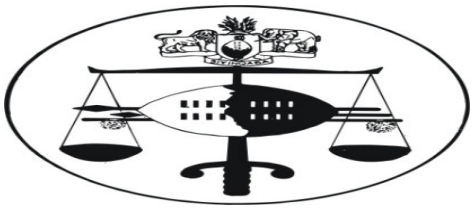

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HOLDEN AT MBABANE Civil Appeal No.47/2018

In the matter between:

Swaziland Union of Financial Institutions and Allied Workers **Appellant**

Versus

First National Bank Swaziland Limited **1st Respondent**
First National Bank (Swaziland) Pension fund **2nd Respondent**

Neutral Citation: *Swaziland Union of Financial Institutions and Allied Workers versus First National Bank (Swaziland) and Another (47/2018) [2018] SZSC 62 (30th November, 2018)*

Coram: **MCB MAPHALALA CJ, SB MAPHALALA JA AND JP ANNANDALE JA.**

Heard: 22nd August 2018
Judgment: 30th November 2018

Summary

Application for prohibitory interdict in the Industrial Court. On review by the High Court, injunctive was relief set aside. Contentious issue giving rise to erroneous order by Court a quo predicated on statutory regulation of pension funds. Absence of jurisdiction by Court of first instance incorrectly upheld on review. Held: Collective Agreements in workplace inviolable by any entity, not limited to employer only. Pension benefits part and parcel of terms and conditions of employment, subject to collective bargaining through a Union. Direct consultation of workers on their acceptance or rejection of proposed change in type of Pension Scheme, in violation of Regulation and Collective Agreements. Appeal upheld, order of Industrial Court confirmed.

JUDGMENT

JACOBUS ANNANDALE JA

[1] The appellant is a recognized union which represents employees in the financial sector and in particular those in service of the first respondent, "the Bank". As part of the employment package, a pension benefit scheme is an integral part thereof. The second respondent, "the Fund", administers the pension scheme insofar as it relates to employees of the Bank. The Pension Fund is duly and properly registered under the relevant statutory provisions.

[2] The focus of this appeal is centered around the question of whether terms and conditions of employment, being within the ambit of collective

bargaining through a Worker's Union, also include a conversion of the employees' pension scheme benefit from a Defined Benefit to a Defined contribution Scheme. It extends to the soliciting of the individual employees' views and decisions on this by the Bank and the Fund. Jurisdictional issues, specifically that of the High Court on review from the Industrial Court as well as the extent of jurisdiction of the Industrial court itself also come to the fore.

[3] Anteceding the present litigation, the Fund resolved to change the character and parameters of the pension scheme. Whereas it used to be known as a "Defined Benefit Scheme", it was decided to convert it into a "Hybrid Fund, incorporating a continued Defined Benefit Scheme." The latter scheme was to be in respect of members who are within five years of retirement from the date of the resolution to convert, and the remainder of members would then have a "Defined Contribution Scheme". The effective date was to be 31st March 2016.

[4] The Bank issued letters to its employees in which the conversion and rationale behind it is communicated to the various individual members of the pension fund. The intricate relationship between the Bank and the Fund is patently obvious from the letters themselves. The letterhead reads that it comes from the Human Resources Officer of the Bank, and it ends under the signature of the Principal Officer of the First National Bank Pension Fund, one and the same person.

[5] The contents of these letters about the Fund conversion is what irked the union and galvanized it into seeking an interdict to put an end to the process

whereby the bank canvassed the individual employees to indicate whether or not they accept the conversion and related incentives, subject to appropriate regulatory approval. The bone of contention is that the Bank could not do as it did since it negated the collective bargaining unit of the unionized employees, the appellant.

[6] The issue to decide is not whether the conversion would be to the advantage or otherwise of the employees or if the former structure was sustainable or not, or even if contributions and benefits would remain the same, be reduced or increased. It is also not about further possible options, incentives or the finer details nor whether the decision making process was in accordance with the ability of the trustees to decide as they did. Instead, it is the Union which took exception to the fact that the Bank or the Fund saw it fit to consult with the employees directly and individually, instead of a blanket consultation through the auspices of the appellant Union. In the main, the Union felt that it was sidelined and ignored, despite a recognition agreement which allows for *inter alia* the right to collective bargaining.

