IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 26B/2020

HELD AT MBABANE
In the matter between:

CASHBUILD SWAZILAND (PTY) LTD	**Applicant**
And	
THEMBI PENELOPE MAGAGULA	**Respondent**
In Re:	
CASHBUILD SWAZILAND (PTY) LTD	**Appellant**
And	
THEMBI PENELOPE MAGAGULA	**Respondent**

Neutral Citation: *Cashbuild Swaziland (Pty) Ltd vs Thembi Penelope Magagula* (26B/2020) [2021] *SZSC* 31 (09/12/2021)

Coram: **M.C.B. MAPHALALA CJ, M.J. DLAMINI JA, R.J. CLOETE JA, S.J.K. MATSEBULA JA AND N.J. HLOPHE JA.**

Heard: 22nd November, 2021.
Delivered: 09th December, 2021.

SUMMARY : *Constitutional law – Whether Industrial Court is an "inferior" Court to the High Court – Whether the Industrial Court of Appeal is an "inferior" Court – Both are created by Act of Parliament being the Industrial Relations Act 1 of 2000 – What are specialised Courts referred to in Sections 139 and 152 of the Constitution – Whether the High Court has the jurisdiction to entertain the review of a Judgment of the Industrial Court (and by implication the Industrial Court of Appeal) – Whether Section 19 (5) of the Industrial Relations Act is constitutional – History of labour disputes discussed – Found that the Industrial Court and the Industrial Court of Appeal are specialised Courts and are clothed with exclusive jurisdiction relating to all labour matters and are not "inferior" Courts – Accordingly the High Court has no jurisdiction to review any Judgment of the Industrial Court (and by implication the Industrial Court of Appeal) – Found that Section 19 (5) of the Industrial Relations Act is unconstitutional and as such struck down.*

JUDGMENT

R.J. CLOETE – JA

[1] The matter before us emanated from the Industrial Court of Eswatini ("IC"), then morphed into review proceedings in the High Court of Eswatini ("HC"), then on appeal to the Supreme Court ("SC") sitting in its appellate jurisdiction and now there are proceedings before us seeking this full bench to review and set aside the judgment of the SC in terms of the provisions of section 148 (2) of the Constitution of 2005 ("Constitution").

[2] As we are entitled to do in terms of the powers vested in us in terms of the provisions of section 148 (1) of the Constitution, we, *mero muto,* made the following Order when this matter was heard on 20 October 2021:

> **1. Both parties shall by no later than 15 November 2021 file with the Registrar of this Court and serve Heads of Argument and Bundle of Authorities relating to the following specific issues:**

1.1 The constitutionality of the provisions of section 19(5) of the Industrial Relations Act 1 of 2000 in the light of the provisions of section 139 of the Constitution of the Kingdom of Eswatini of 2005 which provides that the Judiciary consists of Superior Courts of Judicature and comprising the Supreme Court and the High Court on the one hand and specialised, subordinate and Swazi Courts or Tribunals exercising a Judicial function as Parliament may by law establish.

1.2 The resultant dichotomy between the Courts of general jurisdiction namely the Superior Courts and the specific jurisdiction of the specialised Courts such as the Industrial Court and the Industrial Court of Appeal which has exclusive jurisdiction over all labour related matters as referred to at section 8(1) of the said Industrial Relations Act 1 of 2000.

2. Due to the importance of the matter, this Order shall be served on the Attorney General of the Kingdom of Eswatini who shall be entitled to file and serve Heads of Argument and the Bundle

of Authorities on or before 15 November 2021 and shall be entitled to appear and further his argument at the hearing of this matter.

3. **The matter is postponed until Monday 22 November 2021 for the hearing of arguments relating to the above issues and if appropriate, the merits of this Review Proceeding.**

[3] The Applicant's Heads of Argument were, for the sake of dealing with the matter expeditiously, accepted from the Bar. Counsel, quoted from a *dictum* in the 1997 case of **Takhona Dlamini vs President of the Industrial Court, Court of Appeal Case 23/97** which provides as follows:

"It is quite clear from the aforegoing that the legislature was conscious of the difference between an appeal and a review and 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)."

(With due respect, this judgment was handed down before the promulgation of the Industrial Relations Act of 2000 ("IRA") and the Constitution of 2005 ("Constitution").)

[4] He further submitted that the perceived dichotomy between the Superior Courts on the one hand and specialised Courts such as the IC and the Industrial

Court of Appeal ("ICA") is artificial. Further that when one has regard to the distinct character of review proceedings, it becomes clear that the Superior Courts are in fact more suited to the role of review. (See my comments below relating the appointment of Judges of those Courts below)

[5] Applicant's Counsel further pointed out that the review jurisdiction of the HC is actually set out in the Constitution at section 152 thereof which is also dealt with by me below. He further submitted that the notion that the conferment of powers of the HC on the IC makes these Courts equal and that accordingly the review of one by the other is untenable. His submission is that the powers of the HC vested in the IC are merely meant to give the Industrial Court effective limited jurisdiction in the discharge of its adjudicatory functions which are expressly set at section 8(3) and that accordingly that this Court had full jurisdiction to hear the matter on its merits.

[6] In compliance with the abovementioned order, 1st Respondent's Attorneys duly filed Heads of Argument relating to the issue concerned. In essence their contention is that section 19(5) of the IRA is unconstitutional in that the Constitution in section 139 superseded the said section 19(5) of the IRA and as such the Constitution must prevail over inferior legislation.

[7] Respondent's Counsel further contended that section 8 of the IRA clothed the IC with exclusive jurisdiction over all labour related matters which I will deal with in detail below. In addition both the IC and the ICA were clearly constituted as specialised Courts by the Constitution and that due to the exclusive jurisdiction afforded to those Courts, the intention was always that labour related litigation would end for once and for all at the ICA and that as such the HC did not have jurisdiction to review any decisions of either of those Courts. The 1st Respondent therefore applied for this Court to dismiss the application of the Applicant with costs and furthermore submitted that this Court has the power to order that the decision of the IC be upheld as if it were an order of this Court.

