IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

HELD AT MBABANE **CASE NO. 14/2019**

In the matter between:

KUKHANYA CIVIL ENGINEERING CONTRACTORS (PTY) LTD **Appellant**

and

MCINISELI MATSEBULA **Respondent**

Neutral Citation: *Kukhanya Civil Engineering Contractors (Pty) Ltd v Mciniseli Matsebula (14/2019) SZHC 20 (08/05/2020).*

Qoram: FAKUDZE, MAPHANGA et TSHABALALA AJJA.

Heard : 7th April 2020
Delivered : 8th May 2020

Summary: ***Labour Law-Industrial Relations Act -Appeal from a ruling of Industrial Court dismissing Appellants' points in limine raised in an application in terms of Rule 14 of Industrial Court Rules. Appellant challenging Industrial Court's competence to entertain an application on affidavit without first reporting a dispute under procedure of Part VIII of Industrial Relations Act 2000.***

Quare- Whether on proper interpretation of section 8(1) as read with sections 17 and 65 together with the rules it is invariably mandatory to comply with Part VIII and Rule 7 of the Industrial Court Rules. Rules 7;14 and 15 of Industrial Court Rules and definitive of the types of proceedings that may be instituted before the Industrial Court. Rule 7 provides for proceedings where disputes of fact foreseeable and Rules 14 and 15 providing for application on Notice of Motion and affidavit for relief where no material disputes of fact exist and where application for urgent relief.

Held- Court a quo correct in finding no material disputes of fact or dispute warranting conciliation or arbitration and that application for a liquid claim eminently suited for an application for relief in terms of Rule 14. Appeal dismissed with costs. Matter to be remitted to the Industrial Court on merits.

JUDGMENT

MAPHANGA AJ with FAKUDZE AJ et TSHABALALA AJ concurring.

[1] In this appeal the appellant seeks to impugn a ruling on certain preliminary points in an application serving in the industrical court before Ms AJX Hlatshwayo AJ (sitting with ELB Dlmini and D P Mango) which issued on the 3rd September 2019. Needless to say the proceedings are still pending before the court *a quo.* Be that as it may, aggrieved by the courts determination dismissing its point *is limine* wherein it challenged the courts jurisdiction, the appellant has seen it fit to seek redress and appeal the ruling on the following grounds:

1.1 that the court a quo erred in law and in fact by holding that it had jurisdiction to hear and determine the matter notwithstaning the failure by the Respondent to comply with the peremptory provisions of Party VIII of the Industrial Relations Act;

1.2 The Court a quo erred in law by holding that he Respondent can deviate from Part VIII of the Industrial Relations Act where there are no real disputes of fact foreseeable; and that

1.3 The court a quo erred in law and in fact in holding that there is no dispute, present or foreseeable in the future.

Background Facts

[2] The appellant as its name suggests is a civil construction company in the Kingdom. At the time of the institution of the proceedings in the court a quo against the appellant the respondent was a serving human resources officer of the appellant albeit on a fixed-term contract. Before being put on the short-term contract he was on indefinite service terms which he describes as a permanent contract from the 1st March 2006 until December 2016.

[3] It is common cause that due to adverse financial circumstances and unfavourable market conditions the appeallant was constrained to lay off seveal employees including the respondent on terms that it would negotiate retrenchment terminal benefits. Consequently the appellant computed and undertook to settle the appellant's terminal benefits. Pursuant to these arrangements the appellant made and issued a written acknowledgment of the calculated terminal payment due to the appellant in a letter of offer it addressed to him dated 27th September 2017.

[4] In the acknowledgment which was accepted and confirmed by the respondent upon the latter's assent to it, the appellant undertook to pay the respondent a total of E132, 032.82 on the following terms:

4.1 an initial sum of E39, 609. 85 payable by December 2017; and

4.2 the balance of E92, 422.97 being payable no later than May 2018.

