the Respondents' assertion that the Industrial Court, being an inferior Court to the Industrial Court of Appeal, is duty bound to enforce the exposition of the law as contained in the **Isaac Dlamini case** above. We consider ourselves bound by the decision of our apex Court, firstly, because the paragraph cited above does constitute the *ratio decidendi* of the judgement of the Industrial Court of Appeal. Secondly, because it is trite law that where an inferior Court is convinced that an earlier decision of the apex Court, which would otherwise be binding on it was wrong (as I am, with respect) it is, however, duty-bound to faithfully follow such decision, and leave it to the apex Court to decide whether to modify or

reverse its earlier decision.[5] It would appear to us that in arriving at its decision, the Industrial Court of Appeal did so without the benefit of judicial precedents on constitutional interpretation. In fact, we are more than convinced that the outcome of the **Isaac Dlamini case** would have been different had their Lordships' been afforded the benefit of persuasive legal material which strived for the interpretation of every chapter and/or part of our Constitution in a manner that is accountable, decentralized and responsive to its fundamental purpose as captured in its Preamble.

[34] Our above stance is premised on principles of constitutionalism which stipulates that in a constitutional state such as ours, the government is constituted in terms of the constitution with all other laws being subject to testing against it. Thus in the famously celebrated constitutional, case of **S V Acheson 1991 SA (2) SA 805 (NM**, the High Court of Namibia, whilst giving an interpretation of the **Constitution of Namibia Act No. 1 of 1990**, held that:

> ***"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion"*** **(underlining is ours)**

[5] R (On The Application of Rjm) (Fc) v Secretary of State for Work and Pensioning [2008] UKHL 63

[35] It is for these reasons that for purposes of this case, for our part, we would be prepared to interpret **Part 4 of Chapter VIII of the Constitution of Eswatini Act, No 1 of 2005,** to mean that the JSC is not just a department of government but rather an institution created, by the Constitution, to exercise constitutional as well as public powers. Indeed, for this proposition we do not subscribe to the notion and/or theory that the **JSC Act, 1982**, established the JSC. In fact, the reverse is true, i.e. that in 2005, the Constitution established the JSC and proceeded to provide, under Section 268, on "*Existing Law,*" that:

> ***"(1) The existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as maybe necessary to bring it into conformity with this constitution."***
>
> (Underlining is ours).

It is needless to state that Section 268, represents the so called "saving clause" under statutory law, which, upon interpretation, allows any law to continue to operate only if it is not repugnant to the Constitution, to which it owes its continued existence. In the case of ***Ex parte:***
Attorney General In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General (SA7 of 1993) [1995] NASC 1 (13 July 1995), Justice Leon AJA quotes with approval the following passage from the American Case of **GORHAM V LUCKETT**, where the Court there said:-

> ***"And if this last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former Acts, so far as it differs from them in its prescriptions. The great object, then is to ascertain the true interpretation of the last Act. That being ascertained, the***

necessary consequence is that the legislative intention thus deduced from it must prevail over any prior inconsistent intention to be deduced from the previous Act."

[36] Another interesting dimension to this discourse was ventilated by the Ghanaian Supreme Court of Judicature in the case of **Janet Maakarley Amegatcher v The Attorney General and 3 Others [2012] GHASC 26**, wherein the Court was petitioned to interpret **Article 88 (1) and (5) of the 1992 Constitution of Ghana**. For its part, the article in question provided as follows:

> *"88(1) There shall be an Attorney General of Ghana who shall be Minister of State and the principal legal advisor to the government.*
>
> *(2) ....*
>
> *(3).....................*
>
> *(4)....................*
>
> *(5)The Attorney General shall be responsible for the institution of and conduct of all civil cases on behalf of the state; and all civil proceedings against the state shall be instituted against the Attorney-General as defendant.*

[37] The petitioner's contentions which were summed up in the judgement of the Court were that:

> *"....the Attorney – General was never intended to act as legal counsel for the other two organs of State namely the Legislature and the Judiciary as well as independent State institutions. This is because our constitutional scheme clearly envisages situations where the interests of these*