[8] The Attorney General's Chambers, *amicus curia,* for which we are indebted, also filed useful Heads of Argument relating to the issue. Their research acknowledged that section 139 of the Constitution recognised specialised Courts and that section 151(3)(a) protected the exclusive jurisdiction of the IC as provided for in section 8 of the IRA. I will deal with this extensively below.

[9] In addition the Attorney General's Chambers acknowledged that section 151(3)(b) of the Constitution specifies that the HC has both appellate and review jurisdiction over Swazi Courts and Court Martials. The Court was referred to the *dictum* in the matter of **Swazi Observer (Pty) Ltd v Hanson Ngwenya & 68 Others (Appeal Case 19/2006** where this Court stated that **".....in industrial matters the Industrial Court of Appeal is the end of the road."** Thus, there ought to be finality in litigation in the specialised courts themselves, with no appeals or reviews to the High Court or Supreme Court.

[10] The Attorney General's Chambers prayed that this Court finds that the IC is a specialised court with all the powers of the HC in exercising specialised jurisdiction with Judges of the same qualification of those of the HC and issuing judgments bearing the same weight as HC judgments.

[11] Section 148 (1) of the Constitution provides as follows:

> **"148. (1) The Supreme Court has supervisory jurisdiction over all courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for**

the purposes of enforcing or securing the enforcement of its supervisory power."

[12] The IC was established by section 6 of the Industrial Relations Act 1 of 2000 ("IRA") and section 6 (1) reads as follows:

"6 (1) 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 or labour relations and employment conditions in Swaziland."

[13] Section 8 (1) of the IRA provides as follows:

"8. (1) 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 Act, 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 employers' association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof." (my underlining)

[14] Section 20 (1) and (2) of the IRA provides for the establishment of the Industrial Court of Appeal ("ICA") and reads as follows:

"20. (1) There is established an Industrial Court of Appeal which shall have the same powers and functions as the Supreme Court but shall only deal with appeals from the Industrial Court.

(2) The Industrial Court of Appeal shall consist of a Chief Justice and two Justices of Appeal, all of whom shall have the same qualifications as judges of the Supreme Court and shall be appointed in the same manner as the Judges of the Supreme Court." (my underlining)

[15] Section 21 (1) of the IRA provides as follows:

"21. (1) Subject to Section 19 (1), the Industrial Court of Appeal shall have power to hear and determine any appeal from the Industrial Court." (my underlining)

[16] Section 19 (5) of the IRA reads as follows:

"19. (5) A decision or order of the Court or arbitrator shall, at the request of any interested party, be subject to review by the High Court on grounds permissible at common law."

[17] It will be useful at this point to give a brief outline regarding the history relating to jurisdictional issues in respect of labour related matters:

17.1 From 1963 to 1980, the Industrial Conciliation and Settlement Proclamation number 12 of 1963 prevailed and in terms thereof labour adjudication was the domain of tribunals staffed by non-judges and lay individuals nominated by factions in the workplace to assist in dispute resolution.

17.2 The original jurisdiction of the HC was highlighted in the 1968 Constitution which, at chapter IX, Part 1 at section 104 provided that:

"The High Court shall be a superior court of record and shall have – (a) unlimited original jurisdiction in all civil and criminal matters; (b) such appellate jurisdiction as may be prescribed by or under any law for the time being in force in Swaziland; (c) such revisional jurisdiction as the High Court possesses at the commencement of this Constitution in accordance with the provisions of this Constitution and any other law then in force in Swaziland...."

17.3 Section 2 (1) of the High Court Act 1954 provided that:

"The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa."

17.4 The South African Supreme Court Act of 1954, at Section 2 (1) thereof provided that:

"The High Court shall be a Superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa." (The Supreme Court in South Africa is the equivalent of the Eswatini High Court)

17.5 Section 16 of the South African Act provided for a review of judgments of inferior Courts and **"inferior Courts"** was defined to mean **"any court (other than the court of a division) which is required to keep a record of its proceedings, and includes a magistrate or other officer holding a preparatory examination into an alleged offence."**

17.6 The jurisdiction of our HC was not ousted by the 1968 Proclamation and in 1980 the first entity styled "IC" was created by an Act of Parliament under the **Industrial Relations Act of 1980** ("the 1980 Act") which started to chip away at the unlimited original jurisdiction of the HC but which contained a provision for review by the HC of IC decisions and the right of appeal to the SC.

17.7 Its successor, the **Industrial Relations Act of 1996** ("the 1996 Act") continued to oust the jurisdiction of the HC but retained its revisional power. It also created the ICA with exclusive jurisdiction to hear appeals from the IC and ousted the jurisdiction of the SC to hear appeals from the IC.

17.8 However the Legislature retained the provision of review by the High Court whereas the IC had no original or residue jurisdiction left and whereas an appeal from the HC review decision would indirectly confer jurisdiction on the HC over the IC despite the jurisdiction of the HC and thus by implication that of the SC, having been ousted under the 1996 Act.

17.9 The current IRA duly trumped all before it regarding jurisdiction and it conferred **exclusive jurisdiction** on the IC in respect of all labour matters as referred to above. (my underlining)

17.10 The decisions of the IC are not reviewable for the reasons set out below and therefore decisions of the Court of the first instance in labour matters, which used to be HC, never were reviewable when emanating from the IC.

17.11 It is apparent that the Legislature, in continuing to retain the review provisions in Section 19 (5) of the IRA, erred in doing so by not taking into account that the HC had been erased from the picture when exclusive jurisdiction was awarded to the IC, which in the discharge of the functions under the Act shall have all the powers of the HC.

17.12 The Judges of the IC and the ICA are permanent Judges, qualified and appointed on the same criteria as the Judges of the HC and SC and on the same tenure. Accordingly the IC and the ICA are doing the work that the HC and the SC used to do until the IC was empowered with exclusive jurisdiction and was given its own appeal court being the ICA.

