IN THE

INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case No. 14/2018

In the matter between:

THE ATTORNEY GENERAL **Appellant**

And

SAYINILE NXUMALO **Respondent**

Neutral citation: *The Attorney General v Sayinile Nxumalo (14/2018) [2018] SZICA 06 (24 October 2018)*

Coram : N. Hlophe AJA, T.M. Mlangeni AJA, and T.L. Dlamini AJA

For Appellant : Mr M. Vilakati

For Respondent: Mr. M. Mkhwanazi

Heard : 8th October 2018

Delivered : 23rd October 2018

Labour law – Industrial Relations Act, 2000 (as amended) – Jurisdiction of the Industrial Court – Extent of the power of the court to review decisions of statutory boards and bodies acting qua employer where the decision relates to an

infringement of a labour legislation or any matter which may arise at Common Law between an employer and an employee in the course of employment.

JUDGMENT

[1] Before this court is an appeal against a ruling on a point of law, a ruling that was issued by the Industrial Court, per Justice **Nkonyane J**, on the 21 August 2018. The question for decision is whether the principle in the judgment of the case of **Alfred Maia v The Chairman of the Civil Service Commission and 2 Others (1070/2015) [2016] SZHC 25 (17 February 2016)**, *viz*., that the Industrial Court has no power to review decisions of statutory boards or bodies acting *qua* employer, unless a certificate of unresolved dispute has been issued pursuant to an unsuccessful conciliation under the auspices of the Conciliation, Mediation and Arbitration Commission (CMAC), is confined to cases of dismissal only.

[2] The Respondent, who was the applicant in the court *a quo*, instituted proceedings on the 27 April 2018 for the review and setting aside of a decision of the Teaching Service Commission (TSC) issued on the 30 April 2015.

[3] According to the founding papers, the respondent was in 2003 appointed to be the Headteacher at Manyovu Primary School following the retirement of the then Headteacher. On or around March 2012, five (5) charges of misconduct were preferred by the TSC against the respondent. However,

none of those charges were prosecuted. In March 2014 the respondent was served with another charge sheet by the TSC. This new charge sheet contained fourteen charges of misconduct.

[4] Consequent to the charges preferred against her, the respondent appeared before the TSC for a disciplinary hearing that took place between March 2014 and April 2015. At the end of the hearing, the respondent was found guilty on count 5 2, 5, 6, 7, 8, 9 and 14. The respondent stated in her founding papers that she was found guilty even in respect of count 14 notwithstanding the fact that this count is one of three (3) counts that were withdrawn at the hearing. She was acquitted on counts 11, 12 and 13 for lack of evidence whilst counts 3, 10 and 14 were withdrawn.

[5] The sanction that was imposed in respect of the charges she was found guilty of was a suspension without pay for 12 months and a demotion to the position of Deputy Headteacher upon completion of the suspension period.

[6] The respondent stated in her papers that the disciplinary hearing against her was conducted in contravention of Regulation 15 of the Teaching Service Regulations, 1983. She submitted that she was therefore prematurely prosecuted before the TSC and that the TSC flouted its own policies and procedures.

[7] She also stated that she was found guilty of a charge (count 14) that was withdrawn at the hearing and that no specific sanction was issued in respect of each charge but she was instead handed a globular suspension without pay plus a demotion to the position of Deputy Headteacher. She further alleged that she was not afforded an opportunity to defend the stoppage and reduction of her salary, instead, the TSC acted unilaterally in doing so.

[8] She also stated that the Chairman of the TSC was biased against her and had on a previous occasion informed her that he would get even with her for having colluded with one Amos Dlamini to cheat him in relation to cattle that he had purchased and that were delayed to be delivered to him. The disciplinary hearing was used, according to the Respondent, by the Chairman to carry out the threat of striking back at her. The background to this is that she and the Chairman had a history of business dealings in which she acted as his agent in buying cattle on his behalf. According to the Respondent, because of this personal relationship she had with the Chairman he was supposed to recuse himself from the disciplinary hearing. The extent of the relationship was such that she was an invited guest at the Chairman's thanksgiving ceremony at his home at Mkhondvo area, and the Chairman was an invited guest at Respondent's wedding in 2013.