[7] The Union then approached the Industrial court in July 2016, soon after the consultation process undertaken by the Bank commenced. The gist of relief was to interdict the Bank and the Fund from direct engagement of the unionised members in contravention of the recognition agreement, alternatively to declare the already indicated choices of acceptance or rejection of the conversion as null, void and of no effect.

[8] In order to gain access to injunctive relief in the Industrial Court, the Union relied upon its representational capacity as founded upon Article 3.2 of the Recognition Agreement between itself and the Bank. It reads that:

> "The Employer recognizes that the employees have the right to belong to the Union and further recognizes the Union as the sole collective bargaining agent for and on behalf of the employees. The employer further undertakes not to enter into negotiations on conditions of employment with individuals or any organization other than the union which pertain to employees."

[9] From this, it is clear that the agreement recognizes the Union as "the sole collective bargaining agent for and on behalf of the employees". It furthermore records the undertaking by the Bank that it shall "not enter into negotiations on conditions of employment with individuals."

[10] The second foundational issue on which the Union relied is to be found in article 14 of the Recognition Agreement, under the heading "Pension Fund". Clearly and unambiguously it is recorded that the "Contributory Pension Scheme in place is a condition of employment." It goes on to say that a Group Life Insurance Scheme on behalf of the employees is included and that the Pension fund is governed by the Retirement Funds Act of 2005.

[11] The learned Judge of the Industrial Court considered these clauses of the recognition agreement vis-à-vis the actions of the Bank and / or the Fund by directly addressing letters to the employees about the conversion of the pension fund and to obtain their acceptance or rejection of it. He held:

> "From this clear wording of Article 14 of the Collective Agreement, there is no doubt to the Court that the Pension Fund is a condition of employment. Further, there is no doubt from the reading of Article 3.2 of the Recognition Agreement that the Employer (1st Respondent) undertook not to enter into direct negotiations on conditions of employment with the individual employees to the exclusion of the applicant. Once it is established that the pension fund of the employees is a condition of employment, it should follow that the 1st Respondent is precluded from engaging in direct engagement with the members of the Applicant in terms of Article 3.2 of the Recognition Agreement."

[13] That the Court was alive to its jurisdictional limitations is also apparent from its judgment. It held that:

> "The Court will also dismiss the point of law relating to the lack of jurisdiction by this court. Presently, the Industrial court is not being called upon to resolve a retirement or pension fund dispute. That is clearly the preserve of the High Court of Swaziland or the Ombudsman. The question presently before the Industrial Court is whether there was a contravention of Article 3.2 of the Recognition Agreement as read together with Article 14 of the Collective Agreement by the 1st Respondent in so far as the consultation process is concerned. The point of law is therefore dismissed."

[14] The *ratio* for assumption of jurisdiction by the Industrial Court is thus clearly stated to be a labour dispute between employer and employee by the

Bank or its proxy, as manifested in the consultation process of individual employees instead of through the Union, as provided for under the Collective Agreement. The represented employees accordingly sought to interdict both the Bank and the Fund from consulting and approaching individual unionised members of the appellant about a change to the existing terms and conditions of employment, in particular their pension fund.

[15] From the outset, it is noted that neither counsel proposed that the interdict that was issued out of the Industrial Court fell short of any legal or other technicality which underlies the ordering of an interdict, interim or final, nor is there any dispute over the ability of the Industrial Court to order injunctive relief, or over the composition of the court, or about the alleged issues which relate to aspects of service on the erstwhile respondent, or the fact that the court enrolled and heard the matter as one of urgency. There was also not any argument as to the propriety of a final interdict, as it was ordered, instead of it being interlocutory or of interim effect.

[16] The real bone of contention, and which plays a crucial role in this appeal, is focused around the object of the exercise. On the one hand, it was sought to construe the interest and business of the then applicant as having nothing to interfere with the operations, functions, administration and decisions taken by a pension fund. The Retirement Funds Act of 2005 has its own particular provisions as to how the operations of a pension fund, such as that of the second respondent, is to be run. This Act of Parliament regulates the business of a Pension Fund. The Union recognized it as such, and so did the learned Judge of the Industrial Court.

[17] It is common cause, in whichever way an assessment is to be made, that the business of a retirement or pension fund, in itself, falls outside the scope of the Union's activities, and that the Industrial Court has no jurisdiction to pronounce on the manner in which its business is conducted. This particular pension fund, the second respondent on appeal, is managed independently of the employer, employees, or the Union by its own Management Board. It has representation by representatives of both the Bank and its workforce.