[18] The following pertinent provisions appear in the Constitution but did not appear in the 1968 Constitution. Section 139 (1) of the Constitution provides as follows:

"139. (1) The Judiciary consists of-

(a) The Superior Court of Judicature comprising-

(i) The Supreme Court

(ii) The High Court

(b) Such specialised, subordinate and Swazi Courts or tribunals exercising a judicial function as Parliament may by law establish." (my underlining)

[19] Section 152 of the Constitution provides as follows:

"152. The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its review or supervisory powers." (my underlining)

[20] Section 152 of the Constitution does not refer to specialised courts (or even Swazi Courts for that matter) but only to subordinate courts or tribunals and

adds reference to any lower adjudicating authority for the purposes of review. Section 152 therefore cannot and does not apply to specialised courts being the IC and ICA. A court cannot be a specialised court and a subordinate court at the same time as they are listed separately in section 139 (1) (b) of the Constitution and a specialised court is not referred to in section 152 of the Constitution at all.

[21] Section 151 (3) of the Constitution provides that:

> **"151. (3) Notwithstanding the provisions of subsection (1), the High Court-**
>
> **(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;**
>
> **(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force."**
>
> (my underlining)

[22] Accordingly Section 151 (3) (a) does not confer the right of review on the HC in respect of IC decisions. At subsection 151 (3) (b) it retains the rights of review in respect of Swazi Courts and Court Martials. The absence of a similar reference to review in subsection 3 (a) makes it clear that the drafters of the Constitution did not intend that the decisions of the IC be or remain reviewable by the HC or any other Court but that a right of appeal to the ICA was envisaged.

[23] Neither the IC nor the ICA are tribunals. They are specialized Courts and as such the IC has exclusive jurisdiction over all labour matters in the Kingdom and that a right of appeal lies to the ICA from any decision of the IC and it follows that neither the HC nor the SC have any review jurisdiction over the decisions of those Courts.

[24] The HC as a Court of first instance was substituted in full by the creation of the IC by Statute. The SC as the appeal body was substituted in full with the formation of the ICA. The Judges of the IC and the ICA are appointed on exactly the same terms and criteria as those relating to the HC and the SC.

Judges are appointed by the Appointing Authority on the recommendation of the Judicial Service Commission.

[25] Despite some research, I cannot find any other Court which has its own exclusive jurisdiction and the IC is the only Court, apart from the HC, which has its own Appeal Court and there can be no doubt whatsoever that the IC and the ICA **are specialised Courts and not subordinate Courts.**

[26] With due respect, it is noted that in the matter of **Derrick Dube vs Ezulwini Municipality and Others Supreme Court Case No. 9 of 2016**, a full bench of this Court came to the conclusion that the IC and the ICA were not superior Courts, but "inferior" Courts in terms of the Constitution and that the decisions by those Courts were reviewable by the HC. After extensive additional research, and for the reasons set out in this Judgment I most respectfully disagree with that decision.

[27] In **Dube,** *supra,* the Court referred to the decision of **Botswana Railways Organisation vs Setsogo and Others 1996 BLR 763** in which the Court held that the Botswana Industrial Court was a subordinate Court as the Botswana

Constitution at that time of the judgment (1996) expressly provided that a **("subordinate Court")** means **"any Court other than the Court of Appeal."** However, it needs to be pointed out that the Constitution of Botswana was amended in 2002 to read that a **"subordinate Court"** means **"any Court other than the Court of Appeal, the High Court, a Court Martial or the Industrial Court".** (my underlining)

[28] It is, with respect not logical that there should be concurrent jurisdiction between the ICA and the SC over matters emanating from the IC and/or the ICA hearing appeals from the IC and the SC hearing appeals against reviews by the HC, the latter clearly having been stripped of all jurisdiction over labour matters in terms of the IRA of 2000.

[29] As has been demonstrated above the IC and ICA deal exclusively with matters in respect of which the IC had originally enjoyed jurisdiction and the jurisdiction of the HC expressly having been ousted by the Legislature, having been given exclusive jurisdiction over all labour related matters, it follows that the HC and the SC no longer have any jurisdiction over any of the decisions of the IC or ICA. In other words the IC and ICA operate in a parallel

plane to the HC and the SC and not under them. It inevitably follows that the IC and ICA are not **"subordinate Courts"** as referred to in Section 152 of the Constitution but are specialised Courts in their own right.

[30] Accordingly, it is my considered view both the IC and ICA are specialised Courts established by an Act of Parliament, as such are not inferior or subordinate Courts; and, as such have exclusive jurisdiction over all labour issues and that the HC (and the SC) have no jurisdictional right to review any of the decisions of either the IC or the ICA, the latter having exclusive jurisdiction over appeals emanating from the IC and that is where litigation relating to labour related matters end.

[31] For far too long it has been the case that a matter heard in the IC is taken on review to the HC and then from there on appeal to the SC sitting in its appellate jurisdiction and from there to this Court on review in terms of 148 (2) of the Constitution. In addition the matter could still be taken on appeal to the ICA. This has caused undue hardships and financial implications for many an employee who would simply not have the wherewithal to fund never ending litigation and this trend must now come to an end.

[32] In the result it is clear that the provisions of section 19 (5) of the IRA are unconstitutional and as such are struck down.

[33] Accordingly the Order of this Court is as follows:

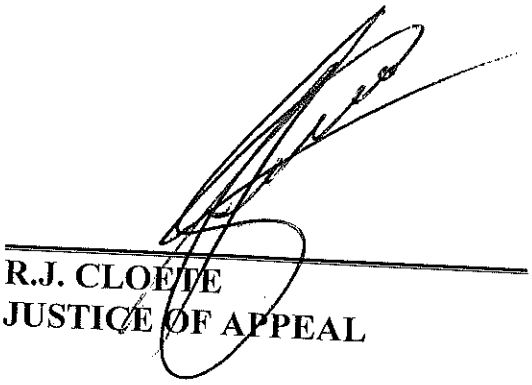
1. The provisions of Section 19 (5) of the Industrial Relations Act are declared unconstitutional and as such are struck down.

2. The High Court of Eswatini does not have the jurisdiction to review any Judgment of either the Industrial Court or the Industrial Court of Appeal.

