SIBONGILE NXUMALO Appellant in Case No 25/96

and

MPHUMELELO GWEBU Appellant in Case No 30/96

and

CLIFFORD MASEKU Appellant in Case No 28/96

and

LUCKY B VILAKAZI Appellant in Case No 29/96

v

ATTORNEY GENERAL First Respondent

TEACHING SERVICE COMMISSION Second Respondent

ACCOUNTANT GENERAL Third Respondent

JUDGEMENT

TEBBUTT J A

Four similar matters have come on appeal to this Court. Each one started as an urgent application before Sapire A C J. Each one was a claim for salary which had allegedly been unlawfully withheld from the applicant. The facts in all four cases are exactly the same; only the amount of the claim in each case is different. In each case the respondents, who are also the respondents in this Court, took a point in limine that the High Court did not have jurisdiction to hear the application and that the court having

jurisdiction was the Industrial Court and that Court alone. This contention was in each instance upheld by Sapire A C J who, in consequence, dismissed the application. His judgement was the same in each case. It is against that judgement that each appellant now comes on appeal to this Court. The present judgement will therefore apply to all four appeals.

The facts of the cases are these. Appellants are all school teachers appointed by second respondent to the employment of the Swaziland Government, represented by the first respondent. It is common cause that pursuant to a mass meeting of teachers on 13 June 1996, a "sit-in" strike was called by the Swaziland National Association of Teachers (SNAT) to commence the following day i.e 14 June 1996.

By "sit-in" strike was meant that the teachers should go to their schools but should not teach. On the evening of 13 June 1996 there was broadcast on national radio and television, an announcement by the Minister of Education in which he advised parents that because of the threatened strike they, the parents, should keep their children at home until the dispute between the Government and the teachers over a demand by the latter for a pay increase had been resolved. The strike lasted from 14 June 1996 to 10 July 1996. The appellants had deducted from their salaries by the Accountant-General, who is for this reason the nominal third respondent, the amount they would have earned for that period on the principle of "no work, no pay". Their claims for the various amounts deducted in each case are based on the premise that the fact that they did not teach during the period was not a matter which depended on whether they elected to adhere to the SNAT resolution to strike or not but because there simply were no pupils to teach. Respondents denied this averring that the appellants were all willing participants in the strike. The appellants alleged that their applications were urgent as

they had no money with which to meet bond payments and other expenses such as electricity and could lose their homes and have their electricity cut off if their claims were not immediately granted.

Neither the question of urgency nor the factual disputes were dealt with by Sapire A C J who dismissed the appellant's application purely on the point in limine that he had no jurisdiction to entertain the claims, which fell, so he found, within the exclusive jurisdiction of the Industrial Court.

The gravamen of his decision is to be found in the following passage from his judgement:

"The creation of an Industrial Court, the definition of its jurisdiction as to subject matter, and the use of the word "exclusive" in section 5(1) are indications giving rise to an inescapable inference that the legislature intended to establish a special court which alone, to the exclusion of all other courts, would deal with what may loosely referred to as "labour matters", inelegantly defined in the section, where Labour Law would be applied. Broadly speaking Labour Law is to be understood as the common law of master and servant as expanded and otherwise modified by Industrial Legislation.

The words "properly brought before it" are not to be read in the context as meaning pending cases regularly instituted. In the context of the Act as a whole the adjectival phrase can only refer to those cases, which, having regard to their jurisdictional facts, involve issues governed by labour law as defined in the section itself, and which fall within the ambit of those matters reserved for decision by the Industrial Court. In such cases the Industrial Court alone has jurisdiction."

He added;

"Applicant's cause of action is one of a category of matters reserved for the exclusive jurisdiction of the Industrial court."

The Constitution of the Kingdom of Swaziland, which came into operation on 4 6 September 1968, provided in Chapter 1X Part 1, Section 104 that:
"The High Court shall be a superior court of record and shall have –

(a) unlimited original jurisdiction in all civil and criminal matters ...."

On 12 April 1973 the King's Proclamation of 1973 was promulgated. In it the King of Swaziland declared that in collaboration with his Cabinet Ministers, who would henceforth constitute his Council, and supported by the whole nation –

"I have assumed supreme power in the Kingdom of Swaziland and that all Legislative, Executive and Judicial power is vested in myself."

He then proceeded to decree that:

"A. The Constitution of the Kingdom of Swaziland which commenced on the 6th September 1968, is hereby repealed."