[18] The Industrial Court held that there was "No evidence that the applicant [the Union] was meddling in the management of the pension fund." The Court further rejected any notion that it rather was the Fund which consulted members of the Union, not the employer. The premise of this factual finding was that the letters were issued under the mast or letterhead of the Bank, not the Fund, and that all communications were to be made to the Human Resources Officer of the Bank itself.

[19] The factual finding of an absence of meddling into the affairs of the pension fund by the Union, coupled with the factual finding that it was the Bank itself, and not the Fund, which consulted employees on the envisaged changes, should have been the end of the matter. The Court below cannot be faulted with confirmation of these findings, and it also correctly concluded that it had no jurisdiction over the internal affairs of the Pension Fund itself. Nor did the Industrial Court have anything to say about the Fund and its internal affairs. These supervisory and other powers of the Courts and the Ombudsman are independently regulated under the Retirement Funds Act of 2005.

[20] To retain perspective, it is useful to be reminded of the relief that was sought in the Industrial Court. It sought a *rule nisi*, to be confirmed in due course, to interdict the Bank and the Fund from direct engagement with employees, in violation of Article 3.2 of the Recognition Agreement. Also, that any election by employees to change or retain their retirement benefit package be set aside, again on the premise that employee benefits fall under the collective recognition agreement. No relief was sought or obtained, which could be said to be directed against the administration, management and operation of the Fund itself.

[21] The internal management, operations, functions, office bearers etcetera of the second respondent on appeal could not be and were not affected by the order obtained in the Industrial Court. The Fund, just as the Bank, were interdicted from canvassing employees, being members of the appellant union, about a proposed change to convert their present conditions of service insofar as it relates to their retirement benefits, from a Defined Benefit Scheme into a Hybrid fund, incorporating a Defined Benefit Scheme for members who are within five years of retirement and a Defined Contribution Scheme for the rest of the members.

[22] Otherwise put, it is of no concern to this Court as to whether the Fund deals with and manages retirement funds in whichever legal way it deems fit. It does not matter either as to which of the two modalities have the best consequences and effect on the retirement position of past, present or future employees. The only issue should have been whether or not the Fund and the Bank was to be stopped from consultation of employees, members of the

Union, as to their take on a possible conversion, a choice which would ultimately be put into practice by the second respondent.

[23] For this to be so, it requires of the Court to determine two further things: firstly, if the Union itself is entitled to seek the relief on behalf of its members, and whether they are employees of the bank. Secondly, whether the collective agreement between the Union and the Bank precludes the Bank or any other entity from direct consultation with employees on issues which relate to their employment benefits, if it can also be said that the retirement package make-up and functioning under various schemes are indeed such benefits which fall under their collective agreement.

[24] Counsel for the Union aptly observed that in any employment package, the part which deals with their "future life", after retirement, is indeed a most important part of employee benefits. The employees of the Bank recognized it as such, and in their collective agreement, via their union, they determined and consented to the provision that established employee benefits would only be considered with full involvement of the appellant.

[25] The import of Article 3.2, referred to in paragraph [8] (*supra*), is that the Union is the "sole collective bargaining agent for and on behalf of the employees." The plain and unambiguous language denotes a collective bargaining procedure, contrary to individuals being canvassed for their choices, or in individuals seeking their own separate improvements in terms and benefits of employment. All of these were agreed to be done collectively, as a team. It was then agreed that "the employer further undertakes not to enter into negotiations on conditions of employment with

individuals or any organization other than the Union which pertain to employees." It requires no further analysis or interpretation of this article to conclude that it is says exactly just what is stated as the obvious.

[26] It could hardly have been any more plain, simply and clearly put. It is this same article of the recognition agreement which is relied upon in the prayer for injunctive relief, first advanced in the Industrial Court.

[27] The appellant sought for both the Bank and the Fund to be restrained from acting contrary to Article 3.2 of their agreement, and no more. For avoidance of doubt as to whether or not the pension aspect of the terms and conditions of employment, which is a *sine qua non* for the relief, is indeed a condition of employment, article 14 of the Agreement provides the answer. It reads:

"Article 14 <u>PENSION FUND</u>

14.1 The parties agree that the Contributory Pension Scheme in place is a condition of employment. The details of such scheme shall be given to all current and future employees on engagement.