3. The decision of the Industrial Court of 18 October 2018 is reinstated.

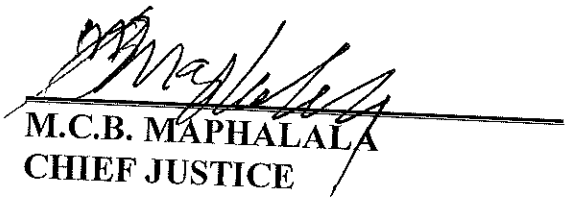
4. The application by the Applicant for the review in terms of section 148 (2) of the Constitution is accordingly dismissed.

5. There shall be no order as to costs.



R.J. CLOETE
JUSTICE OF APPEAL

I agree



M.C.B. MAPHALALA
CHIEF JUSTICE

I agree

S.J.K. MATSEBULA
JUSTICE OF APPEAL

For the Appellants: MAGAGULA AND HLOPHE ATTORNEYS
For the Respondent: MKHWANAZI ATTORNEYS

DISSENTING JUDGMENT

M.J. DLAMINI JA

SUMMARY: *Constitutional law – Whether decisions of the Industrial Court are reviewable by the High Court – Whether Industrial Court inferior / subordinate court – Whether s 19(5) of the Industrial Relations Act, 2000 is constitutional – Whether decisions of the Industrial Court of Appeal are reviewable – Whether s 8 (1) extends to review arising from industrial court proceedings.*

Introduction

[1] The issue of the reviewability or finality of the decisions of the Industrial Court and or Industrial Court of Appeal was sufficiently dealt with by this Court three years ago in the case of **Dube v eZulwini Municipality**[1]. Then, we had hoped to put the matter at rest. It is hard to understand how this very matter has crept back to the supreme forum of this jurisdiction for further adjudication. Many a judgment has been handed down on this or related question from as far back as the year 2000 in the case of **Memory Matiwane v The Industrial Court of Appeal and Another**,

[1] Derrick Dube v Ezulwini Municipality [2018] SZSC 49 (30 November 2018)

Civ. Case No. 2378 / 98 (8/3/2000). The issue must be hard to suppress and keep at bay. By this decision it is hoped the matter will be put to rest once for all.

The question for determination

[2] The central issue for determination in this application is whether section 19 (5) of the Industrial Relations Act No.1 of 2000, as amended, (the Act) is constitutional. If it is found to be not constitutional, it must be struck down. The Court *mero motu* raised the question of the constitutionality of the provision. In **Potgieter,**[2] the court *"emphasized that where the constitutionality of a law is not raised by the parties, it is the duty of the court to raise it"*. The question raises a number of other subsidiary but equally important issues such as whether the Industrial Court and Industrial Court of Appeal are inferior courts reviewable by the High Court or, they are of the same legal status as the High Court and Supreme Court respectively and therefore not reviewable.

[3] Section 19(5) empowers the High Court to exercise review jurisdiction on a "decision or order" of the Industrial Court or Arbitrator "at the request of any interested party.... on grounds permissible at common law". The constitutional

[2] **Potgieter v Lid van die Uitwoerende Raad**.....[2002] 1 All SA 589 (T)

challenge to the subsection arises in part because Section 8 (1) of the Act endows the Industrial Court with exclusive jurisdiction in labour matters and, in part, because the Industrial Court is generally characterized as a 'specialised' court. The exclusive or specialized jurisdiction of the Industrial Court is further insulated by section 151 (3) (a) of the Constitution which says that the High Court *"has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction"*.

[4] Section 19 is headed: *'Right of appeal or review'*. The first sub-section states that *"There shall be a right of appeal against the decision of the Court on a question of law to the Industrial Court of Appeal"*. Then the impugned subsection (5) grants review of decisions of the Industrial Court by the High Court on common law grounds. The subsection does not seem to provide for a right of review since the review is at the request of an interested party. If I am correct in this regard then the review must be with leave of the court. Section 21(1) empowers the Industrial Court of Appeal to hear and determine appeals from the Industrial Court on a question of law only. It is clear then that neither section 19 nor section 21 endows the Industrial Court or Industrial Court of Appeal with review power of any kind. This is so because these two courts as creatures of statute can only have such power as the statute may provide. It seems to me that a party aggrieved by a decision of the

Industrial Court has one of two ways – appeal or review. Where both options are available, review must normally be disposed of first. (See **Mahomed v Middlewick N.O. and Another,** 1917 CPD 539 at 540 – 541; **Liberty Life Association of Africa v Kachelhoffer N.O. and Others** 2001 (3) SA 1094 (CPD) at 1108 F – G).

[5] Section 21(4) provides for the finality of the decisions of the ICA. This sub-section reads: *"The decision of the majority of the judges hearing an appeal shall be the decision of the Court and such decision shall be final"*. Of note hear is that the word "Court" in this Act means the 'Industrial Court'. It is then contended that the decision that is final is in fact the decision of the Industrial Court. The immediate question that arises is whether the subsection, as worded, also shuts the door to any review. I do not think so because otherwise the Act would be contradicting itself, by giving review under s 19(5) and taking it away under s 21(4). Assuming, however, that s 21(4) does pretend to shut the door to both appeal and review, what would stop a review under s 35 or s 152 of the Constitution? Further, s 151(3) (a) excludes appeal and original jurisdiction and not review. In my view, the Industrial Court and the Industrial Court of Appeal are courts envisaged under s 35(3), s 139(1)(b) and s 152. Short of an amendment of the Constitution in section 139, nothing and no form of argument or policy decision would uplift the IC or ICA to a level equal to the High Court. Even if the jurisdiction of the High Court to entertain appeals or reviews

from the industrial courts were to be denied, the industrial courts would still not be equal to the High Court so long as Section 139(1) remains as is.

[6] Respondent argues that section 19(5) "is unconstitutional in so far as it then refers matters which are the exclusive reserve for the specialized court designed exclusively for specific matters..." With respect, this argument is not correct. I do not believe that the legislature made a mistake and contradicted itself by reversing or nullifying the exclusivity of the Industrial Court. It is my opinion that section 19(5) does not do what Respondent is asserting. The jurisdiction of the Industrial Court remains exclusively for labour matters. What section 19(5) does is to remove from the labour court any non-labour issue that creep into labour proceedings. This issue, for lack of a better word, is in fact extra-jurisdictional and more often than not negatively and unjustly impacts the proceedings. It becomes necessary therefore for the labour court to be disabused of that issue. This side show does not affect the purely labour related issues and the court's exclusive labour jurisdiction.

