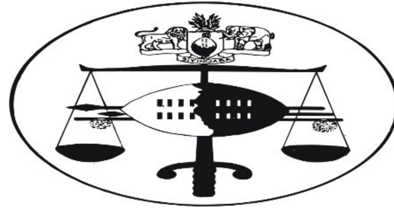

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE **CASE NO. 14/2015**

In the matter between:

THE CHAIRMAN, CIVIL SERVICE COMMISSION **APPELLANT**

AND

ISAAC M.F. DLAMINI **RESPONDENT**

Neutral citation: *The Chairman, Civil Service Commission v Isaac M.F. Dlamini (14/2015) [2016] SZICA 01 (31 March 2016)*

Coram: **M.C.B. MAPHALALA CJ, MAMBA AJA, and M. DLAMINI AJA**

Heard: 16 March 2016

Delivered: 31 March 2016

[1] Labour Law – Appeal from Industrial Court per section 19(1) of Industrial Relations Act 1 of 2000 on a point of Law only. Point of law defined. Court a quo misconstrues or makes an incorrect interpretation or mistake of Law. This is a point of Law and is appealable.

[2] Civil Law – procedural fairness or rules of natural justice – right to be heard before a decision is taken that adversely affects one's rights – the nature of such right to fair hearing.

Fair hearing may take different forms – oral, or written depending on exigencies of the case at hand.

MAMBA AJA

[1] The respondent joined the Civil Service in 1972 and exited such service when he retired on 18 November 2010. In 2003 whilst serving as Deputy Master of the High Court, he was appointed as Acting Master of the High Court with effect from 01 July 2003 to 31 December of that year. As the post or position of Master of the High Court remained vacant at the end of his acting period, his position as Acting Master was periodically renewed and extended until 16 March 2007. As Acting Master, he was remunerated at Grade 4.

[2] It is common cause that certain discussions were held between the respondent and the Civil Service Commission (CSC) in 2010 whereby *inter alia*, the respondent demanded that he be appointed and confirmed as the substantive Master of the High Court – with effect from 01 January 2004. These discussions were apparently not fruitful and the respondent reported the dispute to the Conciliation, Mediation and Arbitration Commission (CMAC) which is established in terms of section 62 (1) of the Industrial Relations Act 1 of 2000 (as amended) (hereinafter referred to as the IRA). A truce was brokered by CMAC whereby it was *inter alia*

agreed that 'the Ministry of Justice undertakes to hold in abeyance the appointment of the Master of the High Court.'

[3] When the respondent failed to convince the CSC and the Ministry of Justice to appoint him as the Master of the High Court, he then sought the intervention of the Judicial Service Commission (JSC). Again, the said Commission did not act on his demands and he continued in his acting capacity for yet another period of thirteen months without any letter of appointment. By letter dated 27 April 2012, he reverted to the CSC and demanded that the latter convene a meeting in which he could present his case to be confirmed as the substantive Master of the High Court. In response by letter dated 28 May 2012, the Civil Service Commission advised the respondent that it had referred his demands or grievances to the JSC under which the position of Master of the High Court fell or was governed or regulated in terms of section 160 of the Constitution.

[4] Undeterred and not satisfied with the referral of his matter to the JSC, the respondent sent two further letters to the CSC demanding that he be confirmed as the master of the High Court with effect from April 2007. These letters are dated 16 July 2012 and 02 August 2012, respectively. He also threatened legal action if the CSC failed to convene the meeting

he had demanded. The CSC stood its ground and the respondent filed an application before the court below for, *inter alia*, the following order:

> '1. That the decision made by the [CSC] refusing to hear and consider [respondent's] claims be reviewed and set aside.
>
> 2. Directing the [CSC] to convene itself for purposes of hearing and determining the [respondent's] claims within 14 days from date of granting this order.'

The application was opposed by the applicant who contended that the court *a quo* had no jurisdiction to review a decision of an employer regarding his employee where the said decision had not been reported and concluded by CMAC in terms of the dispute resolution procedure stipulated in Part VIII of the IRA. The Appellant submitted that its decision communicated to the respondent in its letter of 28 May 2012, referring the matter or dispute to the JSC had not been referred by the respondent to CMAC and consequently CMAC had not issued a certificate of unresolved dispute. In argument before the Court, the Appellant also argued that the CSC had given the respondent the chance to be heard before it took the decision to refer the matter to the JSC.

