IN THE APPEAL COURT FOR SWAZILAND

HELD AT MBABANE

CASE NO. 23/1997

In the matter between:

TAKHONA DLAMINI Appellant

and

PRESIDENT OF THE INDUSTRIAL COURT First Respondent

NANTEX (SWAZILAND) (PTY) LIMITED Second Respondent

JUDGMENT

TEBBUTT JA:

The issue in this appeal is whether a decision of the Industrial court that it would not hear an application which an employee sought to bring before it because the matter was "not properly before it" should be taken on appeal to the Industrial Appeal Court by the aggrieved employee or brought by the latter on review to the Swaziland High Court.

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The facts are these. The Appellant on 3 October 1991 entered into an oral agreement of employment with the Second Respondent (to whom for convenience I shall refer as Nantex) at a monthly wage of E450. On 12 January 1996 Nantex handed Appellant a letter of dismissal from her employment. I need not detail the allegations made in that letter. Suffice to say that Appellant contended that her dismissal was "invalid, wrongful and unfair" and she tendered her services to Nantex in terms of the employment agreement. On 15 January 1996 the trade union to which Appellant belonged, acting on her behalf, reported a dispute to the Labour Commissioner. On 15 February 1996 the dispute was still unresolved and the period within which the Labour Commissioner could lawfully conciliate between the parties had expired. On 17 September 1996 Appellant brought an application in the Swaziland Industrial Court in which she averred that "the dispute has been declared unresolved. However despite this the Commissioner has not yet issued the certificate of unresolved dispute". She claimed an order that the Labour Commissioner be directed to issue a certificate of unresolved dispute and in the same application claimed from Nantex the following:

i. Arrear wages at E450 per month from January 1996 to date of judgment, with interest thereon a tempore morae; and

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ii. "reinstatement with all rights and benefits to her job with respondent as at 12th January 1996".

As an alternative she claimed:

(a) - an order declaring the employment contract
cancelled;
(b) E10 800 being 24 months statutory compensation in terms of the Industrial Relations Act of 1996;
(c) special compensation of E21 600;

(d) a severance allowance of E675;
(e) one month's wages of E450 plus interest; and
(f) additional notice pay of E270, plus interest.

Appellant was one of twenty employees (out of thirty) who were similarly dismissed and who each brought claims against Nantex which claims, save for the amounts involved, were all

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for the same relief and based on the same facts and circumstances. On an application by Nantex all the applications were consolidated, Appellant's matter being used as the test case for all of them.

Although an order was claimed in the applications directing the Commissioner for Labour to furnish a certificate of unresolved dispute, this appears to have been an error begause there was, in fact, attached to the applications a "Certificate of Unresolved Dispute" by the Commissioner dated 29 August 1996. It must therefore be accepted that the Commissioner for Labour did furnish such a certificate. Part of that certificate is most germane to this appeal and I therefore cite the relevant portions of it verbatim.

After setting out that a dispute existed between Appellant's union and Nantex it went on to read thus:
"ISSUES IN DISPUTE

(1) Unfair dismissal (30 employees) - maximum compensation
(2) The dispute, between the above parties, which was reported to or intervened by me on 13/02/96 under section 57(1) or 58(1) (of the Industrial Relations Act of 1996) is hereby certified as an unresolved dispute."

I need not cite the further portions of the certificate. They merely set out that the union had alleged that its

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members had been unfairly dismissed and why it said so and that Nantex had disagreed and made certain counter-allegations as to the workers' conduct.

Before the Industrial Court Nantex took two points in limine. The first point related to Appellant's locus standi to bring her application. This was not pursued before the Industrial Court and no more need be said about it. The second point, however, was pursued and ruled on by the Court and it is that ruling that has given rise to this appeal.