[7] In my view, at the level of the Industrial Court of Appeal, if that court should fall into and find itself in a reviewable mode, the remedy would not lie in a review by the High Court in terms of section 19 (5). The remedy rather ought to be in terms

of section 148(1) of the Constitution. In the absence of a provision equivalent to section 19 (5) covering the Industrial Court of Appeal, section 148 (1) provides a special remedy to prevent possible abuse of power by or lapse in the proceeding of any court or adjudicating authority. Our understanding is informed by the specific wording of the Act and the implicit need to expedite and fast trek labour proceedings. And the Respondent is correct in that the 'purpose and aim of the [Act] was for the expeditious deliberation of labour matters...." It seems that what has tended to add to the delay in labour litigation has been the understanding that sections 19 (5) confers a right automatically available to an applicant. In our view there is no such right of review.

[8] What does section 139 provide relevantly to this matter? Subsection (1) divides the courts of judicature of the Kingdom into two broad streams viz. the superior courts and subordinate courts and tribunals. Subsection (2) provides that the superior courts have jurisdiction in all civil and criminal matters (including matters arising under the Constitution) "and such other jurisdiction as may, by law, be conferred on (them)". This subsection must be read together with section 35(3) which clarifies the above position beyond cavil.

[9] Whilst the scope of subsection 139(1) (a) is not so problematic, it is otherwise with subsection (1) (b). This is so in part because of the variety of 'courts' it encompasses and in part because it is open-ended, for quite understandable reasons. Currently named types of courts under (b) are specialised courts, subordinate courts, Swazi courts and tribunals. To this list we may now add the Small Claims court. All of these entities are courts subordinate to the High Court and a fortiori the Supreme Court. It will be noted that whilst the named entities may be specialized in the generic sense the terms themselves are not specialized and to that end the Constitution has not defined them. In the result all the classes of courts under (b) could safely be referred to as 'subordinate' courts (as made up of the magistrate's courts, the industrial courts, the small claims court and tribunals as may be specified by their constitutive instruments). From another point of view the Swazi courts are specialized courts in more or less the same way as the Industrial court.

[10] The proponents of the invalidity of section 19(5) argue that the sub-section has been superseded by section 139. On the basis of section 8(3) of the Act, they argue that the IC is equal to the High Court the latter cannot therefore review the decisions of the former. With due respect this argument is false, for the simple reason which I have already adumbrated above, section 8(3) is not a provision under the Constitution. Whatever section 8(3) says cannot change the standing provision

under section 139(1). The borrowed powers that the Industrial Court exercises in terms of section 8(3) does not elevate the IC to the constitutional status of the High Court. Thus, notwithstanding the provisions of section 8(3) the IC remains inferior to the High Court. In the result, section 139 does not supersede section 19(5). Instead, section 139 confirms the superior/inferior dichotomy in the status of our courts.

[11] The endowment of the Industrial Court with exclusive powers limited to labour matters in terms of section 8 (1) is a jurisdictional issue. Section 139(2) provides that *"the Judiciary has jurisdiction in all matters civil and criminal, including matters relating to this Constitution, and such other jurisdiction as may by law be conferred on it"*. Honourable Justices and interested parties are invited to read 'High Court' in place of 'Judiciary' in the subsection. It is common cause that only the superior courts have jurisdiction in constitutional matters. That then excludes the subsection 139(1) (b) class of the Judiciary to which the Industrial Courts belong.

Review jurisdiction (under the common law)

[12] It is admitted that labour related matters must end in terms of section 8(1) read with section 21(4). On review, the High Court does not deal with 'labour related'

matters strictly so-called. As already pointed, the review jurisdiction under section 19 (5) is limited to common law grounds. If the basis for the review is generated by the Act on a labour provision, that would be a matter for the industrial court and would be dealt with by way of an appeal.

[13] Section 8 (3) and (5) are complementary. For once the IC was endowed with powers similar to those of the High Court in the discharge of its functions it follows that the decisions or orders of the IC will have the same force and effect as judgments of the High Court. With respect I do not see how it could be argued that section 8(3) confers review power on the IC when that power has been conferred on the High Court under section 19(5). The IC is a creature of statute; it cannot exercise a power it has not been expressly or by necessary implication vested with. So, whose decisions would the IC review in terms of section 8(3)? The subsection (3) speaks to the 'discharge'. The IC can only discharge what has been allocated to it by way of functions and similar powers. In my view any purported exercise of review power by the IC cannot be part of the 'discharge' contemplated under the subsection 8 (3).

[14] The *amicus curiae* (Amicus) has submitted as follows:

"4 The Law Office believes that section 19(5) is unconstitutional in so far as it makes a provision that judgments of the Industrial Court (and by extension, Industrial Court of Appeal) are reviewable.

5 In relation of an arbitrator's decision being subject to review, the Law office is of the view that based on section 8(3) of the IRA the Industrial Court has review powers over arbitration awards. The said section clothes the Industrial Court with power to review in labour matters read with Rule 28 of Industrial Court Rules".

[15]The submission by the Law Office would seem to flow from the assumption that section 8(3) has some inherent power or jurisdiction like the High Court which enables it to exercise power not expressly provided. This reasoning or assumption is contrary to the fundamental principle regulating statutory bodies. Strangely, however, section 19 (5) places the IC and arbitrator on the same footing. How then could section 8(3) allow the IC to turn around and review decisions and orders (awards) of an arbitrator? I do not see how para 46, 52 or 53 of the **Stephen Zuke** [3] judgment assists the Law Office. In para [52] this Court (per SP Dlamini JA) clearly stated as follows: *". . . When*

[3] **Ministry of Tourism and Another v Stephen Zuke and Another,** Civ. App. Case No. 96/2017

discharging its mandate the Industrial Court is not exercising review proceedings. . ." The judgment was unanimous. A rule or regulation cannot properly confer a power on a statutory body which the statute creating that body does not confer. The rule or regulation would be ultra vires and invalid.