[5] At the conclusion of the application, the court *a quo* found or ruled in favour of the respondent and granted the two prayers stated in the preceding paragraph. The appellant was, together with the Swaziland

government, also ordered to pay the costs of suit. It is this order that is appealed against and is the subject of this appeal.

[6] In its notice of appeal, the appellant states that:

> ‘1. The court *a quo* erred and misdirected itself in exercising jurisdiction over an application for review.
>
> 2. The court *a quo* erred and misdirected itself in holding that the respondent’s application was solely for the determination of a question of law and did not have to be reported to the [CMAC].
>
> 3. The court *a quo* erred and misdirected itself in holding that the [CSC] can sue and be sued in its own name.
>
> 4. The court *a quo* erred and misdirected itself in setting aside the Appellant’s decision contained in its letter dated 28 May, 2012.’

[7] The respondent submitted in his heads of argument that what was before this court was a review rather than an appeal and this was contrary to section 19(1) of the IRA which provides that an appeal shall lie before this court from a decision of the court *a quo* or an arbitrator appointed by the President of the Court on a question of law only. In fairness to Counsel, he did not seriously argue this point before us. The central

ground of appeal by the appellant is that the court *a quo* erred in holding that because the respondent was only allowed to make written complaints or representations to the CSC, this was a denial of the right to be heard before a decision was taken. The point being made is that the court *a quo* misconstrued the law and thus made an error of law. This is equally true of the issue of jurisdiction or lack thereof. It is a matter of law and therefore appealable. Whether a court or decision maker has jurisdiction or not is a matter of law based of course on the particular facts of each case and the nature of the relief claimed.

See *Swaziland Electricity Board v Collie Dlamini Appeal Case 2/2007* (unreported judgment delivered on 27 February 2008) where this court stated as follows:

> **'[6] The question that immediately announces itself in this enquiry is what is meant by a question of law as opposed to a question of fact.**
>
> **In MEDIA WORKERS UNION OF SA v PRESS CORPORATION OF SA LTD, 1992 (4) SA 791(A) @ 795 E M GLOSSKOPF JA referring to SALMOND ON JURISPRUDENCE 12th edition @ 65-75 stated that:**
> **"The term "question of law" …is used in three distinct though related senses. In the first place it means a question which a court is bound to answer in accordance with a rule of law – a question which the law itself has authoritatively answered to the exclusion of the court to**

answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter. In a second and different signification, a question of law is a question as to what the law is. <u>Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter</u>. A third sense in which the expression "question of law" is used arises from the division of judicial functions between a judge and jury in England and formerly, in South Africa. The general rule is that questions of law in both the aforegoing senses are for the judge, but that questions of fact (that is to say, all other questions) are for the jury."

And at 796, the learned Judge of Appeal referring to the notions of question of fact and question of judicial discretion quoted SALMOND where the author states that:

"<u>Matters of fact are capable of proof, and are the subject of evidence adduced for that purpose.</u> Matters of right and judicial discretion are not the subject of evidence and demonstration, but argument, and are submitted to the reason and conscience of the court. In determining questions of fact the court is seeking to ascertain the truth of the matter; in determining questions of judicial discretion it seeks to discover the right or justice of the matter. Whether the accused has committed the criminal act with which he is charged is a question of fact; but whether, if guilty, he should be punished by way of

imprisonment or only by way of fine, is a question of judicial discretion or of right. …

Matters and questions which come before a court of justice, therefore, are of three classes:

(1) Matters and questions of law – that is to say, all that are determined by authoritative legal principles;

(2) Matters and questions of judicial discretion – that is to say, all matters and questions as to what is right, just, equitable, or reasonable, except so far as determined by law.