The King, however, made certain saving decrees, one of which was Section 7 which laid down that:

"Parts 1 and 2 of Chapter 1X.....of the repealed Constitution shall again operate with full force and effect and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this and ensue ing decrees."

In the King's Proclamation (Amendment) Decree No 1 of 1982 it was decreed that with effect from 12 April 1973:

"This Proclamation (i.e the King's Proclamation of 1973) is the supreme law of 5 Swaziland."

This was confirmed in 1987 in a further Proclamation viz the King's Proclamation (Amendment) Decree No 1 of 1987. Section 3 is the relevant section.

The Industrial Court was created by the Industrial Relations Act No 4 of 1980. Its successor is the present Industrial Relations Act No 1 of 1996 which repealed the 1980 Act The 1996 Act (the Act) governs the issue before this Court but it is helpful also to have regard to the relevant section of the earlier Act (the 1980 Act).

As a starting point, it is as well to remember the purpose of the Act It is –

"An Act to provide for the collective negotiation of terms and conditions of employment and for the establishment of an Industrial Court and an Industrial Court of Appeal."

Section 4(1) of the Act provides as follows:

"An Industrial Court is hereby established with all the powers and rights set out in this Act or any other law, for the furtherance, securing and maintenance of good industrial relations and employment conditions in Swaziland."

Section 5(1) of the Act reads thus:

"The Court shall have exclusive jurisdiction to hear, determine and grant appropriate relief in respect of any matter properly brought before it including an application, claim or complaint or infringement of any of the provisions of this Act, an employment Act, a workmen's compensation Act, or any other legislation which extends jurisdiction to the Court 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 an industry union, between an employers' association, an industry union, an industry staff association, a federation and a member thereof." (My emphasis)

It is perhaps pertinent to refer at this stage to the similar sections of the earlier Act. It too, was "an Act to provide for the collective negotiation of terms and conditions of employment and for the establishment of an Industrial Court for the settlement of disputes arising out of employment."

Section 5(1) of the earlier Act provided thus:

"The Court shall have exclusive jurisdiction in every matter, properly before it under this Act, including jurisdiction.

1. to hear and determine trade disputes and grievances;
2. to register collective agreements and to hear and determine matters relating to the registration of such agreements;
3. to enjoin any organisation or employee or employer from taking or continuing strike action or lockout."

It is a well-known principle that has been emphasised time and again not only in the courts of Southern Africa but also in courts in other parts of the world where the judicial function, power and independence is jealously guarded, that there is a strong presumption against legislative interference with the jurisdiction of the ordinary courts. In the South African courts this has been frequently been stressed. In Photocircuit SA (Pty) Ltd v. De Klerk No and De Swardt No and Others 1989(4) SA 209 at 214 H - J, Friedman J (as he

then was) said:

"There is a strong presumption against legislative interference with the jurisdiction of the Supreme Court. It is a well-known rule of statutory interpretation that the curtailment of the powers of a Court of law will not be presumed in the absence of an express provision or a necessary provision to the contrary therein. The Court will therefore examine closely any provisions which appear to curtail or oust its jurisdiction."

(See also De Wet v Deetlefs 1928 AD. 286 at 289; Tefu v Minister of Justice 1953(2) SA61(T); R v Padsha 1923 AD 281 at 304). In Paper. Printing. Wood and Allied Workers' Union v Pienaar NO and Others 1993(4) SA 621 (A) at 635 A - B, the South African Appellate Division (per Botha J A), referring to the presumption set out by Friedman J in the Photocircuit case supra, said:

"This well-known presumption has frequently been applied in our Courts and there is a substantial body of case law illustrating its application in various contexts"

As stated earlier similar views have been expressed in Courts in other countries e.g in the House of Lords in England (see Pyx Granite Co Ltd v Ministry of Housing and Local Government and Others (1959) 3 A11ER, (HL) at 6 D - F).

The presumption applies, in my view, with equal force in Swaziland.

The presumption will a fortiori apply where the unlimited jurisdiction of the High Court is constitutionally enshrined as part of the supreme law of the country, as in Swaziland. In The Federal Commissioner of Taxation v Munro 38 Commonwealth Law Reports,

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Isaacs J said in regard to the construction of a legislative enactment af p 180):

"There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds; if the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail."