[16] It should be noted that section 8(3) is qualified. The court under this section is not vested with "all the power of the High Court....." The vesting in issue is to be understood in light of the words: *"In the discharge of its functions. . ."* Unless the functions of the IC "under the Act" include reviewing decisions of certain bodies such as the arbitrator that function cannot be vested in the court by the subsection 8(3). Thus the subsection should not be understood as conferring upon the court functions that it presently does not have under the Act. In addition, the Constitution provides for a referral by the Industrial Court to the High Court of any contravention of Chapter Three of the Constitution dealing with fundamental human rights. It must be clear then that the referral under section 35 (4) of the Constitution signifies that the Industrial Court is a lower court than the High Court.

[17] In my view, para [20] of the **Stephen Zuke** judgment correctly restates the jurisdiction of the court in that it involves a dispute or issue 'between an employer

and an employee" (as contemplated by section 8(1) of IRA). In paragraph 8 of their heads of argument, the Amicus writes: *"Whilst section 8 (1) of IRA confers exclusive jurisdiction to the Industrial Court over labour causes, section 19(5) of the same confers jurisdiction on the High Court against the Industrial Court decisions"*. This statement is not entirely correct: I can only trust that that is not deliberate. Only review power over decisions of the IC is entrusted with the High Court. In paragraph 9 of their heads the Amicus says that the referral in terms of section 35(4) of the Constitution as happened in the **Stephen Zuke** case is *"somewhat absurd as there is both exclusivity and inclusivity of the jurisdiction conferred"*. If I understand this assertion correctly, then I do not agree with it: it is simply a contradiction in terms.

[18] In **Gentiruco AG v Firestone SA (Pty) Ltd** 1972(1) SA 589 (AD), Trollip JA at 601A wrote: "Those provisions indicate that the Commissioner's Court is a special court that is established, not for any area or province but for the whole country, in order to hear and determine disputes of a particular kind". In regard to proceedings in his court section 76(1) endows the Commission with specific judicial powers and concludes: "and generally the commissioner shall...have all such powers and jurisdiction as are possessed by a Judge sitting alone to try a civil action before a provincial division of the Supreme Court having jurisdiction at the place where the action or proceedings before the commissioner are held". And section

82(2) enacts that "any decision or order of the commissioner... shall have the same effect and shall be regarded for all purposes as a decision or order of the Provisional Division. In the result, the learned Justice of Appeal continued: ". . . The undoubted effect of the above-mentioned provisions is virtually to equate the proceedings, decisions and orders of the Commissioner's Court with those in a civil case in a Supreme Court. It was common cause that the latter's proceedings etc are not reviewable; the only remedy of an unsuccessful litigant is to appeal. The reason is that by statute only 'the proceedings of inferior courts have been and are reviewable'.

[19] The reasoning in **Gentiruco AG** comes very close to that sustained by the proponents of equality between the High Court and the Industrial Court. But lacking in the statutory provision in the **Gentiruco AG** is the presence of an express provision similar to section 19 (5) and a constitutional provision similar to section 139 (1) or section 152 which by inference place the Industrial Court in category (b) of the Judiciary. The **Gentiruco AG** case is therefore not on all fours with the present case. Section 19(5) reflects a deliberate legislative intent and is not in conflict with any provision of the Constitution. If section 19 (5) was an error, the opportunity to have it corrected became available in 2005 when the Constitution, which in section 151 (3) (a) was fully aware of the special jurisdiction of the Industrial Court, was enacted. I do not think that just because section 152 does not

mention the Industrial Court by name or category (specialized) that means that the Industrial Court is released from the review jurisdiction of the High Court, unless we read a conflict between section 139 (1) and section 152 of the Constitution. No one has suggested any, and rightly so too. There is a latent danger in the proposed review that the baby may be thrown out with the bathwater. In my view it is a wise move that the decisions of all subordinate entities exercising judicial or quasi-judicial power be ultimately liable to review by the High Court.

[20] The Amicus in paragraph 23 of their heads of argument submit: *"In the result, may it please the Honourable Court to hold that the Industrial Court is a specialized court with all the powers of the High Court in exercising such specialized jurisdiction, with Judges of same qualification as those of the High Court and issuing judgments equivalent to High Court judgments"*. The broad principle is accepted save for the holding as requested. Also, I do not agree that the judgments of the respective courts are equal. The sought for equality presupposes the equality of the courts in section 139 (1) (a) and (b). That cannot be short of a revolutionary praxis. The issue before Court seems to me the result of holding the divide between appeal and review as trifling.

[21] In **Swaziland Revenue Authority and Others**[4] the issue was whether the Industrial Court of Appeal is a "tribunal or inferior court" with the result that its judgments would be reviewable by the High Court. The Full Bench of the High Court determined that "the High Court does not have the power to review decisions of the Industrial Court of Appeal". Seemingly or rather unfortunately, that judgment was not appealed, notwithstanding its critical importance. Such judgments ought always to be tested for certainty and finality before the Supreme Court. These judgments raise constitutional issues. It is important for the Attorney General, in particular, to always approach the highest court where a lower court has made a judgment which seems to signify a turning point in the laws normal processes. Important changes in the law should be effected with due expedition. Promptly taking the issue to the Supreme Court would help avoid the situation remarked on by the court where the court (High Court) appears to be reviewing its own decision[5] because the similar point has arisen while the earlier decision on the same or similar point remains in limbo, without the certainty or finality of the Supreme Court. It is not for fun that the Attorney General intervenes in these proceedings.