In matters of the first kind, the duty of the court is to ascertain the rule of law and to decide in accordance with it. In matters of the second kind, its duty is to exercise its moral judgment in order to ascertain the right and justice of the case. In matters of the third kind, [fact] its duty is <u>to exercise its intellectual judgement on the evidence submitted to it in order to ascertain the truth."</u> (The underlining or emphasis has added by us.)'

[8] In its judgment on the issue of the CSC affording the respondent a hearing the court *a quo* expressed itself in the following words:

'27.5 …the court is persuaded that the applicant was not given a hearing either orally or in writing before a decision was made that was detrimental to his rights. The applicant had made it clear that he intended to make oral submission at the hearing, duly assisted by his counsel. The first respondent denied the applicant a hearing. The first respondent's

decision, as contained is unprocedural and irregular. That decision deserves to be set aside.

28. It is not in dispute that the applicant did not appear before the first respondent to present his grievance, despite his request to be given that opportunity. The first respondent, however, made a decision on the matter. The first respondent dealt with the matter as if the applicant had been given a hearing based on his written submission. That approach was wrong as the applicant did not file a written submission.

…

32. A fundamental principle that is confirmed by the above cited authorities is that; a party in a matter that is before an administrative authority, is legally entitled to a hearing before a decision is taken on the matter. A failure by an administrative authority to give an interested party a hearing will render its decision unprocedural and unfair. The decision would be liable to be set aside.'

That, in my judgment is the gravamen or crux of the decision or *ratio decidendi* of the court *a quo*. It held that over and above the written letters the respondent had sent to the appellant, the appellant was still obliged to hear submissions from his attorney before making its decision

referring the matter to the JSC. That, in my judgment is an oversimplification and rather rigid and dogmatic approach to what a hearing under such circumstances entails.

[9] As the Learned judge in the court *a quo* rightly pointed out, a hearing is always a must or pre-requisite where the decision to be taken would adversely affect or impact on the rights of a person to the dispute or decision making process. This principle is grounded on the notion of natural justice or procedural fairness namely; that a person may not be condemned before he is given the opportunity to be heard on the issue under consideration. In *David Bhutana Dlamini v The Commissioner of His Majesty's Correctional Services and 2 Others, Civil Case 470/2008* (unreported judgment delivered on 27 August 2010) the Court stated as follows:

> **'[19] Whether a certain set of rules or regulations requires the enforcement of the rules of natural justice or not depends on their construction and meaning. I consider that the starting point should be that the rules of natural justice apply unless specifically or impliedly excluded. I have gone through the prisons regulations and I have found no indication that those rules do not encompass the application of the audi alteram partem rule in situations such as the one under the spot-light herein. In the case of ADMINISTRATOR, TRANSVAAL AND ANOTHER v**

ZENZILE AND OTHERS, 1991 (1) SA 21 the Appellate Division ruled that

"When a statute empowered a public body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter had a right to be heard before the decision was taken, unless the statute expressly or by implication indicated the contrary."

This was followed in SIBIYA AND ANOTHER v ADMINISTRATOR , NATAL AND ANOTHER, 1991 (2) SA 591 (D AND CLD) where the court made it clear that the right to be heard did not depend on whether the decision to be taken was punitive or disciplinary. I would respectively add that that right obtains even where the decision is an administrative one, the determining factor being whether or not it adversely impacts on existing rights. The transfer in question clearly adversely affects the applicant's existing rights to his family and property.'

See also *Van der Merwe and others v Slabbert NO and others 1998 (3) SA 613 at 624.*

[10] It is again crucially important to note that the nature and or form of the hearing may vary from one case to another. There is no standard hearing otherwise the court would be advocating for form over substance and this is not just. It is dogmatic and rigid. The Canadian Supreme Court in *The*

Board of Education of the Indian Head School Division No. 19 of Saskatchewan v Ronal Gary Knight [1990] S.C.R 653, quoted with approval by our High Court in *Nkosinathi Magagula v the Commissioner of Police and Another (96/11) [2013] SZHC 193 (09 September 2013)* had this to say:

> **'It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action (4th ed. 1980), at p. 240), the aim is not to create "procedural perfection" but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. Hence, in the case at bar, if it can be found that the respondent indeed had knowledge of the reasons for his dismissal and had an opportunity to be heard by the Board, the requirements of procedural fairness will be satisfied even if there was no structured "hearing" in the judicial meaning of the word. I would agree with Wade when he writes (Administrative Law (5th ed.), at pp. 482-83):**
>
> **A `hearing' will normally be an oral hearing. But it has been held that a statutory board, acting in an administrative**

capacity, may decide for itself whether to deal with applications by oral hearing or merely on written evidence and argument, provided that it does in substance `hear' them"; . . . [Emphasis added; footnotes omitted.]

