IN THE SUPREME COURT OF APPEAL OF SWAZILAND

CIVIL APPEAL CASE NO. 22/2006

In the matter between

DELISILE SIMELANE **APPELLANT**

And

THE TEACHING SERVICE COMMISSION **1st RESPONDENT**

THE ATTORNEY GENERAL **2nd RESPONDENT**

Coram: **BROWDE AJP**

ZIETSMAN JA

RAMODIBEDI JA

For the Appellant: MR DLAMINI

For the Respondent: **MR. KUNENE**

JUDGMENT

ZIETSMAN JA

During or about 1995 a contract of employment was entered into between the appellant and the first respondent in terms of which the appellant was employed to provide teaching services to pupils at the Siyendle Secondary School.
During or about the month of August 2003 the first respondent, without formally cancelling the contract of employment, stopped paying the appellant her salary. According to the appellant no disciplinary proceedings were conducted prior to the stopping of the payment of her salary. The appellant alleges that the action taken by the first respondent is wrongful and unlawful. She accordingly applied, on Notice of Motion, for an order directing the first respondent to reinstate the payment of her salary and to pay all arrear salaries due to her as from the month of August 2003. She also claimed an order that the first respondent pay the costs of the application.

The application was opposed by the first respondent. The first respondent admits having stopped paying the appellant's salary but alleges that the reason for this is the fact that the appellant absconded from duty and did not produce a medical certificate to the effect that she was not fit to perform her duties under her contract. The first respondent alleges that this amounted to a breach of contract by the appellant which left the first respondent with no other alternative but to apply regulation 14 of the Teaching Service Regulations of 1983.

In a replying affidavit the appellant alleges that she had a valid and lawful reason for not reporting for work. She states that she was threatened with

assault and prevented by a group of parents from going to the school. The appellant alleges that if she had been given a hearing she would have been able to explain her absence from the school. She denies that she was guilty of a breach of contract.

When the matter came before Mabuza AJ in the High Court Mr. Kunene, for the respondents, raised, as a point *in limine*, the question whether the High Court had jurisdiction to hear the matter in view of the provisions of Section 8 (1) of the Industrial Relations Act No. 1 of 2000 which provides that the Industrial Court has exclusive jurisdiction in respect of certain matters. This point *in limine* was upheld by Mabuza AJ and she dismissed the appellant's application with costs. It is against that order that the appellant now appeals.

Section 8 (1) of the Industrial Relations Act reads as follows:

> **"8 (l)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 employer's association and a trade union, or staff association or between an employee's association, a trade union, a staff association, a federation and a member thereof.**

The dispute between the parties is clearly a dispute between an employer and an employee, and the question to be determined is whether the jurisdiction of the

High Court in a matter such as the present one is ousted because of the provisions of the said Section 8 (1).

The intention of limiting the jurisdiction of the High Court in labour matters started with the Industrial Relations Act No. 4 of 1980. Section 5 (1) (a) of that Act provided that:

> **"5 (1) The Court (i.e the Industrial Court) shall have exclusive jurisdiction in every matter properly brought before it under this Act, including jurisdiction: (a) to hear and determine trade disputes and grievances".**

The word "dispute" was defined to include any dispute over the terms and conditions of employment of any employee.

In the case of **Mills, Donald v Elmond Computer Systems (Pty) Ltd 1987 - 1995 (1) S.L.R 102 (High Court)** the plaintiff applied for summary judgment in respect of a claim for arrear salary and gratuity payments. The defendant opposed the claim and took the point *in limine* that the High Court had no jurisdiction to hear the matter because of the provisions of Section 5 of the Industrial Relations Act. This point *in limine* was dismissed by Dunn AJ. In the course of his judgment he referred to the well-recognised principle that in order to oust the jurisdiction of a court of law such intention on the part of the legislature must be clear. He came to the conclusion that Section 5 (1) limited the jurisdiction to the Industrial Court only in respect of matters properly before that court. He stated that matters were properly before the Industrial Court only if the disputes procedures referred to in Part VII of the Act had been followed. At page 5 of the judgment Dunn AJ states:

> **"It is clear from the sections I have referred to under Part VII of the 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. In my view, therefore, a matter can only be said to be properly before the court if it has been referred to such court under Section 53, 58 or 60".**

Dunn AJ concluded, however, that a person who was a party to such a dispute was not obliged to use the machinery provided for by the Act, and that Section 5 (1) of the Act did not oust the jurisdiction of the High Court. The section, he found, simply provided a simpler and less costly machinery for the settlement of disputes arising out of employment.