[4] **Swaziland Revenue Authority and Ors v Presiding Judges of the ICA and Anor,** Case No. 1742/17
[5] Ibid at paras [7] and [8]

[22] The issue concerning the legal status of the Industrial Court and Industrial Court of Appeal *vis-à-vis* the High Court and Supreme Court is quite vexing. That the former pair of courts falls under section 139 (1) (b) has never been seriously questioned. But for the Constitution, it could even be more forcefully argued that the Swazi Courts, a complete system of national courts, have a better claim to section 139 (1) (a) membership than the industrial courts. Yet both the Swazi and the industrial courts are not 'courts of law' strictly so-called since their jurisdiction is limited to 'Swazi' and 'labour' matters respectively. On the other hand, the High Court is a court of unlimited jurisdiction and by dint of its training could as effectively deal with the matters otherwise reserved for the Swazi and industrial courts. As it is, the High Court begins with a plenitude of jurisdictional powers and only sheds some of those powers to other or statutory bodies rather than the reverse. That shedding does not affect or detract from its unlimited jurisdiction. Thus strictly speaking section 19(5) was not necessary; it is justified by considerations of abundance of caution

[23] In para [27] of the **Swaziland Revenue Authority** case is posed this question: *"How can a specialist court or specialist tribunal be reviewed by a non-specialist court"*. This question, in my view and with respect, misses the fundamental nature of the review provided in terms of section 19 (5). The wording of the subsection is

clear in that the review is limited to grounds sounding in common law and not in labour or industrial issues which fall under the protected sphere of the industrial court. Once the narrow scope of the review is properly delineated the problem with review by the High Court dissipates into thin air and the subsection 19(5) stands as firmly as ever. There is no conflict between section 8 (1) and section 19 (5) of the IRA. Period. The question posed is a non-issue; only a result of a misunderstanding.

[24] As the court in para [30] of **Swaziland Revenue Authority** says that before the Constitution in 2005, decisions of the Industrial Court of Appeal were not reviewable, who then after 2005 said these decisions should be reviewable? It then becomes necessary to trace the issue to the first review in order to find out what happened and who said what. Time however does not permit this inquiry in light of our High Court Library and the many gaps in SwaziLii. But on the face of it, and generally, a Constitution imposes its own authority and discipline in the area of its operation. If the ICA was a superior court before the Constitution that superior status was lost with the Constitution coming into force. Whatever may have been the understanding before 2005, a closer and proper reading of section 21(4) throws a new light in the debate.

[25] If the review of the decisions of the Industrial Court of Appeal is not traceable to this sections 19 (5) which predates the Constitution, then it must be traceable to section 152 of the Constitution. I do not believe that section 152 was meant to disrupt the preexisting arrangements. If decisions of the Industrial Court of Appeal must be reviewed on any ground notwithstanding that they are final, a balancing process must occur with a view to disrupt the preexisting state of affairs as little as possible. To that end, any review of the Industrial Court of Appeal decisions must occur within the context of section 19(5). This approach retains the finality of the decisions while subjecting them to the limited review in terms of section 19 (5). This compromise would seem to provide a win-win result. For, if we say decisions of the Industrial Court of Appeal are beyond all review under the IRA then the finality of these decisions would be rendered nugatory because section 152 must prevail and the exemption from review by the High Court would otherwise have to be provided in terms of the Constitution itself, preferably under section 152.

[26] In my view, to revoke section 19 (5) (as unconstitutional) would result in the Industrial Court as a specialized or specialist court coming to an end. There would be no basis for limiting the scope of review on the assertion that the Industrial Courts are a specialised court system. It will be noted also, that the High Court under section 152 may not only review the decisions of the Industrial Court of Appeal but may

also supervise its performance by orders, directions etcetera as may be necessary. The High Court has these powers not only by reason of section 152 but also because it is a superior court of unlimited jurisdiction capable of doing on due request anything necessary to secure fundamental justice and regular performance of any lower order of adjudicating court or tribunal. Further, if the decisions of the Industrial Court of Appeal were at all not reviewable by the High Court, it would, for all intents and purposes, mean that the Industrial Court of Appeal is a superior albeit in a class of its own beyond section 139 (1) and 152 and as such a law unto itself. As the law of the land stands, only an amendment of the Constitution would elevate the industrial court to the level that some stakeholders might desire.

[27] In para [33] of the **Swaziland Revenue Authority** it is stated: "....Industrial Court of Appeal judgments cannot be final for purposes of appeal and not final for purposes of review, and certainly not for review by a court that for all practical intents and purposes is inferior to it, but for a classification that possibly did not at all reflect upon the substantive status of the Industrial Court of Appeal". With the greatest respect to the learned Judges in that case, to say what is asserted in the foregoing statement is in the first place, to deny the basic destination between appeal and review. In a word, appeal challenges the merit while review concerns the

the magistrate's court through the High Court to the Supreme Court. The Swazi law litigant is in a worse situation. In that system, the matter may begin at the chief's council, move to the Swazi court, Swazi Court of Appeal, Higher Swazi Court of Appeal, the Judicial Commissioner, the High Court and finally the Supreme Court or the Royal Court of Appeal (at Masundwini). The Swazi Court is also a specialized court. Striking down any section of the IRA will not materially change the rules of the game. So long as section 139 (1) and 152 stand as they are, no amount of clothing the Industrial Court of Appeal with superior law status as section 8 (3) or 20(1) does to the Industrial Court or Industrial court of Appeal will transform either court to a superior court immune from review by the High Court.

[30] The Respondents have been harping on about section 152 as if it is the long sought-after bridge to the 'promised land'. In this regard, the Respondents point at the wording of the section and argue that the absence of "specialized courts" means that the IC is not one of the categories of subordinate courts subject to the review and supervisory power of the High Court under that section. The argument in my view is misplaced. All that the drafter did was to cite the generic types of entities exercising judicial or quasi-judicial power liable to review and supervision by the High Court. In the result the reference to "all subordinate courts" does not mean only the Magistrates Courts. When all is said and done, the 'specialised courts' are

but subordinate courts of a kind. By reason of the non-mention, it is argued that section 152 does not apply to specialized courts, viz. the IC and ICA. The argument does not pass muster.

