IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

Appeal Case No. 17/2005

In the matter between:

MOSES DLAMINI Appellant

and

THE TEACHING SERVICE COMMISSION 1st Respondent

THE ATTORNEY GENERAL 2nd Respondent

Coram

J.P. Annandale, JP

J.M. Matsebula, JA

S.B. Maphalala, JA

For the Appellant: Mr. T.R. Maseko of P.M. Shilubane & Associates

For the Respondents Mr. T. Dlamini Attorney General's Chambers.

JUDGMENT

12 APRIL 2006

[1] The Appellant, formerly a teacher employed by the First Respondent, was dismissed after an adverse finding against him by a disciplinary tribunal, convened by his employer. He approached the Industrial Court for relief. Without dealing with the merits of the matter, a point *in limine* by the First Respondent was upheld. It was found that since the matter would actually require a review of the proceedings of the tribunal, it lacked the jurisdiction to do so. It is against this finding that the present appeal is based, framed under three points as follows:-

> (i) The Court *a quo* erred in fact and in law in its finding that the Appellant's application brought on a certificate of unresolved dispute (section 85 (1) of Industrial Relations Act 2000), for reinstatement, relied on grounds for view at common law, therefore not protected by the Act.
>
> (ii) The Court *a quo* erred in fact and law in holding that it lacked the jurisdiction to entertain the Appellant's application challenging an unfair dismissal on the basis of unfair procedure.
>
> (iii) The Court *a quo* erred in law in holding that fair procedure provided in the Act does not entail the application of the *audi alteram partem* principle in unfair dismissal cases.

[2] The first two grounds of appeal can conveniently be dealt with jointly, each being focussed on the jurisdictional empowerment of the Industrial court. The third ground is without merit and does not require to be dealt with. Suffice to say that the court *a quo* never made such a

finding in its judgment.

[3] The teaching profession is a noble and honourable calling where the education of school-going learners is entrusted to their teachers for many hours a day during the formative years of children. An education is the passport towards a productive and enriched lifetime while the absence thereof leads towards a life of servitude in the lower echelons of society. The right to quality education is inalienable in our society, constitutionally and morally imbedded as a *sine qua non* for a better life.

[4] Public primary and secondary schools in Swaziland resort under the auspices of the Teaching Service Commission, which exercises control over the appointment and discipline of teachers in those public schools. Their aim is to ensure quality education by dedicated qualified teachers, in whose care learners are placed during school hours. Teachers not only impart academic knowledge to learners but also become role models of impressionable students during their formative years.

[5] It is therefore incumbent on the Teaching Service Commission (TSC) to ensure that adverse and perversive behaviour by deviant teachers is nipped in the bud because the position of trust held by teachers can readily lead to abuse of those young ones.

[6] It is a commonly known fact that those same young children are easily impressionable, also to the extent that suggestion and prompting can readily lead to the fabrication of events that never occurred in reality but

thrives in their imaginative minds. Precisely because of this phenomenon, when an accusation of impropriety is levelled against a school teacher, it is absolutely imperative that a tribunal which deals with such a complaint must be alive to this and by necessity, meticulously apply the rules of natural justice, giving a fair hearing and at the same time, keep an open and unbiased mind.

[7] A disciplinary tribunal under the auspices of the TSC is not expected to be seasoned jurists, knowledgeable in the intricacies of law relating to admissibility of evidence, procedure and such like, but the minimum requirements of a fair hearing are universal and well established. These include, without placing a limitation on such aspects, the right of an accused person to hear evidence against him in his presence and the right to test the veracity of such evidence through cross-examination, either personally or through his or her legal representative. Moreover, the tribunal at such hearing must demonstrably be unbiased, retaining an open mind during the full course of proceedings. In the absence of that, the outcome of such disciplinary proceedings may well be set aside on review or appeal, as the case may be.