[9] Lastly, the respondent stated that she was not advised of her right to appeal the decision of the TSC and was accordingly denied the right to appeal. For these reasons, she filed the application wherein she sought to review and set aside the decision of the TSC.

[10] The appellant did not file an answering affidavit in the court *a quo* but filed a notice to raise points of law. A summation of the points of law is that the basis for a review of the decision of the TSC is the right to administrative justice that is guaranteed by **section 33 of the Kingdom's Constitution, 2005**. The appellant argued that the decision complained of must therefore be administrative, and that in terms of section 35 of the Constitution, only the High Court is vested with the jurisdiction to inquire into any alleged violation of section 33.

[11] It was the appellant's contention that the decision sought to be reviewed is not administrative but is merely a disciplinary sanction by an employer. In other words, the source of the decision is contractual and not administrative. Accordingly, the submission was that the respondent seeks to review a decision that is outside the scope of section 33 of the Constitution and which is not amenable to review. On that premise, it was contended that the Industrial Court lacks jurisdiction to entertain the application.

[12] A distinction between an administrative and contractual power was stated by **Ngcobo J** in the case of **Chirwa v Transnet Limited and Others 2008 (4) SA 367 (CC),** where he stated as follows:

> "142. *The subject–matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the Applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not*

detract from the fact that in terminating the Applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of state which exercises public power does not transform its conduct in terminating the Applicant's employment contract into an administrative action. Section 33 is not concerned with every act of administration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under section 33." (emphasis added)

[13] The section 33 of the South African Constitution cited in the above quoted text is an equivalent of section 33 of our Constitution. Likewise, Transnet is a creature of statute just like the TSC is. The distinction explained by **Ngcobo J** between administrative and contractual powers as they relate to section 33 of the South African Constitution places in a perfectly similar situation and context the argument that was made by the appellant in the court *a quo.*

[14] In paragraph 17 of the judgment of the court *a quo*, **Nkonyane J** stated as follows:

"17 **…** *The points of law raised on behalf of the 1st Respondent are mainly that;*

17.1 this Court has no jurisdiction to entertain the present application because these are review proceedings;

17.2 this court can only exercise review powers if the decision or proceedings complained about is an administrative decision;

17.3 a disciplinary sanction by an employer against an employee is not administrative as contemplated by Section 33 of the Constitution and therefore not amenable to review; and that

17.4 in terms of Section 35 of the Constitution it is the High Court that has jurisdiction to enquire into an alleged violation of the Section 33 right".

[15] In paragraph 19 of the judgment of the court *a quo*, the Honourable Judge concedes that on the basis of the judgment in the case of **Alfred Maia v The Chairman of the Civil Service Commission and Two Others (1070/2015) [2016] SZHC 25 (17 February 2016)** the Industrial Court has no power to hear and determine review applications.

[16] The Honourable Judge further states that the **Alfred Maia case (supra)** is however distinguishable from the present one in that the Maia case was considering a review application of a matter that involved the dismissal of an employee. His Lordship then stated that in the present case, the review that is being sought is not in respect of a dismissed employee.

[17] His Lordship further stated that in the **Alfred Maia's** case Maia (employee) did not file an application for a determination of an unresolved dispute, but instead instituted proceedings by way of administrative review without having the dispute reported to CMAC as required by Part VIII of the Industrial Relations Act.

[18] In this court's considered view, the court *a quo* was making the distinction mentioned in paragraph [17] above in order to place emphasis on the fact that the principle in the **Alfred Maia's** case is that the Industrial Court has no jurisdiction to determine review applications that have been filed directly to the Industrial Court. The Court's jurisdiction only extends to matters that have been reported to CMAC as per the dictates of Part VIII of the Industrial Relations Act, 2000 as amended (the IRA).