14.2 The Pension Fund includes a Group Life Assurance Scheme on behalf of its employees.

14.3 The Pension Fund is governed by the Retirement Fund Act 2005."

[28] In addition, it also serves to dispel any notion that the Pension Fund is governed from anywhere else than the Retirement Fund Act of 2005. It is common cause that the court of first instance, from which injunctive relief was sought, was not vested with jurisdiction to order the Fund as to how to conduct its business. Nor did it presume to do so, being well alive it its own limitations.

[29] What the Industrial Court was tasked to consider was to decide if it had jurisdiction to grant injunctive relief, which it is indeed able to do. Then, to decide if the Bank is to be interdicted from acting contrary to the collective agreement, which conduct it then stopped. The Bank was ordered to halt any direct consultation on conditions of employment with its workers. This much is derived from the collective agreement. As for the Fund, the same relief was asked for and ordered. The Fund, whether in its own identity and capacity or whether as a department or section of the Bank, could equally so not consult with individual employees as to their retirement fund benefits and composition. The Industrial Court could not and did not place any limitation on the affairs of the Fund.

[30] The consequential relief which was prayed for in the alternative was to set aside any already indicated individual preferences of choice, contrary to the collective agreement.

[31] Regarding the original cause of the rift between the litigants, it was proposed that a choice be made between two variants or modalities of retirement funds. This choice was held out by the Union to squarely fall within its exclusive domain, to the exclusion of the employer or anyone else, as only

the Union could consult with the workers, then collectively decide on which option it would prefer. The Bank and the Fund, insofar as they might have wanted to solicit the views and choices of the workers, were therefore sought to be interdicted from direct participation in this process.

[32] For those of us who might not have previously been *au fait* with the distinctions between a Defined Benefit Scheme and a Hybrid Fund, incorporating a continued Defined Benefit Scheme for members who are within five years retirement as of the 31st March 2016 and a Defined Contribution Scheme for the rest of the members, guidance may be found in some proposed legal definitions. According to Tek Corporation Provident Fund and Others v Lorentz [1999] 4 ALL SA 2999 (A) at para.4, a Defined Benefit Fund is:

> "One which undertakes to provide its members with the benefits defined in its rules ….. a pension expressed as a percentage of final salary based on years of service."

[33] A defined Contribution Fund, on the other hand was stated in Resa Pension Fund v Pension Fund Adjudicator, SALR 2000 (3) 313 at 317J -318A to be:

> "A fund in which members are entitled ultimately to withdraw whatever the fruits of the investment of the Defined Contributions may realise".

[34] That there is a distinct difference between the pros and cons of the two funds is aptly demonstrated by the reaction to the proposed change from the one to the other. The criticism of the fact that the Bank or the Fund solicited

individual opinions and choices of its employees was on the basis that it transgressed the collective agreement, and not whether the one choice outweighed the other. It is not about the wiseness of choice but more about the source of enquiry by the Bank or by the Union.

[35] Counsel for the appellant referred us to the *dictum* by Goldblatt J, as he then was, in Kuit and Others v Transnet Pension Fund and Another. (Unreported Case No. 2001/9065 (WLD)) insofar as the difference between the two varieties of funds are concerned. He said that:

> "As a Defined Benefit, Balance of Costs Fund, the benefit obligations of the Fund do not vary depending on the funding level of the Fund. On the contrary, they remain constant and defined in the rules. The very purpose of a Defined Benefit Fund is to guarantee the payment of a defined quantifiable benefit. By virtue of this guarantee members are afforded the security of knowing that by law they are entitled to a pre-defined benefit which is not dependent upon the investment fortunes of the Fund."

[36] What this transposes into is that the security of future funds for retirement is effected in one way or another. Growth, risk, exposure, fundings, and so on are all variables which require prioritization in order to derive a benefit. The choice which employees were to make concerns a term or condition of their employment with the Bank, as stated above. In order to elect which form of pension benefit they are to either retain or change to, is one which is subject to a collective choice, to be taken by both the Bank and the Union. It is the Union

which is the entrenched holder of a mandate to consult with the employees on this issue. Furthermore, should the Bank have chosen to consult via the Fund itself, or through any other means such as a consultancy firm, it would equally fall foul of Article 3.2 (*supra* [8]). It is only the Union, and no one else, not even the Pension Fund, who may enter into negotiations and changes pertaining to overall terms and conditions of employment. Its members are employees of the Bank, they are also members of the Pension Fund, and they are to be affected by the proposed new type of pension scheme. It is their own Union which decided to seek and obtain injunctive relief from the Industrial Court.

