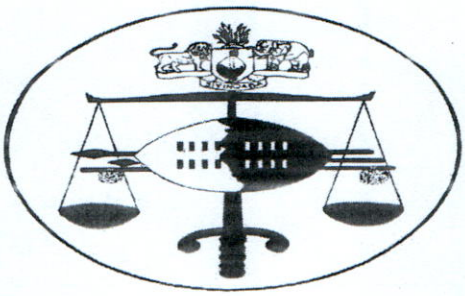


IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

CASE NUMBER 15/2022

In the matter between:

THE ATTORNEY-GENERAL Appellant

and

THEMBA VUSI DLAMINI Respondent

NEUTRAL CITATION: *The Attorney-General v Themba Vusi Dlamini (15/2022) [2022] SZICA 05 (21st February, 2024)*

CORAM: S. NSIBANDE JP, N. NKONYANE JA, D. MAZIBUKO JA

HEARD : 28th September, 2022.

DELIVERED : 21st February, 2024.

Summary---Labour Law---Respondent (Applicant) filed an application for stay of disciplinary process, pending finalization of review proceedings against the employer's alleged unlawful conduct of withholding his salary without having been afforded an opportunity to be heard---Respondent (Applicant) claiming, inter alia, that the employer's conduct infringed his constitutional rights and asking that the issue be referred to the High Court as envisaged by Section 35(3) of the Constitution---Court a quo making an order referring the Constitutional question to the High Court.

Appeal---Appellant filed an appeal against the order of the Court a quo referring the constitutional question to the High Court--- Principle of constitutional avoidance---Applicability of this principle in the present case.

Held---Based on the principle of stare decisis, the Court a quo erred in law when it failed to follow the decision of the Supreme Court in the case of ***Ministry of Tourism and Environmental Affairs & Another vs Stephen Zuke & Another, case number (96/2018) [2019] SZSC 37 (24th October, 2019)*** *which held that the principle of constitutional avoidance is applicable in our jurisdiction.*

Held Further--- The principle of constitutional avoidance provides that, where it is possible to decide any cause, civil or criminal without reaching a constitutional issue, that course should be followed. In casu, the question whether the principle of audi alteram partem was observed by the employer before it stopped the Respondent's salary could have been easily determined by the Court a quo without having to refer the issue to the High Court.

JUDGEMENT

BACKGROUND

[1] The Appellant is the Attorney-General of the Kingdom of eSwatini, appearing herein in his official capacity as the legal representative of all government Ministries and Departments. The Respondent is a government employee, he is attached to the Ministry of Agriculture and his duty station is at Malkerns Research Station, Manzini Region.

[2] In July 2019 the Respondent was arrested and charged with theft of 26 by 6 metre-pipes belonging to the employer. He faced trial for the charge of theft before the Manzini Magistrate's Court. He was found guilty and sentenced to seven years imprisonment with an option to pay

a fine of seven thousand Emalangeni. He was able to pay the fine and did not serve time in prison.

[3] During April 2021, the Respondent fell sick and was admitted at the Nhlangano Health Centre. He was discharged towards the end of that year, but he did not immediately return to work based on Doctor's advice. By letter dated the 09th November 2021, he was called upon to appear before the Civil Service Commission for disciplinary hearing on the 17th November 2021 at 10:00 am. The hearing did not, however, proceed on that day. During that same month, November 2021, his salary was stopped by the employer. The Respondent stated that the stoppage of his salary was unlawful and irregular because he was not afforded an opportunity to be heard before that decision was taken by the employer. The employer denied that allegation.

[4] The disciplinary hearing having failed to proceed on the 17th November 2021, the employer decided to write a letter to the Respondent dated the 10th January 2022 and cited the provisions of Section 38 (4) of the Civil Service Board (General) Regulations of 1963, asking him to make submissions in writing why he should not be dismissed from duty or be subjected to a lesser penalty pursuant to his conviction.

[5] Taking into account all these circumstances that the Respondent found himself in, he decided to launch legal proceedings before the Court *a quo*. In terms of prayer one of the application, he sought an order staying the intended disciplinary hearing process by the employer,

pending the finalization of the application. In prayer two, he was seeking an order; reviewing, correcting and setting aside the decision to stop or withhold the salary. The Respondent also sought alternative prayers as follows;

"Declaring the decision to stop or withhold the salary of the Applicant as unlawful, null and void ab initio.