> ***constitutional organs can be antithetical to each other resulting in controversies that implicate serious balances of power. It is inequitable, or even immoral in such situations for the Attorney – General to be legal adviser for the executive branch and other organs of state".***

In advancing his case, the Attorney –General was steadfast in maintaining that Section 88(5) was not open to any other interpretation except to be given its full literal meaning. And in its synthesis of the issues before it, the Court went on to repeat the words of Justice Sowah in **Tuffor v Attorney- General [1980] GLR 637 at 647-8,** where the Judge of the Supreme Court of Judicature said:

> ***"A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of the people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life."***

[38] It was on the basis of the above analysis that the Full Bench came to hold that a literal reading of **Article 88 (5)** could not be allowed to stand in the way of the aspirations of the people, expressed and acknowledged as a core value in their Constitution. The Court there had in mind the principle of separation of powers, according to which '*certain bodies created by the constitution are clothed with relative autonomy to enable them to exercise oversight responsibility over the other organs of State.*' In the end, the Court held that it was proper to give **Article 88(5),** a purposive interpretation and declare that all constitutionally established independent bodies like the Commission on Human Rights and Administrative Justice,

The Electoral Commission, etc, were capable of suing and of being sued in their own name in respect of those matters relating to and/or incidental to their constitutional functions. This, with respect, is what we too believe.

[39] On the basis of the above analysis, we are more than convinced that the JSC, being a necessary part of an independent judiciary is infact clothed by the Constitution with the limited power to sue and to be sued in its own name in relation to those matters that may be incidental to its functions. It is for the above –stated reasons therefore that *but for* the **Isaac Dlamini case**, we would have dismissed Respondents' first point *in limine*.

The JSC's legal interest

[40] Barring the predicament that was presented to the Court by the **Isaac Dlamini case**, the JSC would, however been non-suited on the second aspect of *locus standi* because:

[40.1] The application before Court has been brought by the JSC in its own name and on its own behalf. This then means that the JSC, like all other legal subjects who appear before the Courts, must show a direct and substantial interest in the subject matter of the litigation. Legal consideration of the extent of the interest in the right that is the subject matter of a litigation and the outcome thereof has been expoused in many reported cases. Thus in the case of **Dalrymple and Others v Colonial Treasurer 1910 TS 372 at 390**, Wessels J (as he then was), stated thus:

> ***"The person who sues must have an interest in the subject matter of the suit and that interest must be a direct***

interest…Courts of law…are not constituted for the discussion of academic questions and they require the litigant to have not only an interest, but also an interest that is not too remote".

At Page 379 of the same judgement, Innes CJ, expressed the rule more clearly when he said:

> ***"The general rule of our law is that no man can sue in respect of a wrongful act, unless it constitutes a breach of a duty owed to him by the wrong doer, or unless it causes him some damage in law".***

Applicants' case

[41] The summary of the case as pleaded by the JSC was this:

41.1 That, Second, Third and Fourth Applicants are Assistant Accountants of the First Respondent who, at the time relevant to this case, were seconded to the JSC.

41.2 That, sometime in November 2020, these officers received verbal notice of their redeployment from the Third Respondent which was shortly confirmed by correspondence from the First Respondent.

41.3 That, the redeployment of the three (3) officers prompted the JSC to engage the Third Respondent with a view of trying to persuade him against his actions. The inter-departmental exchanges that followed thereafter were quite adversorial indeed, and they are the

ones that prompted the JSC to approach this Court for a judicial resolution of the dispute.