[5] On the 1st February 2017 the applicant negotiated and re-engaged the respondent on a written fixed term contract which was to endure until 31st December 2018 this time in a new capacity as Payroll Administrator. Before the lapse of the tenure under the new contract the appellant wrtote to the respondent advising him of its intention to renew and extend the contract for a further term. This engagement was to endure until March 2019 when the respondent received notice of termination of his employement on retrenchment grounds. Of significance is that at the time of the termination in March 2019 the appellant had still not settled or paid the agreed terminal benefits as per the the undertaking and the settlement terms of the 28th September 2017. This prompted the respondent to launch an appliction before the Industrial Court in June 2019 claiming payment of the outstanding terminal benefits. In the statement of his claim he included two additional claims one being for payment of a sum of E23, 400.00 in provident fund benefits upon exiting from a provident fund scheme in which the respondent participated. In the third claim the respondent sought an order for the payment of E7,000.00 as reimbursement of an equivalent sum allegedly deducted by the appellant from the respondents remuneraton pay ostensibly due to cash flow constraints faced by the company at the time. In sum the respondent sought the following relief in respect of the aforesaid claims:

4.3 An order directing the respondent (appellant presently) to pay to the applicant the aggregate sum of E162,632.90 broken down as follows:-

4.3.1 Terminal benefits in the sum of E132, 032.82 ;

4.3.2 Sibaya Provident Fund deductions in the sum of E23, 400.00

4.3.3 Salary deductions in the amount of E7,200.00

4.4 Costs of suit.

4.5 Further and/ or alternative relief

[6] To his notice of application and founding affidavit the respondent attached various correspondence and other documents as pertinent evidence to ground his various claims.

[7] The appellant opposed the application and in its papers raised the preliminary points of law which have led to this appeal in which it sought to challenge the jurisdiction of the court *a quo* to entertain the claim on the basis that:

> 7.1 The respondent had brought the application prematurely as it had failed to comply with the procedural requirements of Part VIII of the Industrial Relations Act by bypassing the reporting of a dispute to the Conciliation Mediation and Arbitration Commission (CMAC) which the appellants contended were mandatory without stating any special conditions and or circusmtances warranting a direct application to the court a quo. It was therefore contended that the application was premature and therefore incompetent;
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> 4.6 That the a dispute may only be referred to the court for adjudication once the Commission for Mediation Arbitration and Conciliation has issued a certificate of unresolved dispute; and
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> 4.7 That the respondent had failed to join the Labour Commissioner as the office mandated to supervise and monitor the payment of employees terminal benefits upon retrenchment; and lastly
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> 4.8 The application was flawed for non-joinder of the Sibaya Provident Fund as a party to the application proceedings.

[8] In its ruling the Industrial Court dismissed the various points of law save for the question of joinder of the administrator of the provident fund or fund manager which it deemed was a necessary party to the proceedings. It is this ruling that has given rise to this appeal.

[9] The crisp issue for determination in this appeal is whether it is impermissible for a party to bring an application for a party to bring an application for a liquid claim directly to the Industrial Court without first complying with the procedural requirements for the reporting of disputes under Part VIII of the Industrial Relations Act as a prerequisite mandatory step.

[10] It is not uncommon, as it has been the case whenever the issue is presented by attorneys raising the point pertaininng to the applicability of the Part VIII procedural requirements in causes before the industrial court, that it is almost invariably dealt with as one concerning the question of jurisdiction. Where the question turns on whether or not is is procedurally competent to approach the industrial court directly on a notice of motion for a specified relief and obviate the CMAC process it would be a misnomer in my view to characterise the issue as a jurisdictional point of law. In such matters it is

never a question that the Industrial Court reserves the requisite jurisdiction at all times in regard to all disputes as defined in the Industrial Relations Act save for those that fall within the exclusive purview of the High Court such as constitutional issues arising during industrial court disputes. It is more appropriate to frame it in an approach that recognises that the court's jurisdiction in certain cases may be stayed where the objection that the applicant has not exhausted preliminary remedies in terms of Party VIII of the Act.

Jurisdiction

[11] The jurisdiction of the Industrial Court is conferred in very wide terms by section 8 of the Industrial Relations Act of 2000. I do not think there is any doubt that a dispute or issue involving the determination of liability by a party for a claim in respect of terminal benefits arising out of a contract of employment, as in this case, falls squarely within the ambit and scope of the powers of the Industrial Court as defined in the expansive section of the act on jurisdiction. That is why the appellants first ground of appeal is misconceived .