2.1 Reinstating the Applicant's salary forthwith from date of the order or judgement of court.

2.2 Directing the Respondents to pay the arrears salaries of the Applicant forthwith.

3. Declaring Section 52(1), (2) read together with Regulation 38 (4) of the Civil Service Board (General) Regulations of 1963 to be unconstitutional and therefore struck down.

3.1 Referring the constitutional question of Regulation 38 (4) to the High Court for determination, to wit, constitutionality.

4. *Costs of the Applicant in the event of unsuccessful opposition.*

5. *Further and/or alternative appropriate relief."*

[6] **OPPOSITION**

The employer (1st Respondent in the Court *a quo*) opposed the Applicant's application and duly filed an answering affidavit thereto. The employer also raised points *in limine* that can be summarised as follows: firstly, lack of jurisdiction. It was argued that there was a material dispute of fact whether or not the Respondent was afforded a hearing before the salary was stopped. It was argued that the dispute of fact was reasonably foreseeable and that the Court *a quo* therefore lacked the jurisdiction to entertain the application as the matter was not first reported to the Conciliation, Mediation and Arbitration Commission (CMAC) as envisaged by the provisions of Part V111 of the Industrial Relations Act. Secondly; it was argued that the relief of stay of the disciplinary process sought was incompetent as it was not akin to the main relief sought. Thirdly; it was argued that the prayer for referral of the constitutional question was incompetent because Section 35 (3) of the constitution envisaged proceedings before a Court that is subordinate to the High Court, whereas the Court *a quo* is not a Court that is subordinate to the High Court. Lastly; it was argued that there was no contravention of any constitutional right of the Respondent necessitating an application for referral to the High Court.

[7] **PROCEEDINGS BEFORE THE COURT *A QUO***

The matter was argued before the Court *a quo* on the 27th April 2022. The judgment of the Court *a quo* was delivered on the 07th June 2022. In its judgement, the Court *a quo* directed its attention to one issue only, that is, prayer 3.1 of the Respondent's application, namely,

referral of the constitutional question arising to the High Court in terms of Section 35 (3) of the Constitution. This appears clearly in paragraph 15 of the judgement where the Court *a quo* stated as follows;

> *"[15] In rebuttal, the Respondents dealt with their points in limine as raised in their answering affidavit. The Court will not deal with the points as raised in this instance, but the pertinent issue of the referral of the matter to the High Court in terms of Section 35 (3) of the Constitution as raised by the Applicant...."*
> (Underlining for emphasis only).

[8] After hearing the arguments, the Court *a quo* came to the conclusion that the raising of the constitutional question by the Applicant was not frivolous or vexatious. It accordingly made an order in terms of prayer 3.1 of the application, that is, it referred the constitutional question to the High Court. The Court *a quo* also made an order staying the proceedings pending the determination of the constitutional question by the High Court.

APPEAL TO THIS COURT

[9] The employer being dissatisfied with the decision of the Court *a quo*, filed an appeal to this Court based on the following grounds;

1. *"The Court a quo erred in law and misdirected itself in failing to pronounce itself on the point in limine on jurisdiction. The Court a quo ought to have found that it had no jurisdiction over the matter which had not been conciliated.*

2. *The Court a quo erred in law and misdirected itself in failing to find that Section 35 (3) of the Constitution envisages proceedings in a Court subordinate to the High Court. The Court a quo ought to have found that the Industrial Court is not subordinate to the High Court in terms of the law and was bound by the stare decisis principle.*

3. *The Court a quo erred in law and misdirected itself in referring the matter to the High Court. The Court a quo ought to have found that it was properly suited to apply the provisions of the Constitution, therefore, the question raised was frivolous and or vexatious.*

4. *The Court a quo erred in law and misdirected itself in failing to decide the matter in terms of the doctrine of constitutional avoidance. The Court a quo ought to have found that the matter can be properly decided in the sphere*

of labour law without resorting to any constitutional question.

5. *The Court a quo erred in law in referring the matter to the High Court for determination of the question whether Respondent's right to equality before the law has been infringed. The Court a quo ought to have found that the equality before the law and the right to a fair hearing in question pertains to labour law which falls exclusively within the Industrial Court's jurisdiction, not the High Court.*"

ANALYSIS AND THE LAW APPLICABLE

[10] The three grounds of appeal appearing as number three, four and five are similar. They are predicated upon the question whether or not the Court *a quo* was correct in law in deciding that the constitutional question raised should be referred to the High Court. The Appellant argued that since the matter before the Court *a quo* constituted a labour dispute, the Industrial Court had exclusive jurisdiction over it. The Court will, therefore, treat these three grounds as one.