In the case of the Industrial Court, the legislature has seen fit to curtail or oust the unlimited jurisdiction of the High Court by conferring on the Industrial Court exclusive jurisdiction in respect of certain matters.

The concept of specialist Courts dealing with specialised matters is a familiar one. One knows of Water Courts, Special Income Tax Courts and the like. In the Botswana Court of Appeal in Botswana Railways Organisation v J Setsogo and 198 Others Civil Appeal No 51 of 1995 the Court had to consider the extent and ambit of the jurisdiction of the Industrial Court where the Constitution of Botswana also enshrined "unlimited original jurisdiction in the High Court to hear and determine any civil or criminal proceedings under any law" but the Trades Dispute Amendment Act, 1992, which created the Industrial Court in that country, also conferred on that Court "exclusive jurisdiction in every matter properly brought before it under this Act." In an unreported judgement delivered in June 1996 Amissah P with Steyn J A and Tebbutt J A concorring (Aguda J A and Hoexter J A dissented from the order made but on an unrelated aspect) held that the exclusive jurisdiction of the Industrial Court was an extremely limited one. I shall return to the limit of such jurisdiction as decided in Botswana in due course. In a separate judgement from the main one of the Court which was delivered by Amissah P, Steyn J A said this in regard to the constitutionally enshrined "unlimited original jurisdiction" of the High Court:

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"(It) does not in ray view necessarily preclude the legislature from establishing specialist Courts with the requisite expertise to adjudicate upon matters which fall within the defined ambit of such expertise and within the procedural constraints prescribed. In this regard Courts that deal with specialist issues such as Patents, Water, Tax or Admiralty Law are well-known. The technological revolution has

brought with it the need for greater specialization both in the field of the practice and the administration of the law. Provided that the value base which underpins the Constitution is not infringed, I do not see that the creation of Courts of expertise with appropriate powers of adjudication diminishes the right of access to the conventional Courts of law."

It is, of course, a well-known canon of construction of a legislative enactment that one must have regard to the Act as a whole and not just to a particular section of it and that it is also permissible to look at the object and the purpose of the legislature in passing the Act. In The Federal Commissioner of Taxation v Munro supra, Isaacs J said:

"Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the circumstances, on the occasion and in the allocation it has used them."

In Tuckers Ltd v Ceylon Mercantile Union (1970) 73 NLR (Ceylon) Sirimane J. dealing with the issue of a legislature encroachment on the judicial power, said this (at p316):

"In order to ascertain whether there has been such an encroachment one should.

I think, look at the Act as a whole and not at a particular section isolated from other provisions of the Act; I am also of the view that in determining this question it is permissible to look at the object and the true purpose of the legislature in passing the Act."

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The same canon of construction has been applied with equal force in South Africa (see Jaga v Dongës NO and Another 1950(4) SA 653 (A) at 662 - 663; Ramajela v Administrator (Cape) 1990(4) SA 11 (E) at 14 B - C; Steyn: Uitleg van Wette 5th Edn at 136 - 137). It should also apply in Swaziland.

Looking at the Industrial Relations Act as a whole and the purpose of its enactment, it is, as stated above, an Act to provide for the collective negotiation of terms and conditions of employment. It is to regulate employer and employee relations through employee and staff organisations on one hand and employers' organisations on the other and through the machinery of negotiation rather than confrontation. That becomes particularly clear when one has regard to the "Disputes Procedure" in Chapter VIII of the Act, which contain detailed provisions as to how disputes between employers and employees in regard to the relations between them must, wherever possible, with the intervention, if necessary, of the Commissioner of Labour, be settled by means of conciliation.

In a matter similar to those before this Court, where an employee also brought a claim against his employer for payment of arrear salary and accrued gratuity in terms of an employment contract and where a point in limine was also taken that the High Court had no jurisdiction to hear the matter and only the Industrial Court could do so, Dunn A J (as he then was) dismissed the point holding that the High Court's jurisdiction was not ousted in a case such as that before him.

(See Donald C Mills-Odoi v Elmond Computer Systems (Pty) Ltd Civil Case No 441/87, an unreported judgement delivered on 17 July 1987).

The learned Judge, who was then dealing with the 1980 Act, referred to those sections of that Act dealing with the Disputes Procedure and said this:

"These sections provide for a simple procedure by which disputes may be settled

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by means of conciliation, with the office of the Labour Commissioner playing the central role."