[42] The JSC captured the conflict between the organs of state that are litigating before us thus:

> ***"17. I also appraised him of the fact that the Judiciary as an independent statutory organ, ought to have been consulted concerning the transfer of officers that had been detailed to work under it. The norm and I submit salutary practice, is that before any officer may be transferred out of the Judiciary, there is a need for the Judiciary to be consulted. This had not happened. I requested that the transfers should not be effected. A copy of the memorandum is annexed hereto marked "LM 1"***
>
> ***18. In response, the third respondent advised me that the consultation had been done with the three Assistant Accountants. With respect, the third respondent misconstrued the salutary provisions pertaining to the independence of the Judiciary. The consultation ought to have been done with the Judiciary first, before consultations with the employees…"***

[43] From the above analysis it was clear that, in the main, the JSC was seeking to enforce an alleged duty, to be consulted, by the First Respondent, before embarking upon the redeployment of the Assistant Accountants. In simple terms therefore, the question for determination by this Court was whether

there existed such a duty, and the legal instrument, that established it. This question is of fundamental importance because:

> ***"courts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important"***[6].

In its Bundle of Authorities, Counsel for the Respondents availed to the Court a copy of the **Public Service Act, No. 5/2018.** Because no legal arguments had been advanced, by Respondents' Counsel during the hearing regarding the relevance of this Act to the issues that were for determination before us, the Court then *mero motu* instructed the Registrar of this Court to request for written submissions from both Counsel.

[44] Specifically, such request was precipitated by Section 25 of the said Act which appeared to have been enacted to regulate the "Transfer, promotion, posting and secondment" of officers within the Public Service. Subsection (4) thereof was more apt for it reads thus:-

> **(4) "A transfer shall be made by Public Service Commission where the officer is being transferred from one service commission to another after the current and prospective Heads of Department have, or relevant service commission, has been consulted."**

For his part, Counsel for the Respondents did indeed respond by filing written submissions, wherein he drew the attention of the Court to the provisions of **Section 1 Sub-section (2) of the Act**, which effectively states that Section 25 was amongst those provisions of the Act whose operation

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[6] As per Innes CJ in Geldenhuys and Neetling v Beuthin 1918 AD 426.

was presently under suspension. Respondents' aforegoing legal assertion could not be controverted.

[45] From the submissions as captured in the paragraphs cited above, it was then apparent that the JSC attributed its interest in the case not to any legal enactment but to some unspecified "salutary provision pertaining to the independence of the Judiciary". Whilst we accept that the three arms of government are constitutionally established, we are however, unable to go to the extent of accepting that enough facts were averred, by the JSC, to establish the existence of a legally enforceable right to be consulted by the First Respondent, when it came to the redeployment of officers such as the aforesaid Assistant Accountants. Even assuming that such a legal right did exist, it is common cause that the enforcement of same would be beyond the jurisdiction of this Court. This second conclusion leads us to Mr Vilakazi's last objection *in limine* relating to the jurisdiction of this Court to adjudicate over this matter, the legal basis of which was **Section 8 of the Industrial Relations Act.**

[46] **Section 8 (1) of the Industrial Relations Act, 2000**, as amended, which sets out the jurisdiction of this Court reads as follows:

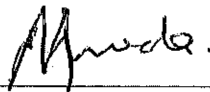
> ***"8 (1) The court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workman's Compensation Act, or any other 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 employer's***

association and a trade union, or staff association or between an employee's association, a trade union, a staff association, a federation and a member thereof".

It is clear, *in casu* that the dispute between the parties is not one between an employer and an employee, in fact, the subject matter of this litigation has nothing to do with the purpose and objects of this Court as captured in its founding statute.

[47] In conclusion, we rule that on the basis of the principle of *stare decisis,* our hands are tied to hold that the JSC does not possess the necessary *locus standi in judicio* to sue and to be sued in its own name in respect of those matters relating to its functions. Further, that even if the **Isaac Dlamini case** was not binding to this Court, *in casu* no sufficient facts were averred by the JSC to establish the legal basis of the alleged duty to be consulted which they attributed to the First Respondent. Further, that even assuming that such legal duty were present, it is common cause that the remedy for its enforcement would have not been tenable before this Court.

In the result, Applicants' application stands to be dismissed. There shall be no order for costs.



M. M. THWALA

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANTS : Mr. Z.D. Jele.

FOR RESPONDENTS : Mr. M. Vilakati.