[19] The principle in the **Alfred Maia** case, in so far as reporting of disputes is concerned, was correctly captured by the court *a quo* in our finding.

[20] It is common cause that in respect of this case the respondent first instituted proceedings for determination of a dispute that remained unresolved during conciliation by CMAC. That application was later withdrawn and the present application was filed.

[21] **Nkonyane J** stated the following regarding the applications referred to in paragraph [20] above:

> *"25 The evidence before the Court also revealed that at some point during 2016, the applicant instituted legal proceedings for determination of the unresolved dispute in terms of Rule 7 of this Court Rules. It was not in dispute that those proceedings were withdrawn. In that application, which was based on the same factual matrix as the present application, the Applicant was seeking an order setting aside the disciplinary action outcome and reinstatement to the position of the Head teacher and also payment of arrear salaries.*

> *26. Similarly, in the present application, the Applicant is seeking an order reviewing and setting aside the decision of the 1st Respondent. The only difference between the two applications is that in the initial one, the Applicant did not use the conventional language of "review". However, that application was based on the same facts and it had all the hallmarks of a review application. The 1st Respondent did not complain then. It seems therefore that the 1st Respondent's disquietude now was only stirred up by the employment of the word "review."*

[22] On the totality of its findings, the court *a quo*, in its judgment in paragraph 29, stated as follows:

> *"29 All the cases referred to by the 1st Respondent (TSC) involved disputes arising from an alleged unfair dismissal. In casu there was no dismissal.*

[23] Consequently, the points of law were dismissed with no order as to costs. The appellant herein then noted the present appeal premised on three grounds, *viz.*,

> *"1. The Court a quo erred in law and misdirected itself when it found that the remedy of review is only competent in Industrial Relations law in cases of unfair dismissal.*
>
> *2. The Court a quo erred in law and misdirected itself when it found that there is a right of review independent of Section 33 of the Constitution.*
>
> *3. The Court a quo erred in law and misdirected itself in dismissing the Appellant's points of law."*

[24] In his opening address during arguments, Mr Vilakati who appeared for the appellant, submitted that the essence of the appeal is the scope of the

principle in the matter of **Alfred Maia v Chairman of the TSC (supra)**. He submitted that the court below held that the principle is confined to dismissal cases only. In the present application that is not the case.

[25] Mr Vilakati contended, when making submissions, that the appellant's case is that the principle is not confined to dismissal cases only but applies to all cases in industrial relations disputes. This contention, in our view, is a good summation of the appeal and determination to be made by this court. For that reason, the court's approach will be to look into this matter from that angle than to deal with each ground of appeal separately.

[26] Mr. Mkhwanazi for the respondent submitted that the principle in the **Alfred Maia's** case seeks to avoid the mischief of having a party being permitted to directly approach the Industrial Court and avoid the route that goes via CMAC. He also submitted that the respondent first went via the CMAC route and a certificate of unresolved dispute was issued. It was therefore his case that the matter was properly before the court *a quo* and that the court has the jurisdiction to hear it and issue its judgment.

[27] Mr Mkhwanazi further submitted that the court is vested with jurisdiction on this matter by virtue of section 8 subsections (1) and (3) of the IRA read with section 151(3)(a) of the Constitution, 2005.

[28] This court has carefully considered the judgment in the **Alfred Maia's** case. In its view the trial court fully applied itself to the issues in dispute and the relevant legal provisions, including case law. It is also the view of this court that the **Alfred Maia** case was correctly decided after a comprehensive review of judgments on the subject matter that was for determination.

[29] In deciding the case of **Alfred Maia**, the trial court extensively considered the judgments of the earlier decided cases. These cases *inter alia* include **Moses Dlamini v The Teaching Services Commission, ICA Case No. 17/2005; Mathembi Dlamini v Swaziland Government, ICA Case No. 4/2005** and **Melody Dlamini v The Secretary of the Teaching Service Commission and 3 Others, Industrial Court Case No. 121/2008**. The court held that these cases were incorrectly decided. This court concurs with the finding.