An analysis of the entire present Act reveals that those matters which are expressly reserved for the Industrial Court's consideration are (a) the provisions of the constitutions of employer or employee

organisations, any violations of such constitutions, unlawful conduct in the election of office bearers in such organisations, the deposit and safeguarding of organisations' funds and certain ancillary matters relating to employee and employer organisations, federations and international workers and employers organisations and, in particular, their recognition (See Part IV of the Act); (b) the establishment of joint industrial councils, work councils and collective agreements (see Parts V, VI and VII of the Act; and (c) the determination of disputes.

A dispute is defined in Section 2 of the Act as including "a grievance, a trade dispute and means any dispute over the –

1. entitlement of any person or group of persons to any benefit under an existing collective agreement or work council agreement;
2. existence or non-existence of a collective agreement or works council agreement;
3. disciplinary act, dismissal, employment, suspension from employment, re-employment or re-instatement of any person or group of persons;
4. recognition or non-recognition of an organisation seeking to represent employees in the determination of their terms of conditions of employment;
5. application or the interpretation of any law relating to employment;
6. terms and conditions of employment of any employee or the physical conditions under which such employee may be required to work"

From this definition it is clear that what the legislature had in mind, when enacting that

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the Industrial Court should adjudicate the disputes, was that those disputes should be of the type set out in the definition viz disputes relating to employer-employee organisations, agreements, terms and conditions under which employees were expected to work and issues relating to the disciplining, suspension, dismissal and subsequent re-instatement or re-employment of an employee. In other words those matters which fall under what may generally be described as industrial or trade disputes.

Moreover, explicit provisions existed under the 1980 Act and still exist under the present Act for the reporting in the first instance of a dispute to the Commissioner of Labour who shall try to settle it by conciliation. The Industrial Court only comes into the picture if the dispute is resolved, in which case it will make the parties' agreement an order of Court or, if the dispute is unresolved, if it is then referred to it at the parties' request by the Commissioner of Labour.

That this was the legislative intention appears, in my view, clearly from the provisions of the 1980 Act which conferred on the Industrial Court exclusive jurisdiction "in every matter properly before it under this Act." Only those matters reserved to the Court in terms of Parts IV, V, VI and VII and brought before the Court in terms of those Sections of Part VIII dealing with the dispute procedures which the parties must follow in order to have a matter adjudicated upon by the Court, can be said to be "properly before it under this Act."

This was the decision of Dunn A J in the Donald C Mills-Odoi case supra. He said:

"It is clear from the sections I have referred to under Part VII of the Act (the Disputes Procedure Part of the 1980 Act) that the Industrial Court should be utilised as a last resort in the determination of a dispute. A person who desires to have a dispute resolved under the Act must utilise the machinery provided for under Part VII and cannot in my view report or refer a dispute direct to the Industrial Court."

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Only if the matter had been referred to the Court after the procedures laid down had been followed could the matter be said to be properly before the Court, said Dunn A J.

I am in complete agreement with the learned Judge.

As stated above a similar point as to what was meant by the "exclusive jurisdiction" of the Industrial Court "in every matter properly before it under this Act" arose in Botswana where the wording of the relevant section of the Trades Dispute Amendment Act of 1992 of that country by which the Industrial Court there was established is precisely the same as Section 5(1) of the 1980 Act in Swaziland.

In Botswana Railways Organisation v J Setsogo and Others supra the Botswana Court of Appeal concluded that the only disputes justiciable by the Industrial Court were industrial or trade disputes and that its "exclusive jurisdiction" is confined solely to those matters "properly brought before it under this Act". The jurisdiction enjoyed by the court was therefore an extremely limited one. Industrial disputes can only be brought before it under sections 7 or 9 of the Botswana Act. Section 7 provides, as do the kindred sections in the 1980 Act in Swaziland, that following the reporting of a dispute to the Commissioner of Labour and it cannot, even with his intervention, be settled by agreement, the Commissioner shall issue a certificate that either or both parties may refer the dispute to the Industrial Court. Section 9 provides that the Minister of Labour may refer to the court an unresolved dispute which involves an essential service or has or may jeopardize the essentials of life or livelihood of the people of Botswana or the public safety or life of the community. The Court of Appeal found that only where the provisions of Section 7 and 9 had been evoked could a matter be said to be "properly before" the Industrial Court. That decision is, in my view, persuasive authority in a consideration of the matter presently before this Court.