The 1980 Act was repealed by the Industrial Relations Act No. 1 of 1996. Section 5 (1) of that Act reads as follows:

> **"5(1) The Court shall have exclusive jurisdiction to hear, determine and grant any 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.**

Here again the phrase "in respect of any matter properly brought before it" is used. The question whether or not the jurisdiction of the High Court was ousted by the new Section was considered in a case which ultimately came before this court as **Sibongile Nxumalo and others v Attorney General and others (Civil Appeal No. 25 of 1996).** Here again the plaintiff brought a claim for the payment of salary allegedly unlawfully withheld from him. At the trial the defendants took the point *in limine* that the High Court lacked jurisdiction to hear the matter. This point *in limine* was upheld by Sapire ACJ who overruled the decision given by Dunn AJ in the **Mills, Donald** case referred to above. The appeal to this court was upheld. In the judgment delivered by Tebbutt JA the following is stated:

> **"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".**

The appeal was upheld. The order granted by Sapire ACJ was set aside and the matter was referred back to the High Court for further adjudication.

The question at issue was again dealt with in this Court in the matter of **Secretary to Cabinet and others v Ben M. Zwane (Civil Appeal No. 2/2000).** This Court confirmed the correctness of the judgment in the **Nxumalo** case. However the following is stated in the judgment:

> **"I should point out however that the Industrial Relations Act No. 1 of 1996 has been repealed by the provisions of the Industrial Relations**

> **Act No. 1 of 2000. One of the changes that has been brought about in the new Act is the deletion of the words "any matter properly brought before it including As can be seen from the terms of the** *Nxumalo* **judgment, it was** *inter alia* **the use of these words by the legislature that motivated the court to decree as it did. It is not necessary or advisable for this court to comment on the effect of this and other changes to the Act save to say that they will undoubtedly have an impact on the jurisdiction of the High Court to hear industrial disputes in matters falling under that Act. It was common cause that the present appeal was not one that was to be decided in terms of its provisions".**

The present appeal is a matter where it is necessary that we consider the changes brought about by Act 1 of 2000 because it is that Act that is applicable to the present matter.

The wording of Section 5 (1) in the 1996 Act, in so far as it refers to the common law, is by no means clear. It refers to "... 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

The wording of Section 8 (1) of Act 1 of 2000 is much clearer. This section provides that:

> **"The court shall… have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application … 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…"**

The words "or in respect of any matter which may arise at common law between an employer and employee" stand alone in the section and are not governed or qualified by any other words or phrases in the section. The section provides, in specific terms, that the Industrial Court shall have exclusive jurisdiction to hear, determine and grant appropriate relief in respect of any matter which may arise at common law between an employer and an employee in the course of employment.

The judicial function, power and independence of the courts is jealously guarded and any legislation limiting the jurisdiction of the courts will be strictly interpreted. See e.g. the judgment in the case **Nxumalo** case where reference is made to the case of **Photcircuit S.A. (Pty) Ltd v De Klerk NO and De Swardt NO and others 1989 (4) S.A. 209 (C)** and to other cases of similar import. It is however pointed out in the same judgment (the **Nxumalo** judgment) that the concept of specialist courts dealing with specialised matters is not unknown.

It is a well-known rule of statutory interpretation that the legislature is presumed to know the state of the law, and to know the interpretation that has been placed upon a section of an Act when a new Act is passed. (See the Nxumalo judgment where reference is made to such cases as S **v van Rensburg 1967 (2) S.A. 291 (C)** and **Terblanche v South African Eagle Insurance Co. Ltd 1983 (2) S.A. 501 (N)).**

When the new Industrial Relations Act, Act No. 1 of 2000, was passed the legislature must be presumed to have known what interpretation had been placed by judgments such as the **Nxumalo** judgment and the **Secretary to Cabinet** judgment on Section 5 (1) of the 1996 Act in respect of disputes between employers and employees. The legislature, in the 2000 Act elected to amend the jurisdiction question relating to common law disputes between employers and

employees, and effect must be given to the amendment.

In my opinion the wording of Section 8 (1) of the 2000 Act can be interpreted in one way only and that is that the Industrial Court now has exclusive jurisdiction in matters arising at common law between employers and employees in the course of employment. The fact that special procedures for the determination of disputes have to be followed before the matter comes before the Industrial Court does not alter the position.

Mr. Dlamini, on behalf of the appellant, referred us to certain South African authorities but they deal with the South African legislation and are of no assistance in interpreting the applicable Swaziland legislation.

My conclusion is that the judgment in the High Court dismissing the appellant's application on the grounds that the High Court did not have the necessary jurisdiction to hear the application was a correct judgment.

In the result the appeal is dismissed with costs.

N.W. ZIETSMAN

ACTING JUDGE PRESIDENT

I agree

J BROWDE

JUDGE OF APPEAL

I agree

M.M. RAMODIBEDI
JUDGE OF APPEAL

[14] For these reasons I would dismiss the appeal. Costs including the costs of counsel will follow the event.

J.H. STEYN
Judge of Appeal

I AGREE

P.H. TEBBUTT

Judge of Appeal

I AGREE

R.A. BANDA

Judge of Appeal

Delivered in open court on 15th November 2006.