[12] I think the issue at hand is comparable or analoguous to the effect of an arbitration clause in a contractual dispute in relation to the right of a party to sue in the High Court for relief pertaining to breach of that contract or the determination of disuptes arising out of that contract. The established position in such cases is that such a clause does not oust the jurisdiction of the High Court to entertain any dispute arising out of a contract containing an arbitral clause but merely stays the same at the instance of a party invoking such a clause by special plea. It's a form of a dilatory plea as opposed to one that is declinatory (having the effect of disposing of a claim). It is indeed illustrative of this concept that in the arbitration analogy the court may in certain exceptional circumstances determine a dispute covered by an arbitration clause and refuse to stay its jurisdiction.1

[13] It falls within the powers of the Industrial Court in those cases where the respondents objects to the hearing of a matter by the court for want of compliance with Part VIII of the Industrial Relations Act, to consider and determine if it may stay its jurisdiction. The real test or issue then is in what circumstances will the court stay its jurisdiction and order compliance with the said procedureal provisions for reporting of disputes to CMAC. In other words in what disputes should the court hold over the determination of a claim pending the referral of the matter for alternative dispute resolution

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1 See ***Swaziland National Provident Fund v Intercon Construction Swaziland (Pty) Ltd*** **Civ Case No. 837/07** (unreported); see also **Butler and Finsen:** ***Arbitration in South Africa: Law and Practice*** at pages 61-63 discussing the power of the power of the High Court in South Africa in relation to the effect of an arbitral clause (which position is comparable to ours). Of significance here is the learned authors' note pertaining the nature of the statutory powers of the court under the arbitration act in relation to the relief sought that it comprises of powers of assistance, supervisory powers and powers of recognition and enforcement. That is the nature of the statutory powers that the Industrial Court of eSwatini exercises in terms of section 8 of the Industrial Relations Act of 2000 in relation to the remedial provisions of the Act vis-a-vis the arbitral and conciliation institutions under the Act.

procedures under the auspices of CMAC? That question is implicitly suggested by the last two grounds of appeal raised by the appellant whose precise iteration I have referred to earlier.

THIS APPEAL

[14] The heart of the applicants grounds of appeal lies in the contention that the court a quo erred in dismissing the appellant's point in limine that the respondent had 'prematurely brought the matter to the Industrial Court or that the court a quo was obliged in light of the provisions of Part VIII of the Industrial Relations Act to refer the matter to CMAC. I think the manner in which the appellants contention was submitted before us appeared to overstate the position to go so far as to suggest that invariably in all disputes a litigant is required to annex a Certificate of Unresolved Disputese as a mandatory prerequisite to bringing any claim to the Industrial Court.

[15] The respondent contends that the appellants position as advanced a quo and before us in this appeal is flawed and erroneous and that the Court a quo was correct in dismissing the point in limine; holding instead that in light of the nature of the claim there was no real dispute of fact present or foreseeable which rendered the matter capable of referral to conciliation and or arbitration before CMAC.

[16] In essence the court a quo's reasoning was premised on the approach that I have adverted to that it retains discretion in appropriate circumstances such as where there is no material disputes of fact to determine and grant summary relief. Whether this approach is correct may be further expored in reference to the procedural and remedial provisions of the Act as read with the Rules of the Industrial Court pertaining to the conduct and regulation of proceedings before the said court and other statutory disputed resolution mechanisms.

Remedial Provisions

[17] It is imperative to highlight the pertinent provisions of the courts jurisdictional section in the Act in order to underscore the broadness of the Courts jurisdiction to which I allude elsewhere in this judgment. I start with the primary section 8 which 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 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' association, a trade union, a staff association, a federation and a member thereof.

(2) An application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, staff association, an employers' association, an employees' association, a federation, the Commissioner of Labour or the Minister"

[18] Subsections 3,4 and 5 further make plain the parity in the power and authority of the Industrial Court in relation to the High Court thus:

(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.

(4) In deciding a matter, the Court may make any other order it deems reasonable which will promote the purpose and objects of this Act.