The point in limine in question is the following. After having set out Appellant's claims i.e. the claim for reinstatement and that of payment of arrear salary and interest with the alternatives as set out above, Nantex pleaded that:

"The Certificate of Unresolved Dispute ... does not set out the issues outlined above (i.e. the claims made) as issues in dispute and accordingly these issues were not reported to the Labour Commissioner as issues in dispute and were not conciliated upon. In the event that they were reported (which Respondent denies) it is presumed that they were resolved as they have not been certified as issues still to be resolved. In the premises (Nantex) states that the applicant's application for such relief is not properly before this Court and this Honourable Court cannot take cognisance of issues that have not been certified as being unresolved by the Labour Commissioner". (My emphasis).

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The Industrial Court upheld this point in limine and dismissed Apellant's claims. In its ruling the Court set out all Appellant's claims and referred to a judgment of Hannah CJ in Philip Vilakazi and Bernard

Dlamini v Swaziland Fruit Canners in 1987 wherein it was held that it is necessary for parties to set out all the issues in dispute in their report to the Labour Commissioner to enable him to discharge his statutory function of conciliating between the parties. For Appellant it was contended that her reporting of an issue of unfair dismissal was adequate in that the relief sought flowed from the jurisdiction of the Court as provided for under section 15 of the Industrial Relations Act. The Court then held as follows:

"It is not in dispute that the issue that was certified as unresolved was namely;

1. Unfair dismissal (30 employees) - maximum compensation.

The issue relating to arrear wages, reinstatement, special award, an award declaring employment contracts cancelled, severance allowance, 1 month wages in lieu of notice and additional notice were not certified as unresolved by the Labour Commissioner. This Court will not take cognisance of them as it has no jurisdiction to hear them pursuant to Rule 3(ii) of the Industrial Court Rules of 1984".

The Court made no order as to costs. Aggrieved by this decision, Appellant brought an application on notice of motion before the High Court for an order that:

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"The decision and judgment of the first respondent (i.e. the President of the Industrial Court) of 10th February 1997 in Industrial Court Case No. 89/96 be reviewed, corrected and set aside".

The matter came before Dunn J who did not consider whether the Industrial Court's decision was correct or not but held that any attack on that decision should not have been brought by-way of review to the High Court but should have been taken on appeal to the Industrial Court of Appeal. The relevant portion of his judgment reads as follows:

"The point in this application is that the Industrial Court considered the jurisdiction conferred upon it by section 5 together with the mandatory procedures to be followed under Part VIII of the Act and held, as a matter of law, that it had no jurisdiction. The applicant is not seeking to rely on any irregularity or impropriety in the process and procedures followed by the Court in deciding the point (in limine). The cases relied upon by the applicant dealt with the question of the proper exercise of a discretion conferred by statute. The applicant's remedy is one by way of appeal to the Industrial Court of Appeal established by section 11 of the Act."

He accordingly dismissed the application with costs.

It is against the decision of Dunn J that Appellant now comes on appeal to this Court,

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Appellant lodged her notice of appeal out of time and applied for condonation for so doing. Respondents did not oppose that application and condonation was accordingly granted.

The sole issue which this Court must decide is what the correct forum is in which a party aggrieved by a decision in the circumstances such as the present must seek to have that decision corrected. In other words, is it a matter for review by the High Court or for appeal to the Industrial Court of Appeal?

This Court is not called upon to decide if the Industrial Court's ruling was right or wrong as neither of the tribunals mentioned has as yet adjudicated upon that matter and accordingly there is no decision or judgment from either of them in respect of which an appeal would lie to this Court.

The Swaziland Industrial Court in its present form was established by section 4(1) of the Industrial Relations Act No. 1 of 1996 {"the Act") for -

"the furtherance, securing and maintenance of good industrial relations and employment conditions in

Swaziland".

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It derives its jurisdiction from section 5(1) of the Act which provides as far as is relevant to this appeal:

"The Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of any matter properly brought before it ..." (My emphasis).