[37] Instead of abiding by the order against it, the present respondents then rather decided to take the matter on review to the High Court. There, they held forth that it should issue orders of:

> "1. Reviewing and setting aside the judgment and order delivered by the Industrial Court on 21st July 2016 under case number 194/2016.
>
> 2. Substituting for that order an order dismissing the application that came before the Industrial Court under that case number;
>
> 3. Alternatively to prayer 2, remitting the matter to the Industrial Court for determination of the application

afresh by a differently constituted court, and having regard to the judgment of the High Court in this review;

4. Ordering the first respondent and (only in the event of their opposition) the other respondents to pay the costs of this application jointly and severally;

5. Granting further or alternative relief."

[38] The chairperson of the Board of Trustees of the Bank's Pension Fund, with her also being an officer of the Bank, deposed to the affidavit in which their case for review is set out. She is supported in this by the Principal Officer and head of Human Resources, also employed by the Bank.

[39] The application for review by the High Court came under the provisions of Section 19 (5) of the Industrial Relations Act and Rules 6 and 53 of the High Court Rules, on grounds which must be permissible under our common law.

[40] First and foremost is her incorrect assumption that the Industrial Court had no jurisdiction over the matter before it. This is premised on her contention that:-

> "It related to an issue between members of the Fund (and their Union) and the Fund, which is not an employer and has no employment relationship with those members and therefore no direct relationship with the Union. The contractual relationship remains between the Union and the Employer."

[41] The Industrial Court dealt with an application to interdict both employer and Fund from engaging with individual employees on the issue at hand. As said, the issue was not one with the Fund *per se*, or in the manner with which it conducted itself under its separate legislative requirements. It was an issue pertaining to the terms and conditions of employment which was subject to the collective agreement.

[42] This same argument was taken as a point of law in the Industrial Court. There, the learned Judge correctly, in my respectful view, dismissed it. He said that:-

> "The question presently before the Industrial Court is whether there was a contravention of Article 3.2 of the Recognition Agreement as read together with Article 14 of the Collective Agreement by the 1st Respondent in so far as the consultation process is concerned."

He clearly did not misdirect himself on the subject matter before him, nor, did he encroach on the Funds' territory.

[43] She also wanted to have a different factual finding, based on the nature and purpose of the correspondence issued by the Fund to its members. From the outset, there is a material distinction between an appeal which may not include questions of fact, and a review on grounds permissible at common law, concerned with procedural or other irregularities, impropriety in the process and procedure. Appeals to the Industrial Court of Appeal are limited to questions of

law only (Sections 19, 11 (1), 22 (1)) while section 11 (5) of the Industrial Relations Act provides for a review by the High Court on grounds permissible at common law.

[44] In Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd & Another 1988 (3) SA 132 (AD) at 152 A-E, Tebbutt JA held that common law grounds are:

> "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."

The list is not exhaustive and may for instance include an error of law to be a good ground for review. (See Hira and Another v Booysen and Another 1992 (4) SA 69 (AD) at 84B).

[45] An appeal against the factual findings as was made by the Industrial Court cannot be disguised as a ground for review and thereafter be entertained on appeal to this Court. Under subterfuge of a review, limited to the confines of common law, the respondents persuaded the High Court to set aside the interdict which was ordered in the Industrial Court. Basically the assumption of jurisdiction by the latter court over the matter was challenged on the basis that a retirement fund is regulated under the Retirement Funds Act and therefore outside the scope and ambit of the Industrial Relations

legislation which endowns jurisdiction on the Industrial Court. Since the Fund itself does not form part of the collective agreement and it is not a dispute between employer and employee it is thus "untouchable" and not subject to the jurisdiction of the Court which interdicted it, together with the Bank, from direct engagement of individual employees on the issue of a proposed change in the pension scheme of its members. Further, it was contended that the Fund and its members do not enjoy any employer – employee relationship, wherefore there is no *nexus* or *vinculum iurus* between the Fund and the union to obligate negotiations via the Union.

[46] Ultimately, the High Court held on review that:

> "The fund is a distinct legal entity with its members not enjoying any employer-employee relationship. The Bank is not an architect of the conversion but the Fund. In the above, the submission that the Industrial Court has no jurisdiction in the matter holds water. In the result it was erroneous to interdict the Bank as it was not its decision to convert the fund. Further, the Fund could not be interdicted on behalf of the Union as there is no agreement between the Fund and the Union giving rising to a legal obligation to negotiate with its members through the Union".