Laskin C.J. echoed this view in *Nicholson*, *supra*, at p. 328, when he stated that the Police Commissioners should have `heard' Nicholson before deciding to terminate his employment, but not implying that there should be a formal hearing. (See also *Cardinal v. Director of Kent Institution*, *supra*, at p. 659, *per* Le Dain J.) In the same vein, the duty to give reasons need not involve a full and complete disclosure by the administrative body of all of its reasons for dismissing the employee, but rather the communication of the broad grounds revealing the general substance of the reason for dismissal (*Selvarajan v. Race Relations Board*, [1976] 1 All. E.R. 12, at p. 19, *per* Lord Denning M.R.)'

[11] The above views were also echoed by Lord Taylor in *R v Army Board of Defence Council ex P. Anderson [1991] 3 All ER 375* (QB) at 387b-g.

'2. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the

degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing: see *Local Government Board v Arlidge [1915] AC 120 at 132-133, [1914-15] All ER Rep 1 at 7, Selvarajan v Race Relations Board [1976] 1 All ER 12 at 19, [1975] I WLR 1686 at 1694 and R v Immigration Appeal Tribunal, ex p Jones [1985] 2 All ER 65 at 68, [1988] I WLR 477 at 481*. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that, wherever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing. Even when such a hearing is necessary, it may only

> **require one or two witnesses to be called and cross-examined.'**

Again in *R v Secretary of State for the Home Department ex parte Doody [1993] 3 ALL ER 92 (HL) 106,* the court stated that

> **'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions or a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected**

> **by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring it modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.'**

[12] In the present appeal, the CSC had sufficient, if not all that which the respondent was complaining about. It has to be remembered that the parties had extensively discussed the matter and had even appeared before CMAC. The respondent had fully or adequately stated his case why he wanted to be appointed the Master of the High Court. These were the issues he wanted to ventilate and he did so by letter to the CSC. Furthermore, some of the letters were written on his behalf by his attorneys. No oral evidence or submissions were deemed necessary in the circumstances. The CSC determined that a meeting was not necessary for it to make the ruling that it eventually made. That ruling was to refer the matter to the JSC. The CSC did not make a decision that adversely affected the respondent in his personal and proprietary rights. The decision by the CSC was to decline to hear the dispute on whether or not

the respondent must be confirmed or appointed as the Master of the High Court. The CSC ruled that it could not hear the matter because it had no jurisdiction to do so. Such jurisdiction resided with the JSC. Thus, the ruling by the CSC did not decide or in anyway affect the rights of the respondent. That being the case, the CSC was not obliged to even grant the respondent a hearing.

[13] From the above facts and analysis of the applicable law, the court *a quo* was in error in holding that the appellant was not given a hearing. He was. Further, the Court erred in concluding that he ought to have been given a hearing. He was not entitled to such hearing – because of the nature and substance of the ruling of the CSC.

[14] It is also not insignificant albeit strictly speaking not necessary for this court to make this finding, that the decision by the CSC to refer the respondent's demands to the JSC, was correct. Section 160 (2) of the Constitution provides that '…the Commission has power to appoint persons to hold or act in any of the offices mentioned under subsection (3) including the power to exercise disciplinary control over those persons and the power to remove those persons from office.'

The office of Master of the High Court is listed under 3(a)(v) thereof. Clearly, therefore, the respondent directed his grievances to the wrong

body but was given the correct advise by the CSC. It is therefore completely unfathomable why the court *a quo* ordered that the CSC must convene a meeting within 14 days to hear the respondent's complainant or demands. The CSC has no such power in law and the court may not cloth it with such power. The court is not the law-giver. The Constitution came into effect on 6 February 2006. The fact that respondent's grievances pre-dates the Constitution is immaterial. What is material is that when he filed his complaint with the CSC in April 2012, the Constitution had transferred those powers from the CSC to the JSC.