[8] The difference between these two remedial procedures is often clouded in obscurity and may well overlap to some extent. In our domestic jurisprudence, Nathan CJ condensed some case law, such as REX V SINGH 1948 (3) SA 554(N); REX V DE MEYER 1949(3) SA892(0); REX V IMPEY AND ANOTHER 1960(4) SA 556(E), when he stated at page 410 of the judgment in R V MKHABELA 1970 - 1976 SLR 408 as follows:-

> "*Before dealing with these matters I should mention briefly the difference between appeal and review proceedings. Proceedings by way of review - I am not here referring to automatic review - are resorted to where there has been some gross irregularity in the conduct of the case. An appeal is appropriate where the judgment is attacked as, for example, being bad in law, or against the weight of evidence, or where the sentence is submitted to be excessive. The improper admission or rejection of evidence may be regarded as an irregularity; but the more usual, and I think the more proper way to raise this question, especially in regard to the application of Section 199 of Act 67 of 138, is by way of appeal, and not by way of review.*"

[9] As a general rule, another way of formulating the difference between the two avenues would be that where the complaint is against the result of the proceedings, the general remedy is by way of an appeal and where the method of the proceedings is attacked, the remedy is to bring the matter on review. See ELLIS V MORGAN 1909 TS 576 at 581; VISSER V ESTATE COLLINS 1952(2) SA 546(C) at 551; PRIMICH V ADDITIONAL MAGISTRATE, JOHANNESBURG 1967(3) SA 661(T) at 671 or BESTER V EASIGAS (PTY) LTD 1993(1) SA 30(C) at 43B in this regard, pertaining to the distinction between appeal and review.

[10] In JOHANNESBURG CONSOLIDATED INVESTMENT COMPAY V JOHANNESBURG TOWN COUNCIL 1903 TS 111 at 114, Innes CJ stated of review proceedings, that it is:

> "*...the process by which, apart from appeal, the proceedings of interior courts of justice, both civil and criminal, are brought before the court (i.e. the reviewing superior court) in respect of grave irregularities or illegalities occurring during the course of such proceedings*".

[11] In the present appeal, the learned Judge of the Industrial Court held that the proceedings before him, though not coached in such words, in fact amounted to a review of the proceedings before a tribunal of the Respondent. At page 4 of his judgment, he found that:

> "*Although in the present case the Applicant has not specifically stated in its papers that it (sic) wants the disciplinary proceeding of the First Respondent to be reviewed and set aside on grounds of the patent irregularities, it is clear that the grounds upon which he challenges his dismissal are grounds for review. His complaint is that he did not have a fair hearing taking into account the way that the chairman conducted the hearing. In order for this court to make a ruling that the dismissal was unfair, it must make a finding on the irregularity or impropriety in the manner that the chairman conducted the disciplinary hearing. That can be done by way of review.*"

In my view, the Industrial Court correctly found that the proceedings *a quo* were in fact proceedings on review. It is this finding, made *in limine,* which is challenged in the appeal before us, with the crux of the matter being the

vexed question as to whether or not the Industrial Court has the power to review proceedings of statutory bodies.

[13] The learned judge *a quo,* as he was bound to do under the well established principle of *stare decisis,* relied upon a decision of the Industrial Court of Appeal, to hold that such jurisdiction is excluded. In FUTHI P. DLAMINI AND OTHERS V THE TEACHING SERVICE COMMISSION AND OTHERS, unreported Industrial Appeal Case No. 12/2002, two members of the present court decided the question of the power of the Industrial Court to review proceedings of the Teaching Service Commission (T.S.C.).

[14] In the judgment, the decision in MUSA GWEBU VS MANZINI CITY COUNCIL, Civil Case No. 2802/2002 was cited with approval. Therein, the High Court held that its jurisdiction regarding review of proceedings of the TSC *qua* statutory body was not ousted by the legislature and that the Industrial Court could <u>not</u> review such matter.

[15] In coming to these conclusions, the High Court emphasised Section 8(1) of the Industrial Relations Act of 2000 (I.R.A.) regarding that court's jurisdiction, vis-a-vis Section 104 Chapter IX Part 1 of the saved provisions of the 1968 Constitution. The latter states that:

> "*The High Court shall be a Superior Court of record and shall have (a) unlimited jurisdiction in all civil and criminal matters ...*"

whereas the I.R.A. states that:

> *"The court shall, subject to Section 17 and 65, have exclusive jurisdiction to hear, determine and grant appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act, 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[3] association, a trade union, a staff association, a federation and a member thereof.*

[16] In both MUSA GWEBU (Supra) and FUTHI DLAMINI (Supra) strong reliance was placed on the Court of Appeal judgment in SIBONGILE NXUMALO AND THREE OTHERS VS ATTORNEY GENERAL AND TWO OTHERS, unreported Appeal Case No. 25/96 (including case No. 30 of 1996, 28/96 and 9/96). In Gwebu (supra) the Court referred at page 6 to the latter decision as follows:

> "*...that Section 5(1) of the 1996 Industrial Relations Act confined the Industrial Court jurisdiction solely to those matters set out in the Act, those disputes which had run the gauntlet of the dispute procedure, and those issues arising from the other legislation specifically set out in Section 5(1). The learned Judge of Appeal said the following:*
>
> *'Having regard to the principle that in order to*

> *oust the jurisdiction of the ordinary courts, it must be clear that the legislation intended to do so and that any enactment which seeks to do so must be given a strict and restricted construction, it is in my view, clear that save for specific provisions mentioned, Section 5(1) does not disturb the common law of the master and servant.*"'

In FUTHI DLAMINI *{supra)* the two members of the Industrial Court of Appeal stated (at page 6) that the issue to decide *(mutatis mutandis* also presently the issue), is that:

> "*The crisp point to be addressed is whether or not the review, correction and setting aside of the proceedings leading to the termination of the officer (Applicant) and the Respondent which is a statutory body whose authority to discipline and terminate the services of any of its officer is created, defined and regulated by Urban Government Act, 1969 and its subsidiary legislation, is not the kind of "appropriate relief which Section 8 of the Industrial Relation Act, 2000 contemplates to be within the exclusive jurisdiction of the Industrial court.*"

At page 8 of FUTHI DLAMINI *(supra)* it was held that:

> "*The High Court has, in addition to reviewing the conduct of statutory or public bodies, always asserted and has inherent power to review the conduct of non-statutory quasi-judicial bodies and domestic disciplinary tribunals. Clearly the*

Respondent is a public body. Furthermore, the employment of the Applicant was determined inter alia *by statutory provisions in that only the council was empowered by the Act to appoint and discharge members of staff.*

The decision of the Respondent, to terminate the employment of the Applicant, and the recommendations of the disciplinary inquiry to that effect were unquestionably proceedings of a disciplinary nature, which may be reviewed by this court.

Had the 2000 act intended to oust the jurisdiction of the High Court in this respect it would have done so in more clearer language (see page 8 of the Court of Appeal judgment in SIBONGILE NXUMALO (supra)"

[19] Before this court, Mr. Maseko persuasively argued that when proper regard is had to all prevailing circumstances presently applicable, the above cited findings cannot properly be followed anymore.

[20] In the Law of South Africa (LAWSA), First issue Vol. 13 Part 1 at 431 para 890, the learned authors refer to the status of the South African Labour Court as a "*Court of law and equity (having) the same authority and inherent powers and standing as a high court in relation to matters that fall under its jurisdiction*".

[21] Specific reference to it being a court of equity is found in Section 155(1) of the South African Labour

Relations Act, 1995 (Act 66 of 1995), and it was held in CEREBOS FOOD CORPORATION LIMITED VS DIVERSE FOODS SA (PTY) LTD 1984(4) SA 149(T) at 173, echoed in KLOOF GOLD MINING COMPANY LIMITED VS NUM 1987 ILJ

99 (T), that the labour court is therefore not only responsible for applying the law, but should ensure that justice is done on a basis of fairness based on society's concept thereof.

[22] In Swaziland, the Industrial Court is also clothed with the mantle of equity. It is a specialist court established under Section 6 of the Act (the IRA), which same Act has as a primary objective the promotion of fairness and equity in labour relations (Section 4(i)(b) of the Act). In doing its duty, the Industrial Court daily deals with issues relating to alleged unfair or arbitrary dismissal, defined in LAWSA paragraph 701 *(op.cit.)* as:

> "*The essence of the doctrine of unfair dismissal is to protect an employee against arbitrary dismissal, that is, dismissal without substantive grounds in a procedurally unfair manner. (It) constitutes one of the basic labour rights in all western countries.*"

[23] This principle, or doctrine, was adopted by the International Labour Organisation in Recommendation 119 of 1963. In NUM V HENRED FREUHAUF TRAILERS (PTY) LTD 1994 ILJ 1257(A) this principle is described as follows at 1263 C:-

> "*Where an employee is unfairly dismissed he*

suffers a wrong. Fairness and justice require that such wrong should be redressed. The Act provides that the redress may consist of reinstatement, compensation or otherwise."

[24] In its daily dealing with matters of alleged unfair dismissal, our Industrial Court, as court of fairness and equity, is required to determine if dismissals were fair, having regard to *inter alia* whether it qualifies as a dismissal in terms of the Act, whether an employee is one as defined in the Act and entitled to protection afforded by the doctrine of unfair dismissals, whether the reasons for dismissal are fair and also, importantly, if the procedure was also fair, in order to decide if a dismissal of an employee can be regarded as fair and reasonable.