[11] The Court will start by addressing ground of appeal number two. The Court is alive to the fact that the legal landscape has since changed as a result of the latest Supreme Court judgment which dealt with the issue of the status of the Industrial Court which was delivered on the 27th

February 2023 in the case of **Nedbank Swaziland Limited & Three Others v. Phesheya Nkambule & Three Others**, case number **(70/2020) [2020] SZSC 04 (27th February,2023).** Prior to this judgment, the position of the law was that the status of the Industrial Court was at par with the High Court as per the Supreme Court's judgment in the case of **Cashbuild Swaziland (Pty) Limited v. Thembi Penelope Magagula,** case number **(26B/2020) [2021] SZSC 31 (09/12/2021).** In the **Cashbuild Swaziland** case, the Supreme Court ruled that the High Court does not have the power to review the Industrial Court or the Industrial Court of Appeal as these are not subordinate Courts. The Supreme Court went on to state that the Industrial Court is on the same level with the High Court and that the Industrial Court of Appeal is on the same level with the Supreme Court. This was the basis of the Appellant's argument that Section 35 (3) of the Constitution envisaged proceedings in a Court subordinate to the High Court and that the Industrial Court is not a Court subordinate to the High Court.

[12] The Court *a quo* ought to have determined the issue raised by the Appellant in terms of the law that was then prevailing, that is, before the law was changed by the decision of the Supreme Court in the **Nedbank Swaziland Limited** case. The Court *a quo* therefore committed an error of law when it failed to pronounce itself on this issue and make a determination whether or not it had the power to make an order for referral taking into account the wording of Section 35(3) of the Constitution. This ground of appeal is accordingly upheld.

[13] The Court will now turn to consider grounds of appeal numbers three to five. As already pointed out in paragraph 10 herein, these grounds of appeal will be treated as one as they are based on similar considerations, that is, the exclusive jurisdiction of the Industrial Court in labour matters and the principle of constitutional avoidance. It was argued on behalf of the Appellant that;

13.1 Based on the doctrine of constitutional avoidance, the Court *a quo* ought not to have referred the question to the High Court but should have found that it had the power to determine the legal questions raised before it, within the context of the labour law principles applicable.

13.2 The Industrial Court has exclusive jurisdiction in all labour law matters in the country, the jurisdiction of the High Court is expressly excluded in matters where the Industrial Court has exclusive jurisdiction.

13.3 The constitutional question raised by the Respondent relates to the right to a fair hearing and equality before the law. This question could easily be determined by the Industrial Court without referring the question to the High Court.

14. The Court *a quo* approached the matter from the perspective that its duty was simply to consider whether the raising of the constitutional

question was frivolous or vexatious, and that once it found that it was neither frivolous nor vexatious, it was bound to refer the matter to the High Court. The Court *a quo* was not persuaded that it had the jurisdiction to entertain the question of law raised based on the doctrine of constitutional avoidance.

15. After hearing the submissions before it, the Court *a quo* was persuaded to follow the judgment of the High Court of Namibia in the case of **Monica Geingos (Born Kalondo) v Aben Linoovene (Bishop) Hishoono, (HC-MD-CIV-ACT-OTH-2021/00538 [2021] NAHCMD 48 (11 February 2022)** which was cited with approval in the local High Court case of **Godfrey Exalto v Royal ESwatini National Airways & Another,** case number **2258/2020 [2022] SZHC 40 (25th March 2022).** In the **Monica Geingos** case, Sibeya J stated as follows in paragraph 44;

"...The constitution is therefore the point of departure in a quest to protect the fundamental rights and freedoms. The Supreme law, in my view, serves as the foundation on which all laws are based. It further serves as the yardstick where the validity of common law or statutory law is measured...."

In paragraph 20 of its judgment the Court *a quo* stated that;

"...The Court is inclined to agree with the views of Sibeya J in the present matter and the arguments as submitted by the Applicant."

Both of these cases referred to by the Court *a quo* did not, however, set aside the principle of constitutional avoidance.