(5) Any decision or order by the Court shall have the same force and effect as a judgment of the High Court and a certificate signed by the Registrar shall be conclusive evidence of the existence of such decision or order.

[19] Section 16 envisages certain types of relief and the relative remedial powers of the court in matters or cases where the causes are either founded or arising out of dismissals, disciplinary and or any other unlawful prejudicial conduct. However it is clear from the wording of this section that the the court's powers under section 8 are not limited to the remedies or forms of relief set out in that section. Section 8(1) broadens the scope to include **"any application claim, complaint or any infringement of any statutory rights or any other common law rights arising in the course of employment"**

The Act is thus very permissive, broadly enabling and largely affirmative of the Industrial Court's specialist function which is further enshrined in the constitution.2

The Main Ground of Appeal

[20] The essential tenet of the appellants grounds of appeal is the contention that any dispute between an employer and an employee may only be

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2 See Section 139 (1) (b) and 151 (3) of the Constitution of Swaziland (now eSwatini) of 2000 on the specialist character and exclusivity of the jurisdiction of the Industrial Court; see also *Ministry of Tourism and Environmental Affairs & Another vs Stephen Zuke & Another (96/2017) [2019] SZSC 37 (2019).*

brought to the Industrial Court after compliance with the Part VIII procedural provisions and upon the issuing of a Certificate of Unresolved Dispute by CMAC. Indeed during the submissions the appellants case pivoted on this singular position. I think this proposition has gained currency following certain obiter remarks by a full bench of the High Court in that Courts decision in ***Alfred Maia v The Chairman of the Civil Service Commission & 2 Others3***; obiter because the issue did not form the central ratio decidendi of the courts decision; the cours decision turning on the existence or otherwise of the Industrial Court's power to review institutional or statutory organisations internal disciplinary tribunals. Looking back the trenchant remarks that have been relied on as blanket authority for the mandatory referral of all employment disputes to CMAC as a prerequisite to litigation or adjudication in the Industrial Court stem from paragraph 35 *et seq* of that judgment which read as follows:

> *"[35] It was stated in* ***Swaziland Fruit Canners (PTY) LTD vs Phillips Vilakati and Another Industrial Court of Appeal Case No. 2/1987 (Unreported),*** *that the Policy of the Act was that a dispute can only be heard or entertained by the Industrial Court, where such shall have first been conciliated upon, and only be referred to the said court if a certificate of an unresolved dispute shall have been issued upon a failure of the conciliation process to resolve the matter. This position was put in the following words: -*
>
> > *"Looking at the matter generally, the policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court, it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. Where the conciliation is successful, machinery exists for the agreement arrived at to be made an order or award of the court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only then, may an application be made to the Industrial Court for relief".*
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> *[36] I only need to clarify that the Judgment referred to hereinabove, was actually based on the 1980 Industrial Relations Act which has since been succeeded by two successive Acts, namely the Industrial Relations Act, 1996 and the Industrial Relations Act 2000. Whilst all these Acts embraced the process of conciliation with the dispute only having to be dealt with by the Industrial Court, if it could not be successfully conciliated upon, and upon a certificate*

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3 *Alfred Maia v The Chairman of the Civil Service Commission & 2 Others* (1070/15) 2016 SZHC 25 (17 February 2016, unreported)

of an unresolved dispute to that effect issuing, it is apparent that with the first two Acts, the conciliation had to be by the Labour Commissioner unlike in the current one (that is the 2000 Act) where it has to be by CMAC as established in terms of Sections 62 to 65 of the Current Act. This distinction however does not detract from the fact that in all the Acts in question, a dispute would only get to be dealt with by the Industrial Court if it could not firstly be resolved by CMAC.

[37] ***This position of the Industrial Court's policy was further underscored by Rule 3 (2) of the Industrial Court Rules which provides as follows: -***

> ***"The court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VIII of the Act".***

[38] ***This court is therefore convinced that the reference to Section 65 of the Industrial Court as the one upon which the jurisdiction of the Industrial Court is premised upon in terms of Section 8 (1) of the current Act, is more than anything underscoring the Policy of the Industrial Court referred to in the foregoing paragraphs which is primarily that the 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."***

[21] At first blush the court appears to have propounded a radical position that as a matter of public policy a dispute could only be adjudicated upon by the industrial court if to use the words of the court *'it could not firstly be resolved by CMAC"*. This statement seems to have articulated a hard and fast rule. For this proposition the court seemed to rely in part on rule 3(2) of the Rules of the Industrial Court and ultimately on section 65 of the Industrial Relations Act.