Among the matters in which it has jurisdiction is the determination of unresolved disputes between employers and employees or their respective organisations. It has been held that in order to have an unresolved dispute "properly brought before it" i.e. the Industrial Court, the disputes procedure set out in Part VIII of the Act must be followed. It is unnecessary for the purposes of this judgment, to set out that procedure in any detail. Suffice to say that it provides that a dispute must be referred to the Commissioner of Labour who may investigate it and take such steps as he may consider advisable to secure a settlement of the dispute by means of conciliation. Should the dispute however remain unresolved, it must be certified in writing by the Commissioner as an "unresolved dispute" whereupon either party to the dispute may apply to the Industrial Court or the Commissioner may refer the matter to the Court, for determination of the dispute, which may then make such orders as are set out in section 15 of the Act which may include reinstatement or an award of compensation.

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The Act also, by section 17 thereof, created the Industrial Court of Appeal which in terms of section 19 of the Act, was given jurisdiction:

"to hear and determine any appeals from the Industrial Court and such appeal shall lie to the Industrial Court of Appeal only on a point of law".

The Act, while establishing the Industrial Court of Appeal, nevertheless retained a right of review of a decision or order of the Industrial Court to the High Court. Section 11(1) of the Act sets out that:

"11(1) There shall be a right of appeal against the decision of the Court on a question of law to the Industrial Court of Appeal".
and section 11(5) provides that:
"11(5) A decision or order of the Court shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law."

It is quite clear from the aforegoing that the legislature was conscious of the difference between an appeal and a ***

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it confined its jurisdiction to hear appeals from the Industrial Court to questions of law only and specifically retained by section 11(5) the jurisdiction of the High Court to review decisions of the Industrial Court on common law grounds. Those grounds embrace inter alia the fact that the decision in question was arrived at arbitrarily or capriciously or mala fide, or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose, or that the Court misconceived its function or took into account irrelevant considerations or ignored relevant ones, or that the decision was so grossly unreasonable as to warrant the inference that the Court had failed to apply its mind to the matter. (See Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd & Another 1988 (3) SA 132 (AD) at 152A-E). Those grounds are, however, not exhaustive. It may also be that an error of law may give rise to a good ground for review (see Hira and Another v Booysen and Another 1992 (4) SA 69 (AD) at 84B).

In deciding the present appeal it must be assumed, without of course, coming to any conclusion on the point and purely for the purpose of considering which forum is the appropriate one to deal with the matter, that the Industrial Court erred in finding that the Appellant's application was not properly

before it. It is also common cause that such an error would be an error of law.

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In 1992 the South African Court of Appeal considered the question of when an error of law gives rise to a common law review in the case of Hira and Another v Booysen and Another (supra) stating that the question is a vexed one and one upon which the decisions of the Courts are not always harmonious. Corbett CJ exhaustively reviewed those decisions and in his usual meticulous and lucid manner summed up what he believed to be the present-day position in the South African law in regard to common-law review. The reasoning of the learned Chief Justice is persuasive and I would respectfully adopt it as also being the present-day position of the law in Swaziland.

Corbett CJ referred inter alia to the case of Local Road Transportation Board and Another v Durban City Council and Another 1965 (1) SA 586 (AD) in which Holmes JA, delivering the judgment of the Court, cited with approval the decision in Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 193 8 TPD 551, the headnote whereof reads:

"A mistake of laws per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined".

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In such a case that would be an irregularity justiciable on review.

The learned Chief Justice also referred to what he described as "the penetrating judgment" of Jansen JA in Theron en Andere v Ring Van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (AD) where Jansen JA opined that the question of whether an error of law is reviewable depends on the intention of the legislature. That intention may have been to confer exclusive jurisdiction to decide the question of law in issue on one tribunal and to exclude reviewability of it.

From the various decisions he referred to, Corbett CJ in Hira's case at 93A-I crystallised the present-day position in regard to common-law review as follows:

" (1) Generally speaking, the non-performance or wrong performance of a statutory duty or power by the person or body entrusted with the duty or power will entitle persons injured or aggrieved thereby to approach the Court for relief by way of common-law review, (See the Johannesburg Consolidated Investment case supra at 115) .

(2) Where the duty/power is essentially a decision-making one and the person or body concerned (I shall call it 'the tribunal') has taken a decision, the grounds upon which the Court may, in the exercise of its common-law review jurisdiction, interfere with the decision are

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limited. These grounds are set forth in the Johannesburg Stock Exchange case supra at 152A-E.