[47] In her reasons for the judgment, the learned judge *a quo* correctly found the Bank to be constrained from direct consultation with the individual employees, instead of collectively, as follows:

> "It is common cause between the parties that the Recognition Agreement and the Collective Agreement was entered into between the Union and the Bank. From this circumstance therefore, it is correctly to say that where, for instance, a matter relating to pension

> benefits arising between the parties to the Recognition and the Collective Agreement, viz. Union and the Bank, the bank has no right to engage members of the Union who happen to be employees, directly. The Bank, in terms of clause 3.2 of the Recognition Agreement read with clause 14 of the Collective Agreement is obliged to speak to its employees through the Union. The duty upon the Bank to refrain from dealing direct with its employees emanates from the two agreements. In other words, the authority upon the Union to represent its members or the Bank's employees in matters arising from employer-employee relationship emanates from the two Agreements. In brief, the two Agreements are a *nexus* between the Union and the Bank."

[48] It is the same rationale which the Industrial Court relied upon to restrain the Bank from its impugned conduct but which was subsequently set aside on review. However, the court *a quo* went on to hold that "nothing binds the Fund to deal with its members through either the Bank or the Union since the Fund is not a party to the Recognition and the Collective Agreements" and because there is thus "no *nexus* between the Fund and the Union by reason that the Fund is not a party to the agreements and therefore it is not bound by its terms".

[49] It needs to be recalled that a factual finding was made in the Industrial Court that both the Fund and Bank solicited the employees directly in contravention of the existing and binding Agreements. It was not contended that this factual finding brought it within the ambit of common law grounds for review, as adumbrated in Johannesburg Stock Exchange and Another v

Witwatersrand Nigel Ltd and Another (*supra*). As already stated above, the factual finding that both entities solicited the choices of individuals was not only inevitable but also correct, in my respectful view.

[50] That the proposed change in pension benefits is a variation in the terms and conditions of employment cannot be gainsayed. This much is unambiguously recorded in article 14.1 of the agreement, quoted in paragraph [10] *supra* and it is subject to collective bargaining. Obviously, a variation in pension scheme type has to be agreed upon by affected employees, but it requires to be done collectively by them, through their Union. It cannot be done unilaterally.

[51] In Johannesburg Municipal Pension Fund v City of Johannesburg (2005) (6) SA 273 (WLD), Malan J stated as follows at 294 A:

> "Unilaterally altering Pension Fund benefits that form part of terms and conditions of employment must be regarded as falling within the definition of 'unfair labour practice' in s 186 (9) of the Act: the conduct in question relates to the provision of benefits to employees… and is unfair because of its unilateral nature."

[52] In SASBO v Bank of Lisbon (1993), 1ICJ 4.5.20, Stafford J held that pension and provident fund issues are not only legitimate, but desirable collective bargaining subjects. The Court found that it was a term and condition of employment that each employee was compelled to join the pension fund. Accordingly, because of the compulsory membership of a pension fund and the consequential binding force on them of pension fund rules and amendments thereto, the question of amendments to the pension

fund fell within the ambit of the Labour Relations Act and provisions of the recognition agreement. This much was also echoed in South African Wood Workers Union v Rutherford Joinery 1990 (11) I LJ 695 (IC) at 700 A-D.

[53] Learned counsel for the appellant argued that further afield, in the United States of America, pensions and changes to a pension scheme have long been mandatory subjects of collective bargaining. (See Inland Steel Company v National Labour Relations Board 170 F.2d 247 (7th Cir.1948)). Also, that Convention 98 of the ILO, ratified by Eswatini, holds that wages, benefits (including pensions) and allowances are not to be excluded from the scope of collective bargaining (Digest of Decisions 5 Revised Edition 2006).

[54] Our National Constitution embraces the inalienable right to collective bargaining by unionised employees regarding their terms and conditions of employment. This includes pension scheme benefits, as already shown. The inevitable and vexed question in this appeal is this: If a change in pension benefits is subject to collective bargaining, which it is, who is precluded or exempted from acting contrary to this? Is it the Fund itself, or the Bank for that matter, which may now circumvent collective bargaining and deal directly with individual employees and members to decide if they agree with a change to their pension benefits? The answer to this rhetorical question must be an emphatic no.