[15] For the foregoing reasons, I would allow the appeal and make an order dismissing the applicant's application in the court below.

[16] I now examine briefly, whether or not the court *a quo* had jurisdiction to review the decision of the CSC before the matter had been exhausted and completed by CMAC. Both Counsel were in agreement that the law on the issue has recently been settled by a full bench of the High Court which held that '…the [Industrial] court can only entertain a dispute between an employer and an employee after such a dispute shall have been conciliated upon without same getting resolved so as to result in a certificate of an unresolved dispute being issued. This court has not been given a justification nor a legal basis for any matter having to serve

before the said court without it fully adhering to this statutory and policy requirement.' *Alfred Maia v The Chairman of the Civil Service Commission and 2 others (1070/15) 2016 SZHC 25 (17 February 2016) at para 38).* This includes public sector employees. The Court held further that the Constitutional right to administrative justice as enshrined in section 33(1) of the Constitution does not extend jurisdiction to the Industrial Court to review an employee's rights to administrative justice, as this '…is not a matter for a review than it is a matter for the enforcement through the structures established in terms of the Industrial Relations Act and the Employment Act to deal with labour disputes' (per para 61).

[17] In the present appeal, although the dispute between the respondent and his employer was at one stage referred to and considered by CMAC, the issue was never concluded or completed by CMAC such that CMAC did not even issue a Certificate of Unresolved Dispute. In any event what was referred to CMAC was the complaint by the respondent that he must be appointed the Master of the High Court rather than the issue of the CSC referring the dispute to the JSC, which is the crisp dispute that served before the court *a quo*.

[18] The appellant's third ground of Appeal is that the Court *a quo* erred in law in holding 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 Part 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 subject to any ministerial or political influence and this independence shall be an aspect of the exercise of any delegated powers or functions of the Civil Service Commission or similar body.' 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.

[19] The court *a quo* ruled that the CSC is a government agency and as such has direct and substantial interest in the litigation as it was its decision that was under the spotlight. The learned trial judge concluded that because of this fact, *'the first respondent must be afforded an opportunity to address those allegations as an interested party, and be able to either admit or deny the allegations made.*

The court does not see any irregularity in the manner the first respondent has been cited in these proceedings more especially because Swaziland Government, as the first respondent's principal, has also been cited as second respondent.' (Per para 23.5 and 23.6 of the judgment).

With due respect to the Learned judge, this is not the answer to the challenge on locus standi. The commission is a statutory body and it can only derive its powers from the enabling legislation. I have been unable to find such powers and the respondent was unable to point to any such powers. One would have thought that it is generally not proper to cite the agent if it has no locus standi, even if the principal is cited alongside it. To compound matters, the court *a quo* proceeded to award costs against the principal and agent.

[20] Rule 53(1) and (8) of the Rules of the High Court, which applies *mutatis mutandis* in the court *a quo,* states that an application for review in such a case shall be directed and delivered to the chairman of the commission. This is, obviously a procedural direction and does not address the issue or incident of locus standi which is a matter of substantive law. In the instant case, having cited the Government, as the principal, it was irregular to cite the commission and the Attorney General. The Commission has no locus standi to sue and be sued. This irregularity, however did not result in a failure of justice as the Government was able to plead its case, this irregularity, notwithstanding.

[21] There has been no appeal on the issue of costs. Both parties were, however, agreed that there are no special circumstances that warrant an

order for costs in this appeal or in respect of the proceedings in the court below. I agree.

[22] For the foregoing reasons, I would uphold the appeal and substitute the order of the court *a quo* with the following:

The application is dismissed and there is no order as to costs.

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MAMBA AJA

I agree.

____

M.C.B. MAPHALALA CJ

I also agree.

____

M. DLAMINI AJA

For the Appellant: Mr. M. Vilakati

For the Respondent: Mr. S. Mnisi