[22] Rule 3 (2) provides:

"The court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VIII of the Act"

Section 2 of the Act defines dispute as follows:

> ***"Dispute" includes a grievance, a grievance over a practice, and means any dispute over the —***
>
> ***(a) entitlement of any person or group of persons to any benefit under an existing collective agreement, Joint Negotiation Council agreements or Works Council agreements;***
>
> ***(b) existence or non-existence of a collective agreement or Works Council agreement and Joint Negotiation Council agreement;***
>
> ***(c) disciplinary action, dismissal, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons;***
>
> ***(d) recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment;***
>
> ***(e) application or the interpretation of any law relating to employment; or***
>
> ***(f) terms and conditions of employment of any employee or the physical conditions under which such employee may be required to work".***

[23] The practical difficulty that arises if giving effect to Rule 3 (2) is that the definition of 'dispute' in the interpretation section is so overbroad as to include causes where no genuine triable issue or dispute capable of either conciliation or arbitrable exists and where the defendant is resisting a claim only to delay payment. It may involve simply the determination of a question of law or the application or interpretation of a contract of employment or a quest for a summary adjudicaition of a liquid claim were speedy resolution is sought.

[24] Secondly if the said Rule 3 (2) would be applied literally it would have an unintended contradiction between its provisions and the procedural rules for the conduct of both long form and urgent applications as contemplated in Rules 14 and 15 as contrasted with the adjudication of triable disputes in terms of Rule 7.

Rule 7 provides for the institution of proceedings. Although no definition of 'proceedings' can be found either in the principal Act or the rules, such may be gleaned form the said rule 7 as including "proceedings other than proceedings brought on notice of motion as provided for in Rule 9. Rule 7

(d) prescribes the mandatory filing of a certificate of unresolved disputes. It is clear that such a certificate is only required in relation to triable disputes or proceedings brought by way of notice of motion for speedy or summary disputes.

But I think clearer guidance can be derived from Rule 14(1) which states:

> ***"where a material dispute of fact is not reasonably foreseen, a party may institute an application by way of notice of motion supported by affidavit".***

[25] The rules contemplate instances where the proceedings do not involve those proceedings or disputes regulated by Rule 7 which in any event makes plain that it is intended for "proceedings other than proceedings brought on notice of motion as provided for in rule 9". I discern however that the reference in that sub-rule to rule 9 was in error as it is rule 14 that provides for proceedings on notice of motion. I also think that there may be some incongruity or contradiction in the rules in so far as Rule 14 (6) envisages the attachment of a Certificate of Unresolved dispute where the case involves a dispute which requires to be dealt with under Part VIII of the Act. It would seem that in light of the clear wording and the distinction between types of proceedings in rule 7, Rule 14(6) would seem to be unnecessary surplusage which has no place in applications coming to the court by way of notice of application under the rule.

[26] It also seems clear to me therefore that the rules as read with section 8 of the Act are predicated on the premise that in its broad powers the Industrial Court may in appropriate cases entertain direct applications either on an urgent basis or by way of summary proceedings for drastic relief, or for the determination of disputes or issues on pure matter of law that only the court is competent to determine in terms of its wide powers under the enabling provisions of the Act as read with the Constitution. Such matters may involve cases where the applicant is seeking an interdict – it is inconceivable in such cases that an applicant be required to first report a dispute to CMAC before approaching the Industrial Court on Notice of Motion.