[30] First and foremost, regard must be given to section 6 of the IRA which establishes the Industrial Court and stipulates the source of its jurisdiction. Mr Mkhwanazi made reference to this section (as a source of the jurisdiction of the Industrial Court). The section provides as follows:

> *"6.* (1) *An Industrial Court is hereby established <u>with all the powers and rights set out in this Act or any other law</u>, for the furtherance, securing and maintenance of good industrial or labour relations and employment conditions in Swaziland."* (emphasis added)

[31] There is therefore no hesitation that the power or jurisdiction of the Industrial Court is stipulated in the IRA or any other law. Save for section 151(3)(a) of the Constitution which this court will refer to later in this judgment, this court was not referred to, and is not aware of, any other law which provides for the jurisdiction of the Industrial Court.

[32] Section 8 of the IRA, particularly subsections (1) and (3), make provision for the jurisdiction of the Industrial Court. Subsection (1) provides 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 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 employee'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."*

[33] The words used, *viz.*, "*subject to sections 17 and 65"*, mean that when exercising its powers vested in terms of section 8, the court must exercise those powers having regard to sections 17 and 65 of the Act.

[34] Section 17 of the Act makes provision for the arbitration of industrial relations disputes. What the words "*subject to section 17*" therefore mean is

that the court cannot determine an industrial relations dispute that has been referred to arbitration under section 17.

[35] Section 65 is a provision under Part VIII of the IRA. This Part provides for disputes resolution procedures. The procedure requires that a dispute be reported to CMAC before it can be submitted to the Industrial Court for determination. The words *" subject to section 65"* therefore, when properly understood, mean that the jurisdiction vested in the Industrial Court in terms of section 8 of the IRA is to be exercised in matters that have gone through the dispute resolution procedures route (via CMAC).

[36] Section 8 (1) of the IRA is the basis on which industrial relations disputes are required to be reported to CMAC (under Part VIII) before they can be heard and determined by the Industrial Court.

[37] The earlier decisions (judgments) that were overturned by the **Alfred Maia** judgment overlooked the qualification or requirement discussed in paragraph [35] above. Consequently, the wording of the latter portion of section 8 (1) *viz., "**in respect of <u>any matter</u> which may arise at common law between an employer and employee in the course of employment**"* was incorrectly interpreted. (emphasis added)

[38] The Industrial Court of Appeal in the case of **Moses Dlamini v The Teaching Service Commission and Another (supra)** placed emphasis on the words quoted in the above paragraph and held that the court *a quo* was "*clearly wrong"* in deciding that the Industrial Court lacks the jurisdiction to review the decision of the TSC. **See: paragraph [39]**

[39] Put differently, the court's view was that the words *"any matter"* were broad and open enough to vest in the Industrial Court the power to review decisions of statutory boards and bodies acting *qua* employer in matters which may arise at common law between an employer and an employee but lost sight of the fact that the court could do so provided that section 65 has been complied with.

[40] This court finds it apposite to again state that the words "*subject to section 17 and 65"* used in section 8 (1) of the IRA places a restriction on the power or jurisdiction vested in the Industrial Court in terms of section 8. There must be adherence to section 65 by first reporting the dispute to CMAC under the dispute resolution procedures under Part VIII.

[41] In addition to the above, the words *"in respect of any matter which may arise at common law between an employer and employee"* do not envisage a review. The **Alfred Maia** judgment correctly stated that this phrase envisages a violation of the common law existing rights between an employer and an employee. **See paragraph [31]**

[42] In our view, the words, when understood in the context of section 8 (1) refer to a dispute that may arise between the employer and the employee at common law.

[43] Review is defined in the Black's Law Dictionary, 10th ed, to mean a consideration, inspection, or reexamination of a subject or thing (emphasis added).