[55] In my considered view, the paramount and exclusive protection of terms and conditions of employment, which includes pension scheme benefits, overrides the anxious conduct of both the Bank and the Fund to get approval

for a change in existing benefits from individual employees rather than through their collective decision.

[56] The accepted fact that the internal operations and business of the Fund falls squarely outside the jurisdiction of the Industrial Court does not equate to a legal or other right to negate the existing and established rights of unionised employees. For that matter, even if an independent consultancy firm was to have conducted the exercise to obtain the decisions of individual numbers of the Union and the Fund, it would equally be subject to censure.

[57] It seems to me that the Fund may well have misinterpreted a letter from the Financial Services Regulatory Authority (FSRA) dated the 4th May 2016, in response to a request by the Fund wherein guidance and assistance was sought as to the modalities of a conversion from a Defined Benefit Scheme to a Defined Contribution Scheme. The Financial Services Regulatory Authority (FSRA) advised the Fund "… that the conversion process must cover the following stages: Existing members of the fund must be consulted and must consent to the conversion". A further eight requirements follow thereafter.

[58] There can be no criticism of this crucial instruction. However, the Head of Human Resources of the Bank, in her other capacity as Principal Officer of the Fund, stated that the Trustees are indeed obliged to consult members of the Fund, but that it is only "a matter of courtesy [to] engage with any other stakeholder". She has it that "(t)he parties can only negotiate on the existence or non-existence of a pension fund, and whether or not the nature of the pension fund should be contributory or non-contributory".

[59] The fallacy of this cornerstone on which the respondents rely has already been dealt with above. A change over from the one type of pension scheme to the other has material and important financial consequences for the members of the Fund, including the members of the Union which was sidelined. It is part and parcel of collective instead of individual negotiation and bargaining.

[60] It follows that the finding by the Court *a quo*, that the distinct legal entity of the Fund, coupled with the provisions of the Retirement Funds Act of 2005 and the Financial Services Regulatory Act results in the absence of a "legal duty upon both the Bank and the Fund to engage the Union" cannot be upheld on appeal. The same applies to the finding that "the Bank is not liable to engage the Union because the matter of conversion of the pension benefits is not within it prerogative".

[61] Ordinarily, it should follow that the appeal be allowed but for sake of completeness, I will briefly turn to another issue which was canvassed before us, that of the High Court's review jurisdiction from the Industrial Court, *vis-à-vis* an appeal to the Industrial Court of Appeal.

[62] From the outset, it is a truism that the distinction between appeal and review is not always clear-cut and unambiguous. Especially so with what it takes to constitute a question of law. Likewise, the limit of common law grounds of review. I have already referred to the case of Hira and Another v Booysen and Another (*supr*a at para [44]) where the appellate Division of South Africa per Corbett CJ held that in addition to the common law grounds of

review, an error of law could sometimes also give rise to a ground for review.

[63] The appellant argued that the decisive issue which pertains to the jurisdiction of the Industrial Court over the matter and which formed the basis on which the review application was allowed, constituted an alleged error of law. As such, the High Court itself is said to have had no jurisdiction to entertain the issue on review since its power of review is limited to common law grounds, not questions of law: Instead, the argument goes, it could only have been adjudicated upon by the Industrial Court of Appeal. The latter Court is said to have exclusive jurisdiction on questions of law, based on section 19(1) of the Industrial Relations Act of 2009 which establishes that Court.

[64] Even though the Takhona Dlamini judgment (*supra*) was decided prior to promulgation of the 2000 Act, the establishment of the Industrial Court of Appeal with its enablement to determine questions of law remains essentially the same. Likewise with the power of the High Court to review decisions of the Industrial Court on grounds permissible under the common law. On page 16 of the judgment, Tebbut JA held that the Act "did not give exclusive jurisdiction to the Industrial Court of appeal on errors of Law".

[65] The Supreme Court followed the *ratio decidendi* of Takhona Dlamini v President of the Industrial Court with emphatic approval in OK Bazaars Swaziland (Pty) Ltd t/a Shoprite v Happiness Dludlu N.O, Makhosazana Taylor and Another (77/12) [2013] SZSC (31 May 2013). That appeal was decided after promulgation of the 2000 Act and confirmed the same legal

principle pertaining to “exclusive jurisdiction” of the Industrial Court of Appeal. It remains the position in our law that in appropriate circumstances, a question of law may well be entertained by the High Court on review.