The judgement of Dunn A J and that of the Botswana Court of Appeal deal, however,

with the wording of Section 5(1) of the Industrial Relations Act as it was in 1980. Has Section 5(1) of the present Act viz the Industrial Relations Act No 1 of 1996, changed the position?

In his judgement Sapire A C J found no significant difference in the wording of the two sections, stating that in both cases the criterion of exclusivity was whether the particular matter was properly before the court. That the criterion is the same brooks of no doubt. In my views, however, the question of the type of matter that can properly be brought before the Industrial Court has been even more closely defined in the present Act than in the 1980 one. It has certainly not widened it.

It is a well-known rule of statutory interpretation that the legislature is presumed to know the state of the law, whether by judicial decision or a long course of practice, at the time of passing of any Act and to know the interpretation which has been placed upon any sections of prior Acts (see. in South Africa, Terblanche v South African Eagle Insurance Co. Ltd 1983 (2) SA 501 (N) at 504 F; S v van Rensburg 1967 (2) SA 291 (c) at 294 H; Devenish: Interpretation of Statutes ppl33 - 135; and, in England, Mersey Docks and Harbour Board v Cameron (1865) 11 HL Cases 443 at 480)

Had, therefore, the legislature intended in the 1996 Act to widen the jurisdiction of the Industrial Court from the limited interpretation given to the Court's "exclusive jurisdiction" by Dunn A J it would have done so in explicit terms. The fact that it has not done so but in fact has by the new section underlined that limited jurisdiction is a clear indication that the legislature intended the section to bear the judicial interpretation previously placed on it (see S v van Rensburg supra at 294 H).

It also accords with the purpose for which the legislature created the Industrial Court viz "for the furtherance, securing and maintenance of good industrial relations and employment conditions in Swaziland."

In his judgement Sapire A C J found himself constrained not to follow but to overrule the decision of Dunn A J in the Donald C Milis-Odoi case in view of what he called anomalies arising from the latter judgement. One of these was a statement by Dunn A J that a litigant could choose the forum in which he wished to bring his case viz either the Industrial Court or the High Court. With respect to Dunn A J.

I agree with Sapire A C J on this point. In those matters which can be properly brought before the Industrial Court as set out in the Act, the appropriate forum is the latter Court and to that extent the High Court's jurisdiction is ousted. It is, however, only in those matters that such ouster occurs. I can therefore respectfully not agree with the further reasoning of Sapire A C J that this aspect should cause the main conclusion reached by Dunn A J as to the limited jurisdiction of the Industrial Court, not to be followed.

Sapire A C J found that the Industrial Court had jurisdiction "to the exclusion of all other courts" to deal with "what may loosely be referred to as 'labour matters' inelegantly defined in the section, where Labour Law would be applied. Broadly speaking Labour Law is to be understood as the common law of master and servant as expanded and otherwise modified by Industrial Legislation."

For the reasons set out above, this, in my opinion is not the position created by the Industrial Relations Act. It confines the Industrial Court's jurisdiction solely to those matters set out in the Act, to those disputes which have run the gauntlet of the disputes procedure, and to those issues arising from the other legislation specifically set out in Section 5(1). Having regard to the principle that in order to oust the jurisdiction of the ordinary courts, it must be clear that the legislation intended to do so and that any enactment which seeks to do so must be given a strict and restricted construction, it is in my view, clear that save for the specific provisions mentioned, Section 5(1) does not disturb the common law of master and servant.

The present claims by the appellants are ordinary common law claims made by an

employee against an employer for payment of wages allegedly unlawfully withheld from him or her.

The reason for the employer's having done so may flow from a strike but that does not bring the matters within the jurisdiction of the Industrial Court or make them ones "properly before" the latter Court.

It follows that the dismissal, with costs, of the appellant's claims by Sapire A C J on the point in limine was incorrect. It is indeed the High Court and not the Industrial Court which has jurisdiction to hear the appellants' claims and it should have then, and must now, do so.

The appeal succeeds, with costs. The order of the Court a quo dismissing the claims in all four appeals is set aside and there is substituted the following order:

"The point in limine raised is dismissed with costs" The matters are referred back to the High Court for further adjudication.

P H TEBBUTT

JA KOTZÉ P:

I agree

G P C KOTZÉ P

BROWDE JA:

I agree

J BROWDE JA