[25] Section 3 of the Act holds that the I.R.A. shall apply to employment by or under the Government in the same way and to the same extent as if the Government were a private person, but excluding service under the Umbutfo Swaziland Defence Force, the Royal Swaziland Police Force and His Majesty's Correctional Services. It was not argued, nor could it be so, that the Appellant could be excluded from the provisions of the IRA on this basis and therefore not entitled to approach the Court. The point is that the court upheld a legal point and found that it lacked jurisdiction to deal with the merits of the matter since it would effectively mean a review of the proceedings.

The essence of the application brought before the court *a*

quo, is that procedural requirements for a fair hearing were allegedly not met, wherefore the hearing and its consequences could not be regarded as fair and just. *Inter alia,* the applicant averred that he was not given fair opportunity to properly state his case because of alleged absence of opportunity to cross examine witnesses testifying against him, to properly state his own case and to make submissions or representations, caused in the main by bias against him and the absence of objectivity and open minds.

Before turning to the issue of the jurisdiction of the Industrial Court and whether it also encompasses the power to review the decision reached by the First Respondent or whether it is ousted by statute, I refer to an instructive passage by Corbett CJ in HIRA AND ANOTHER VA BOOYSEN AND ANOTHER 1992(4) SA 69 (AD) at 83 I - 84 I.

"*The Judge* a quo *....held that an error of law alone, with no consequential irregularity, is not a sufficient ground for review. Here, the magistrate made a mere error of law: there was no consequential irregularity. This error was therefore 'regrettable but not reviewable.' The question as to when an error of law gives rise to a good ground for review in our law is a vexed one and one upon which the decisions of the Courts are not altogether harmonious. In the JOHANNESBURG CONSOLIDATED INVESTMENT case supra, Innes C.J. described common law review in the following terms (at 115):*

> '*Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear*

> *illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court, which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal. The non-performance or wrong performance of a statutory duty by which third persons are injured or aggrieved is such a cause as falls within the ordinary jurisdiction of the Court. And it will, when necessary, summarily correct or set aside proceedings which come under the above category.*'

This formulation is not to be regarded as precise or exhaustive. It is clearly established by a long series of cases that, for instance, common law review applies also to cases where the statute creates a power rather than a duty; where the duty or power invested in an individual official, as distinct from a public body; where the decision under review is taken without proceedings, in the sense of a hearing, having occurred; and where the duty or power is created not by statute but consensually, as in the case of a domestic tribunal. Over the years, too, the grounds of review have been elaborated and defined. Recently these grounds were restated by this court (with reference to a decision of the president of the Johannesburg Stock Exchange) as follows:

> *'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the "behests of the statute and the tenets of natural*

justice"(see NATIONAL TRANSPORT COMMISSION AND ANOTHER V CHETTY'S MOTOR TRANSPORT (PTY) LTD 1972(3) SA 726(A) at 735F - G; JOHANNESBURG LOCAL ROAD TRANSPORTATION BOARD AND OTHERS V DAVID MORTON TRANSPORT (PTY) LTD 1976 (1) SA 887(A) at 895 B - C; THERON EN ANDERE V RING VAN WELLINGTON VAN DIE NG SENDINGKERK IN SUID AFRIKA EN ANDERE 1976(2) SA 1(A) at 14 F - G). Such failure may be shown by proof, inter alia, *that the decision was arrived at arbitrarily or capriciously or* mala fide *or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. (See cases cited above; and NORTHWEST TOWNSHIPS (PTY) LTD V THE ADMINISTRATOR, TRANSVAAL, AND ANOTHER 1975(4) SA 1(T) at 8D - G; GOLDBERG AND OTHERS VA MINISTER OF PRISONS AND OTHERS (supra at 48D - H); SULIMAN AND OTHERS VA MINISTER OF COMMUNITY DEVELOPMENT 1981(1) SA 1108(A) at 1123A.) Some of these grounds tend to overlap.*'"

[28] It is the "*failure to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of justice*", alleged by the Applicant in the court

a quo, which resulted in the finding referred to further up in this judgment, that resulted in a dismissal of the matter before it, holding it to be a review in respect of which the court had no jurisdiction, that gave rise to the appeal before this court.

[29] Was the court *a quo* correct to find as it did?