[66] Learned counsel for the respondents have sought to base the absence of jurisdiction by the Industrial Court essentially on the fact that the Fund is a separate and distinct legal entity, governed by the relevant legislation and not subject to any collective bargaining process. Further, that employees who are members of the Union, have representation in the Fund through their quota of trustees and that the pension scheme belongs to its members and not the Bank. As such, the Industrial Court, as creature of statute, it is confined to workplace matters which arise between an employee and employer, specifically disputes of an employment nature. Since the Financial Services Regulatory Act and the Pension Funds Act stipulate that disputes involving pension funds are subject to resolution by the High Court and the Ombudsman, it therefore excludes the Industrial Court from involvement in the affairs of a pension fund.

[67] However, the Court of first instance did not transgress the boundaries of its statutory limitations. It did not seek to determine any dispute in the affairs of a pension fund, and was very well aware that it could not do so. The aspect which was up for consideration entirely concerned an application for a prohibitory interdict. The apprehension of the then applicant, now appellant, was that contrary to the scope and ambit of a collective agreement to the effect that any alteration of terms and conditions of service and especially the pension benefits of its members may only be varied collectively through the Union, was in jeopardy.

[68] The protection of this right was being eroded by the respondents through the direct and individualized soliciting of approval or rejection by the workplace. Whoever sought to undermine the collective agreement could be interdicted from doing so, including the Fund itself. Respectfully, the Court *a quo* erred in holding that "(n)othing binds the Fund to deal with its members through either the Bank or the Union." This was based on the common cause fact that the Fund is not a party to the Recognition and Collective agreements and that "(i)n summary, there is no *nexus* between the Fund and the Union by reason that the Fund is not a party to the two agreements and therefore it is not bound by its terms".

[69] I reiterate that any entity or person may well be interdicted from conduct that causes harm, or a reasonable apprehension of harm to anyone, without it being a party to the agreement (or other interest) which was being flouted. It would render collective agreements in the workplace quite meaningless if anyone else but the employer and Union can flatly ignore it and do as it wishes.

[70] The High Court further held that since the "conversion of the pension scheme is a decision designed solely by the Fund and not the Bank, it follows that there is no legal duty upon both the Bank and the Fund to engage the Union," and that "(t)he Bank is not liable to engage the Union because the matter of conversion of the pension benefits is not within its prerogative." It is again echoed in the conclusion that "… the allegations by the Union that the Fund and the Bank are liable to deal with the employees of the Bank through the Union is devoid of any legal basis".

[71] In my respectful view, the court *a quo* again erred in this. As already indicated above, it is a very specific term of the Collective Agreement that pension benefits are subject to the Collective Agreement. It simply cannot be said that this requirement is "devoid of any legal basis". This error is then compounded by extending it to the Fund as well, which would result in bypassing the Collective Agreement with impunity and unchecked, simply because there is legislation which precludes the Industrial Court from prying into the business and internal affairs of pension funds. The legislation does not entitle any pension fund to do as it pleases and trample over the collective and established rights of its members. The Fund has no immunity from being interdicted as it was ordered.

[72] From the totality of the aforestated reasons, it is inevitable that the appeal must be allowed, setting aside the erroneous order of the High Court in its reviewing of the correctly ordered interdict by the Industrial Court.

[73] It is because of this that it is not necessary to further burden this judgment with legal argument that is focused on the distinctions between review and appeal, respectively between the Industrial Court of Appeal which entertains questions of law and the High Court in its review jurisdiction, with its attendant limitations pertaining to common law grounds and the sometimes overlapping questions of law (per Hira, *supra*). It is therefore also not necessary to analyse, consider or apply the interesting legal argument which is founded on constitutional principles and jurisprudence, as was ably argued by Advocate Arendse and summarised in his additional Heads of Argument.

The errors in the approach, findings and reasoning of the impugned judgment suffice to determine the appeal.

[74] In the result the Court makes the following order:

1 The appeal is allowed.

2 Costs are ordered to follow the event, which is to include the certified costs of senior counsel.

JACOBUS P. ANNANDALE
JUSTICE OF APPEAL

I agree

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MCB MAPHALALA
CHIEF JUSTICE

I agree

_____

SB MAPHALALA
JUSTICE OF APPEAL

Counsel for the Appellant:	Adv. N. Arendse SC, instructed by M. Hlope and Associates.
Counsel for both Respondents:	Adv. P. Kennedy SC, instructed by Robinson Bertram Attorneys.