(3) where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.

(4) Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all questions, including the meaning to be attached to the

statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailable by way of common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear.

(5) Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal 'asked itself the wrong question', or 'applied the wrong test', or 'based its decision on some matter not prescribed for its decision', or 'failed to apply its mind to the relevant issues in accordance with the behests of the statute'; and that as a result its decision should be set aside on review. "

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Applying the criteria set out above, it was argued on behalf of the respondents that the Legislature intended that the Industrial Court of Appeal should have exclusive jurisdiction to decide on errors of law and that the reviewability of an error of law was excluded. This, it was emphasized, was because the Industrial Court was a specialist Court, staffed by persons with expert knowledge in the specialised field in question. It is true that the existence of such specialised courts points to a legislative policy which recognises and gives effect to the desirability in the interests of the administration of justice - in this instance "the furtherance, securing and maintenance of good industrial relations and employment conditions" - of creating such structures to the exclusion of the ordinary courts (see Mathope and Others v Soweto Council 1983 (4) SA 237 (W) at 291H-292A;

Paper, Printing, Wood & Allied Workers Union v Pienaar NO and Others 1993 (4) SA 1 (AD)) and that, as said by Botha JA in Pienaar's case supra. the Legislature probably intended to establish the Labour Appeal Court in conformity with that policy. However, as set out by Corbett CJ in paragraph 3 of his summary cited above, it is a matter of construction of the statute conferring the power of decision as to the reviewability of such decision where the tribunal concerned has committed a material error of law. In the present instance the Legislature, although it created a specialist court in section 11(5) of the Act, specifically retained in the High Court the power to review decisions of

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the Industrial Court on common-law review grounds. It therefore did not give exclusive jurisdiction to the Industrial Court of Appeal on errors of law. The distinction between an appeal against an error in law and a review where a material error of law is involved is succinctly and clearly set out by Corbett CJ in Hira's case supra at p. 90D-E, where, following his comprehensive review of the relevant cases in South Africa, he said thus:

"As would appear from a number of the cases to which I have referred, the Courts have often relied upon a distinction between (a) an error of law on the 'merits' and (b) one which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him and as a result not to exercise the discretion or power or to refuse to do so, A category (a) error . . . has been held not to be reviewable whereas a category (b) error has been held to be a good ground for review at common law".

The learned Chief Justice considered at 90E-F that it was difficult in principle to draw a clear line of distinction between the two. Nevertheless the distinction exists and whether the error of law falls into category (a) or category (b) must, in my view, depend on the particular facts of the case.

In the present instance the Industrial Court's error of law (again assuming for the purpose of this appeal that it did

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commit an error of law) was that the Appellant's application was not properly before it and it therefore refused to exercise the power conferred upon it by the Act to hear the application. This, in my view, constituted a category (b) error of law. Counsel for the respondents submitted that it amounted to no more than a misinterpretation of the provisions of Part VIII of the Act and was therefore an error on the "merits". In my view, it was not such an error. By its error the Court disregarded its statutory powers and a Court can interfere on that ground (of SA Medical and Dental Council v McLouahlin 1948 (2) SA 355 (AD) at 393, cited by Corbett CJ in Hira's case at 88E-F).

It is also not without significance that in Pienaar's case supra where the South African Appeal Court also considered the common-law review grounds Botha JA referred to the reviewability of a "gross irregularity in the proceedings" and said this (at 638H-I):

"That expression is not confined to defects in the procedure as such. It covers the case where the decision-maker through an error of law misconceives the nature of his functions and thus fails to apply his mind to the true issues in the manner required by the statute, with the result that the aggrieved party is in that respect denied a fair hearing".

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Those remarks were obiter but they are in conformity with previous decisions such as Goldfields Investment Ltd & Another v City Council of Johannesburg and Another (supra) (also referred to by Botha JA) where in an appeal to a Magistrate's Court against certain property valuations by a valuation court, the Magistrate, because of a wrong view he took of the law to hear such appeals, declined to exercise the function which the statute had entrusted to him and this was held to constitute a reviewable irregularity.