[16] The Court *a quo* was also referred to the Supreme Court's judgement in the case of **Ministry of Tourism and Environmental Affairs & Another v Stephen Zuke & Another**, case number **(96/2018) [2019] SZSC 37 (24th October, 2019)** which dealt, *inter alia,* with the question of constitutional avoidance. The Court *a quo* did not follow the Supreme Court's judgement on this point, instead, it chose to follow the High Court's judgement in the **Godfrey Exalto** case. The Supreme Court of eSwatini in the **Stephen Zuke** case held as follows in paragraph 51;

"The principle of constitutional avoidance is well-settled in our law that where it is possible to decide any cause, civil or criminal without reaching a constitutional issue, that course ***should*** *be followed."*

This Court fully agrees with the Supreme Court. Furthermore, taking into account the principle of *stare decisis,* the Court *a quo* was bound to follow the decision of the Supreme Court. The Court *a quo*

therefore committed an error of law by not following the judgement of the Supreme Court on this point.

[17] In *casu*, it was clearly possible for the Court *a quo* to determine the constitutional question raised without referring it to the High Court. The essence of the Respondent's complaint was simply that he was not afforded the opportunity to be heard before the decision to stop his salary was taken. Put differently, the argument was that; the principle of *audi alteram partem* was not observed by the employer. The Court *a quo* does have the requisite jurisdiction and competence to address such a dispute, without referring the matter to the High Court.

[18] The Court *a quo* therefore fell into error when it made the order referring the matter to the High Court. The grounds of appeal numbers three to five are accordingly upheld by the Court.

Jurisdiction of the Industrial Court of Appeal

[19] It was argued by the Respondent that the Industrial Court of Appeal has no jurisdiction to entertain the present appeal proceedings as the matter is still pending before the Court *a quo* because the Industrial Court has not yet determined the substantive aspects of the application before it. This argument has no merit taking into account the provisions of Section 19 (1) of the Industrial Relations Act No.1 of 2000 as amended by the Industrial Relations (Amendment) Act No.3 of 2005 which states as follows;

"There shall be a right of appeal against a decision of the Industrial Court, or of an arbitrator appointed by the President of the Industrial Court under section 8(8) on a question of law to the Industrial Court of Appeal."

[20] The operative word is "decision". In *casu*, the Court *a quo* made an order that the matter be referred to the High Court. It was not disputed that the words *decision* and *order* can be used interchangeably.

[21] The High Court had the occasion to interpret the provisions of Section 19(1) of the Industrial Relations Act in the case of **Swaziland Water and Agricultural Development Enterprise Ltd v Doctor Lukhele & Others**, case number **1504/2011 (HC).** The Court in paragraph 72 held as follows per MCB Maphalala J, as he then was,

"...This Section does not distinguish between final order or interim order, what matters is that there has to be an order or decision made by the Industrial Court or Arbitrator to which there is an aggrieved party...."

This Court is in full agreement with the above interpretation of Section 19(1) of the Industrial Relations Act. The Court *a quo* having made an order, this Court has the requisite jurisdiction to entertain the appeal against that order brought by the aggrieved party, the Appellant. The

objection raised by the Respondent was therefore, misconceived and it is accordingly dismissed.

[22] The Respondent also argued that this Court has no jurisdiction because- *"the matter (Industrial Court case No. 20/2022) is seized with the High Court in so far as the application of the Regulation and Section which are all inconsistent with the spirit of the Constitution of the Kingdom as they simply disregard the rules of natural justice of audi alteram partem rule."*

(Paragraph 4 of Respondent's heads of argument).

The Industrial Court of Appeal is the only Court that is vested with the jurisdiction to hear an appeal based on a question of law from the decision of the Industrial Court or of an arbitrator appointed in terms of the Industrial Relations Act as amended. The High Court of eSwatini has no concurrent jurisdiction on appeal matters.

[23] Although the Court *a quo* made an order that the constitutional issue raised be referred to the High Court, this Court has, in this judgement, made a finding that the Court *a quo* erred in doing so as it was capable of resolving the dispute between the parties without referring the constitutional issue to the High Court, taking into account the principle of constitutional avoidance. This argument is therefore dismissed.

[24] Turning to ground one, the Appellant argued that the Court *a quo* erred in law and misdirected itself in failing to pronounce itself on the point *in limine* relating to jurisdiction. It was argued that the Court *a quo* ought to have found that it does not have jurisdiction as the dispute did not first go through the conciliation route as envisaged by Part VIII of the Industrial Relations Act as amended.

[24] The Court *a quo* did not address itself to the point of law on lack of jurisdiction, which was raised by the Respondents in their answering affidavit. The Court *a quo* pronounced clearly in paragraph 15 of its judgement that it was going to deal with one issue only, that is, the referral of the matter to the High Court in terms of Section 35 (3) of the constitution.