[30] Section 4 of the High Court Act, 1954 (Act 20 of 1954), under the heading "*Powers of Review*", holds that:

> "*4(1) The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Swaziland, and if necessary to set aside or correct the same.*"

[31] Section 151 of the Constitution of the Kingdom of Swaziland, 2005 (Act 1 of 2005) under the heading "*Jurisdiction of the High Court*" reconfirms its revisional jurisdiction but it goes on to say that:

> "*151(3) Notwithstanding the provisions of subsection (1), the High Court* -(a) has *no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction.*" {*my* emphasis)

[32] Section 8(3) of the IRA reads that:

> "*In the discharge of its functions under this Act, the (Industrial) Court shall have all the powers of the High Court, including the power to grant injunctive relief*"

[33] The Industrial Court is a specialist tribunal with expertise in labour or industrial matters. It deals exclusively with such cases, day in and day out. It does not have the inherent civil jurisdiction that the High Court retains, as is clear from the abovequoted legislation. The High Court retains the jurisdiction to review decisions of the Industrial Court.

[34] Halsbury's Laws of England vol 37 para 14 has it that:

> "*The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. ... The inherent jurisdiction of the court enables it to exercise ... control over the powers of inferior courts and tribunals.*"

[35] In CONNELLY V DIRECTOR OF PUBLIC PROSECUTIONS (1964) 2 All ER 401(HL) it was stated at 409 E that:

> "*There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process.*"

[36] That there is a clear distinction between the inherent jurisdiction of the High Court and the particular jurisdictional powers of the Industrial Court is thus quite clear. The legislature particularly endowed the latter court

with the powers it requires to fulfil its specialist task. The Constitution does likewise. There is no doubt in my mind that if this specialist particular jurisdiction were to be partially divested of it by holding that it lacks the power of review in labour matters and industrial disputes, which give rise to approach that court to effectively deal with such disputes, it would undermine the aim and purpose of the rationale behind the establishment of the Industrial Court.

[37] In PAPER, PRINTING, WOOD AND ALLIED WORKERS UNION V PIENAAR NO AND OTHERS, 1993(4) SA 621(A) at 637 A - B, referred to with approval and relied upon to reach its decision in SWAZILAND BREWERIES LIMITED AND ANOTHER V CONSTANTINE GININDZA, unreported Supreme Court of Appeal decision in Civil Appeal No. 33/2006 dated the 16th November 2006, it was held that:

> "*The existence of Specialist courts points to a legislative policy which recognises and gives effect to the desirability, in the interests of administration of justice, of creating such structures to the exclusion of the ordinary courts.*"

[38] It is in the same case of Swaziland Breweries (supra) that the Supreme Court, per Ramodibedi J A with Browde AJP and Zietsman JA concurring, held at paragraph 12 that:

> "*The effect of this change read with the use of the word* "*exclusive*" (in both the Constitution and the I.R.A.) *in the section makes it plain in*

> *my view that the intention of the Legislature by enacting Section 8(1) of the Act was to exclude* (my emphasis) *the High Court's jurisdiction in matters provided for under the Act and thus to confer "exclusive" jurisdiction in such matters on the Industrial Court".*

[39] I cannot but fully agree with this finding. Moreover, this court made a similar finding in unreported Industrial Appeal Case No. 04/2005, MATHEMBI DLAMINI AND SWAZILAND GOVERNMENT, delivered in February 2006. In dealing with a point of law raised in its heads of argument to the effect that "*(the) Industrial Court does not have jurisdiction to review a decision of an employer*" (namely the Teaching Service Commission), it was held at paragraphs 47 - 49 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 relates to an infringement of labour legislation or 'any matter which may arise at common law between an employer and employee in the course o f employment.'*

The decision of the Industrial Court in the case of MOSES DLAMNI V TSC AND ANOTHER (case No. 402/04) seems to be clearly wrong."

It is for these reasons that I conclude that the decision of the Court *a quo* in the present appeal, by holding that it

does not have the power to review the decision of the First Respondent, should be set aside on appeal. Accordingly, it is ordered that the matter be referred back to the Industrial Court, which is to deal with the merits of the matter before it, now that the point *in limine* regarding its jurisdictional powers of review which it upheld, has fallen away.

No costs order is made.

JACOBUS P. ANNANDALE, JP

I agree

J.M. MATSEBULA, JA

I agree

S.B. MAPHALALA, JA