That case is very akin to the present. Also very akin to the present one is the case of the Local Road Transportation Board and Another v Durban City Council and Another (supra). There the Appellant had refused to review certain motor carrier transportation certificates on the ground that as there were de jure no certificates in existence, there were, in effect, no applications before it. The Court held that this decision was erroneous in law and that the Local Board had thereby precluded itself from hearing the applications. I have already quoted from the judgment of Holmes JA citing the headnote in the Goldfield's case supra. He went on to say the following:

"By wrongly deciding that de jure there were no certificates in existence, and therefore there was nothing capable of being renewed, the Local Board never applied its mind to the issue before it. That was an irregularity justiciable on review".

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In casu by wrongly deciding (as it must at this stage be assumed) that de jure. because of the nature of the Labour Commissioner's certificate, the Appellant's application was not properly brought before it, the Industrial Court never applied its mind to the issue before it. That was accordingly an irregularity justiciable on review.

It follows that although the learned judge a quo was alert to the fact that a matter of law was involved, he erred in not finding that an error of law by the Industrial Court in the circumstances in question was an irregularity justiciable on review by the High Court and not a matter for appeal to the Industrial Court of Appeal. The appeal from the High Court's finding must therefore succeed and the matter must be referred back to it for review.

Before I make the appropriate order consequent on this finding I would however make the following comments.

The claims of the Appellant are modest ones. I suspect those of the other applicants in the Industrial Court to be equally modest. They have, however, set in motion a train of legal proceedings many of which, such as the present appeal, while

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no doubt of interest to lawyers, are largely academic in nature and certainly not designed to obtain for the Appellant, and the other claimants like her, a resolution of their allegations that they were unfairly dismissed and, if they were, to secure the modest compensation they have claimed in consequence of such dismissal. They were dismissed in January 1996. The first of the legal proceedings was then set in motion by the referring of the matter to the Commissioner for Labour. The second of them occurred when the unresolved dispute before the latter was brought before the Industrial Court. The third occurred when that Court's decision was brought on review before the High Court. That Court's decision is now on appeal before this Court. It is the fourth legal proceeding. It involves a largely academic decision as to the correct forum to adjudicate on the Industrial Court's error of law, assuming it to be one. Still no resolution of the Appellant's claims has taken place. Nor is it likely to be for some time. The matter must now go back to the High Court. No doubt, whatever its decision now, that decision will again be brought on appeal to this Court. At least two more legal proceedings are therefore involved now. Assuming that the order is then for the Industrial Court to hear the application. Another legal proceeding will occur. And that may possibly also result in an appeal. The costs of all these proceedings are obviously going to be astronomical - they

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probably already are - and completely disproportionate to the Appellant's modest claims.

The Appellant who is the poor litigant in all this, accordingly finds herself enmeshed in a maze of legal proceedings and though, no doubt, she is being assisted by a trade union which will bear the costs concerned, those costs, having regard to what is really a very small point of law, cannot be worth incurring to have it resolved. In the meantime, too, assuming that she succeeds in obtaining some form of compensation, she is being kept out of her money. I find all the aforegoing to be disturbing in the extreme, What makes it even more disturbing in my view is that it could all have been avoided if the parties had taken the simple and practical expedient of asking the Commissioner of Labour to amend his certificate by expanding it to include the issues as to the Appellant's claims. It is not too late to still do so now and good sense would seem to me to dictate that that should be done forthwith in order to put a stop to another chain of legal proceedings that it would seem must inevitably follow, should that not occur. In my view the facts I have set out in these comments do not redound to either the sound course of justice or to the credit of the legal profession.

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The following order is made:

1. The appeal succeeds, with costs.
2. The case is referred back to the High Court for it to review in terms of section 11(5) of the Industrial Relations Act No. 1 of 1996, the decision of the Industrial Court in Industrial Court case No. 89/96, as claimed in the Notice of Motion in High Court Case No. 801/97.

TEBBUTT JA

I agree and it is so ordered

KOTZE P

I agree

BROWDE JA