[44] The underlined words above precisely define, in the view of this court, a review as applied in the context of the court when dealing with a review application.

[45] Mr. Mkhwanazi, relying on earlier decided cases, submitted that in terms of section 8(3) of the IRA the Industrial Court is clothed with all the powers vested in the High Court. He argued that these powers include the power to review decisions of statutory boards and bodies acting *qua* employer.

[46] Section 8(3) of the IRA provides as quoted below:

> *"8. (3) In the discharge of its functions under this Act, the Court shall have all the powers of the High Court, including the power to grant injunctive relief."* (emphasis added)

[47] This court has no hesitation that the powers with which the Industrial Court is vested in terms of this provision are those stipulated in the IRA, particularly section 8(1).

[48] The High Court has unlimited original jurisdiction in civil and criminal matters in terms of section 151(1)(a) of the Constitution. The Industrial Court on the other hand has powers that are set out in section 8(1) of the IRA. It therefore would be illusionary to view the Industrial Court as having the same or similar powers as the High Court. The words *"In the discharge of its functions under this Act"* require no further interrogation (emphasis added).

[49] Coming to section 151(3)(a) of the Constitution, it is clear that this constitutional provision does not add the powers vested in the Industrial Court. It simply establishes the boundaries of those powers, and which should not be encroached by the High Court. It provides as follows:

> *"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;"*

[50] The power to review is not one vested in the Industrial Court in terms of section 8 of the IRA and section 151(3)(a) of the Constitution.

[51] Having carefully considered and examined the applicable law, it is the finding of this Court that the jurisdiction of the Industrial Court extends only to matters that have gone via the dispute resolution procedures provided for under Part VIII of the IRA (reported to CMAC). When determining these matters, the power includes making a determination of the substantive and procedural fairness of the decision being considered.

[52] A consideration of the procedural aspect is effectively a review of the decision. This is the only kind of review that the Industrial Court can embark upon. It must be in respect of a matter that has gone via the CMAC route where it is conciliated upon and a certificate of unresolved dispute issued thereafter.

[53] Coming back to the disputed issue in the present appeal, *viz.*, whether or not the principle in the **Alfred Maia** judgment is confined to dismissal cases only, the correct position is that it is not. Although the issue in the **Alfred Maia's case** was that of a dismissal, the judgment did not confine itself to jurisdiction in respect of dismissals. It considered the jurisdiction of the court generally.

[54] The court expressed itself as follows in paragraph [20]:

> *"[20]* **…** *Whatever the position, these functions cannot include a review of a decision dismissing an employee because a dismissal is defined in the Act as a dispute which can only be dealt with after following the procedure set out in part 8 of the Act. This means that a review*

> *instituted to challenge a dismissal without it having been preceded by conciliation would be against the express provision of the Act on how disputes between an employer and an employee should be resolved."* (emphasis added)

[55] The court *a quo* was without any doubt, in our opinion, stating that a dismissal is also a dispute that is to be resolved like other disputes whose resolution by the court must be preceded by conciliation.

[56] For the aforegoing, the appeal is upheld.

[57] During arguments Mr. Vilakati was asked to state what is to happen to the respondent's case in the event the appeal is upheld. His response was that the court can exercise the remedial powers vested in terms of section 16(8) of the IRA and allow the application that was withdrawn to be re-launched so that it may be heard.

[58] That is a fair suggestion in the view of the court since it provides room for equity to be achieved. The following order is accordingly issued:

1. The appeal is upheld with no order as to costs.
2. The order of the court *a quo* is set aside and the following order is substituted:

2.1 The points of law are upheld with no order as to costs;

2.2 The application is dismissed with no order as to costs; and

3.3 The respondent is granted leave to re-launch the application that it withdrew and is to do so within 14 court days from the date of this judgment.

T.L. DLAMINI, AJA

I agree

N.J. HLOPHE, AJA

I agree

T.M. MLANGENI, AJA