[27] All said I think that the remarks of the Court in the Maia case have been so misapplied and or misconceived as to presume a statement by the court of a general rule on the pertinent procedural considerations in regard to the scope of the Industrial Court's powers. After all it is that court that can determine, as much as the High Court does in relation to actions and applications, whether a matter may be brought on application or by way of trial proceedings. In the industrial court context, whether by way of Rule 7 or Rule 14. This is reaffirmed in the wording of Rule 14(13) of the Industrial Court Rules which confirms the courts power to refer any limited and specified disputes of fact arising in any application on affidavit before it to oral evidence or to trial. Likewise Rule 15(2) (b) envisages applications

where the provisions of Part VIII would either not apply or be waived and hear applications on grounds of urgency.

Now the proposition advanced in the obiter remarks of the Court in the *Maia* case seem to have been echoed in a subsequent judgment of this Court in the judgment of my brother **T. Dlamini AJ** in ***The Attorney General v Sayinile Nxumalo* (14/2018)[2018] SZICA 06** where his Lordship makes the following observation in the judgment of the Court at paragraph 35:

> *"[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).*
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> *[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"*

There is a long shadow that was cast by a much earlier decision of this Court which preceded the ***Maia*** judgment. This was the decision in ***Swaziland Fruit Canners (PTY) LTD v Phillips Vilakati and Another*** **Industrial Court of Appeal Case No. 2/1987 (Unreported)** and it may well be the source of the misunderstanding in so far as it was relied on for the proposition stated in ***Maia*** to this effect:

> ***"…..(T)he Policy of the Act was that a dispute can only be heard or entertained by the Industrial Court, where such shall have first been conciliated upon, and only be referred to the said court if a certificate of an unresolved dispute shall have been issued upon a failure of the conciliation process to resolve the matter. This position was put in the following words: -***
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> > ***"Looking at the matter generally, the policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court, it must be reported to the Labour Commissioner who is obliged to conciliate with a view***

to achieving a settlement between the parties. Where the conciliation is successful, machinery exists for the agreement arrived at to be made an order or award of the court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only then, may an application be made to the Industrial Court for relief".

[36] I only need to clarify that the Judgment referred to hereinabove, was actually based on the 1980 Industrial Relations Act which has since been succeeded by two successive Acts, namely the Industrial Relations Act, 1996 and the Industrial Relations Act 2000. Whilst all these Acts embraced the process of conciliation with the dispute only having to be dealt with by the Industrial Court, if it could not be successfully conciliated upon, and upon a certificate of an unresolved dispute to that effect issuing, it is apparent that with the first two Acts, the conciliation had to be by the Labour Commissioner unlike in the current one (that is the 2000 Act) where it has to be by CMAC as established in terms of Sections 62 to 65 of the Current Act. This distinction however does not detract from the fact that in all the Acts in question, a dispute would only get to be dealt with by the Industrial Court if it could not firstly be resolved by CMAC.

[37] This position of the Industrial Court's policy was further underscored by Rule 3 (2) of the Industrial Court Rules which provides as follows:-

"The court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VIII of the Act".

I have been unable to locate the cited provision of the said Rule 3(2) of the Industrial Court Rules adverted to by the Court in Maia. In any event for the reasons I have outlined here I cannot, with the greatest diffidence, agree with the above proposition. In my settled view of the matter, I do not think

the provisions of Sections 8, 17 and 65 relied on and the construction assigned to them in the line of cases before and after Maia, support so blanket a proposition as to suggest a party can only approach the Industrial Court for redress via CMAC. As stated in note 1 at page 5 above, the Industrial Court of Appeal is conferred with exclusive jurisdiction in the widest possible terms under the Act; one which is subject only to the classification of the powers of the Court to determine, in terms of the type of dispute, whether a matter ought to be reported to the CMAC for conciliation or arbitration or whether the court itself can entertain and grant relief; this in turn depending on whether the powers of the court so invoked are of adjudication in the first instance, of assistance4, supervisory powers or powers of recognition and enforcement5.

[28] Coming to the facts *in casu* it appears to me that the court *a quo*, after consideration of the circumstances of the matter, came to the conclusion that case was one ***"in which justice*** (would not be served) ***by referral to the procedures in Part VIII as there are no real disutes foreseeable in resolution of the issues between the parties"*** (parenthesis mine).