[25] Jurisdiction is a primary consideration that any Court should first deal with to satisfy itself that it has the requisite authority to entertain the matter before it. The reason for this is not hard to see. If the Court does not have jurisdiction, any judgment, decision or order that it makes is a nullity. Further, if the Court does not have jurisdiction, it cannot make a pronouncement on any issue ancillary to the matter before it. In the case of **Edwin Manana v ESwatini Water & Agricultural Development Enterprise & Two Others,** case number **(33/2022) [2022] SZICA 13 (31st May, 2023)** this Court made the following observations in paragraphs 9.2 to 9.3;

"9.2 The employee is correct in stating that: in the application that was before the Industrial Court, on the 13th October 2022, the Honourable Court issued 2 (two) decisions that are inconsistent with each other.

9.2.1 On the one hand the Honourable Court declined to enrol the application that was before itself on the basis that: that application was not urgent, and therefore it could not be enrolled as such.

9.2.2 On the other hand, the Honourable Court had decided the merits of the application. The Honourable Court could not decide the merits of an application which it had declined to enrolled as such.

9.3 It is an error of law for the Industrial Court or any Court, to issue 2 (two) decisions in the same application that are inconsistent with each other...."

This Court, in the **Edwin Manana** case, went on to find that the Industrial Court committed an error of law in the manner that it determined the issues as shown above. By comparison, in *casu*, the Court *a quo* committed an error of law by ignoring the point of law raised whether or not it had Jurisdiction to entertain the application, yet it proceeded to issue the order that it did, that is, to refer the matter to the High Court in terms of Section 35 (3) of the Constitution.

[26] In the case of **Botha v Gensec Asset Management (Pty) Ltd,** case number **[2000] 3 BLLR 260 (LC)** at page 265, the Court was faced with the question whether or not it could grant an *Anton Piller Order*. An Anton Piller application is an application *pendente lite*. The Court had to be satisfied that it had jurisdiction to hear the main matter. The Court in that case observed that;

".... if a Court lacks jurisdiction to hear a matter, it cannot have jurisdiction to entertain any issue or an application ancillary to it."

Similarly, in *casu,* the Court *a quo* had the duty to first address the point of law raised relating to lack of jurisdiction before going ahead to deal with the question of referral to the High Court. Ground of appeal number one is therefore upheld

CONCLUSION

[27] Before this Court, the Appeal was argued in its entirety. It will not be proper for this Court, however, to make orders on those issues that were not addressed by the Court *a quo* as a Court of first instance. Those issues include, *inter alia*; whether or not the Respondent was afforded a hearing before his salary was stopped; whether or not a decision to dismiss Respondent was taken without a hearing and that such decision is only awaiting implementation; whether or not the Court *a quo* has jurisdiction in the light of the allegation that there are material disputes

of fact which were foreseeable at the launch of the proceedings; whether or not the Court *a quo* has jurisdiction to hear a dispute which had not first been reported to CMAC in compliance with Part V111 of the Industrial Relations Act and, lastly; whether or not the relief of stay of the disciplinary hearing is competent. On the question of costs, the Court is of the view that, taking into account the requirements of the fairness, justice and equity, it would be proper that each party pays its own costs.

[28] Consequently, it is ordered as follows;

28.1 The Appeal is upheld.

28.2 The judgment of the Court *a quo* delivered on the 07th June, 2022 is hereby set aside.

28.3 The Respondent's application with the date stamp of the 31st January 2022, is remitted to the Court *a quo* for determination, except the issue of referral of the constitutional question to the High Court which has already been resolved by this Court.

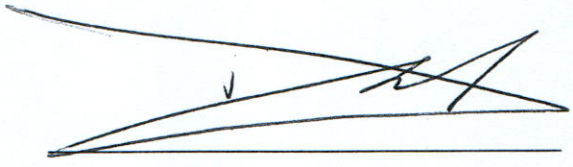
28.4 Each party to pay its own costs.

N. NKONYANE
Judge of the Industrial Court of Appeal

I agree

S. NSIBANDE
Judge President of the Industrial Court of Appeal

I agree



D. MAZIBUKO
Judge of the Industrial Court of Appeal

APPEARANCE

For the Appellant: *Mr. S. Hlawe*
C/o Attorney-General's Chambers

For the Respondent: *Mr. M. Ndlangamandla*
C/o MLK Ndlangamandla Attorneys