This much is evident at paragraph 7 of the ruling where the court records the following:

> ***"7. On the point about the matter being prematurely before court instead of following the alternative dispute resolution mechanism in the Act, the applicant argued that, thereis no dispute to be reported to CMAC but an application in terms of Rule 14 would see the matter justly adjudicated upon. That was submitted to be so especially in light of the acknowledgement and undertaking to pay the sums by the respondent. The Applicant contends that there is no dispute foreseeable in the matter material or otherwise, for the stated reasons of acknowledgment and the undertakings".***

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4 E.g., for interlocutory relief or for drastic remedy such as an interdict.

5 See **Butler and Finsen** ibid., at page 61 in reference to the South African Court's powers in relation to arbitration matters; those comments are most apposite in characterizing the scope and nature of the spectrum powers of the industrial Court in the jurisdiction conferred by section 8 of the Act. For instance in so far as section 8 refers to the powers being subject to section 17 this does not imply that once a matter is referred to arbitration either by the Court or via CMAC the Industrial Courts jurisdiction is thereby ousted. The correct view is the Court retains its jurisdiction subject to the fact that in those cases its powers become those of enforcement as in where an award is made an order of the court.

[29] In my view two observations can be deduced from the ruling of the court *a quo*. The first concerns the competence of the court within its statutory powers to determine its exercise of its jurisdiction e.g., whether to stay its jurisdiction and refer a dispute brought before it in terms of Rule 14 to CMAC or proceed to adjudicate such a claim; but that in reaching such a decision it must do so juridiciously having reference to the circumstances of the matter before it upon application of the rules. Secondly the court correctly determined that in cases where no real/ genuine or material disputes of fact (in the sense of a substantial triable issue) arises, the court is empowered to adjudicate a matter by way of application proceedings brought under rule 14 and thus spare the litigant the unnecessary rigour of the procedure under Part VIII of the Act. I think that is a salutory and correct approach to take in such matters. After all, the overriding policy considerations behind industrial relations law and practice is the attainment of speedy resolution of disputes in a time-efficient and cost-effective manner.

[30] There will be many a be case coming before the Industrial Court (as indeed there have been in the past) where the applicant seeks urgent and summary redress as I have mentioned earlier in this judgment. For instance he may be seeking urgent injunctive relief or even more appropriately, the applicant, as in the matter at hand, may be merely seeking to recover a liquid or liquidated claim where there is no real defence to the liability and indebtedness or where the defendant is only seeking to avoid payment or raising a dilatory defence as in where it disputes that it is *in mora* as regards the payment of the debt. I would compare such scenarios to the common law remedy of a claim brought by way of provisional sentence summons or one sought to be dealt with under the summary judgment procedures.

[31] In the instant case the appellant was not disputing its indebtedness for the principal claim based on the acknowledged terminal benefits pay or for the witheld portion of the respondents salary claim but merely disputed whether it was due.

[32] I think the case is eminently suited to be dealt with in terms of rule 14 of the rules of the Industrial Court and I do not have the slightest of doubts that it is one where no dispute susceptible to either conciliation or arbitration or to trial may be said to exist as contemplated under Rule 7 of the Industrial Court Rules but may be adjudicated readily on a summary basis under the rules pertaining to the conduct of motion proceedings.

[33] I therefore think that the court *a quo* was correct in dismissing the preliminary points and ordering the hearing of the matter on the merits; which matter is still pending before it. I think approach is reaffirmed and aligns squarely with the reasoning and observations of this court in the case ***The Attorney General v Sipho Dlamini* (4/2013) SZICA 07 (19 September, 2013)** to which I was referred by the respondent's learned attorney, Mr Motsa.

In conclusion I am impelled to find, on the principles outlined in this judgment as well as the applicable statutory law and the provisions of the relevant procedural rules, that this appeal is without merit and therefore must fail. It is dismissed with costs.

On account of this being an appeal on a ruling on a point *in limine* I direct that this matter be remitted to the Industrial Court to proceed on the merits as a proper and advisable course for the matter to be expeditiously disposed of.

MAPHANGA AJA

I concur:

FAKUDZE AJA;

I concur:

TSHABALALA AJA.

Appearances:

For the Appellant: Mr F. Tengbeh

For the Respondent: Mr M. Motsa