[31] Section 151 (3) (a) answers to the concerns of the Respondents in that 'review' is not one of the areas of jurisdiction excluded from the High Court. I do not understand how section 151 (3) (a) can be said to exclude the review in the case of the IC and ICA. Actually that conferment is what we are concerned about here at the instance of the Respondents. In passing, I note that 'court martials' are not mentioned under section 139 (1) (b). But can it be seriously argued that but for section 151 (3) (b) these subordinate courts are not contemplated under section 139 (1) (b)?

[32] In para [33] of the [majority] judgment it is argued that by the establishment of the IC and ICA with powers respectively said to be similar to those of the High Court and Supreme Court these latter courts were fully substituted in labour adjudication. One needs only point out (or better still, remind) that the High Court and Supreme Court were never in the first place, that is, after the creation of the industrial courts, in 1996, full players in labour adjudication. These regular courts

had only a limited role to play, that is, that of providing review to industrial court decisions. With respect, the creation of a full-time IC and ICA has in no way changed the legal relationship between the High Court and on the one hand and the IC (and ICA) on the other hand. The fact that the qualification and appointment of the judges of the respective courts are similar only brings to the fore the alleged specialization of the judges of the industrial courts. Trollip JA in **Gentiruco** case did rely on the qualification and appointment but with respect, I do not think that much emphasis ought to be placed on that. It has not been argued or shown that the judges of the industrial courts go through a different professional training and are specially qualified for their appointment: at least not in this jurisdiction.

[33] An example has been given from Botswana in terms of a 2002 amendment to the Constitution to provide that "subordinate court" means "any court other than the Court of appeal, the High Court, a Court Martial or the Industrial Court". The earlier position as found in the **Botswana Railways** case[6] categorized the Industrial Court as an inferior or subordinate court. The change brought about in 2002 supports the position in this judgment that a 'subordinate court' is what the law of the particular state has ordained. Reading the various provisions of the laws of eSwatini leaves no

[6] **Botswana Railways Organisation v Setsogo and Others** 1996 BLR 763 (CA)

doubt that the I.C. (or the ICA) is not a superior court, and must therefore be a subordinate court, that is, a court subordinate to the High Court and as such reviewable by it, unless otherwise expressly or by necessary implication exempted. Rather curiously, the Botswana law would seem to leave the IC neither a superior nor a subordinate court.

[34] If under the law of Botswana the IC is a superior court, it seems to me, this is meant to avoid its decisions being reviewed by the High Court. Even then, the IC certainly cannot be in the same league as the High Court which has 'unlimited' original jurisdiction in civil and criminal matters. For the jurisdiction of the IC must necessarily be limited and confined to labour issues, even if it exercises review jurisdiction in connection with labour matters. Interestingly, the 2004 Constitution of Malawi, in section 110 (2) reads: "There shall be an Industrial Relations Court, subordinate to the High Court, which shall have original jurisdiction over labour disputes...." Unless otherwise concurrent 'original' would seem to equate to 'exclusive' (jurisdiction).

Conclusion

[35] In my opinion, the revocation of section 19(5) from the Act would not achieve the desired end, without the Constitution being also amended. Because the

Constitution does not confer a superior status to the IC section 4 of the High Court Act would still render the IC liable to review by the High Court. This is so, because section 139 (1) (b) has relegated the IC as a specialized court to a subordinate or inferior status. It may be submitted further that the correct understanding of section 151 (3) (a) is that the High Court retains the review jurisdiction over decisions of the industrial courts. Finally, it is section 152 that would also have to be overcome to free the IC from the shackles of the judicial review. Both section 139 and section 151 are specially entrenched. There would be no point in this Court declaring section 19 (5) unconstitutional if nothing will change as far as concerns the ulterior purpose for the pro-changers. The decisions of the IC will cease to be susceptible to judicial review when the IC ceases to be an inferior court in terms of section 139 (1).

[36] The decisions that are ordained as 'final' under section 21(4) are the appeals which come before the ICA in terms of section 19(1), that is on questions of law only, as founded on labour laws as set out under section 8 (1). These appeals must ordinarily end before the ICA because there is no other 'industrial' court structure above the ICA. Section 21(4) is thus perfectly in order. The position is different in the case of review which is not a labour-related issue even as it may arise in labour/industrial litigation. In this respect, I agree with Mr. Dlamini, counsel for the party opposing the striking down of section 19 (5), in his heads under paragraphs

9.1,10 and 10.1. Further in my view, the Constitution of 2005 being a later law impliedly 'blessed' the *status quo* established under the IRA of 2000. The drafters of the Constitution were clearly alive to the set up under the Act hence the mention of 'specialised' courts in section 139 (1) and 'original' and 'appellate' jurisdiction in section 151(3). The diversion of 'review' to the High Court was thus deliberate and not a mistake or a default. Thus it is fair to say that the law-giver was aware of the difference between review and appeal and the suitability of the respective courts assigned to deal with them. What may have been missed in earlier considerations of this issue is that section 21(4) reads: *"The decision of the majority of the judges hearing an appeal shall be the decision of the Court and such decision shall be final"*. Clearly therefore, the decision that is said to be final in not of the ICA but of the IC, for the IC is the 'Court' in terms of the Act. And that is the decision which liable to review under section 19 (5). This should end the debate once for all.

[37] It should always be borne in mind that: *"The system of judicial review is radically different from the systems of appeals. When having an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful' on unlawful?' Rights of appeal*

are always statutory. Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law. This remains true even though nearly all cases in administrative law arise under some Act of Parliament"[7].

[38] The above learned authors continue, (at p 29):

> *"Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not....*
>
> *Judicial control, therefore, primarily means review, and is based on a fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law".*

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[7] Wade and Forsyth, 10th ed, **Administrative Law**, pp 28-29

In casu, what the Respondent, assisted by the Attorney General, is saying is that the exclusive jurisdiction conferred on the IC is unfettered. In that the Respondents may be said to be guilty of 'constitutional blasphemy'. "Unfettered discretion cannot exist where the rule of law reigns".

[39] On the issue of jurisdiction, Herbstein and Van Winsen[8], explain:

> *"The superior courts, differing in this respect, have an inherent jurisdiction to make orders, unlimited as to amount, in respect of matters which come before them, subject to certain limitations imposed in some instances by the common law but more often by statute.* ***In other words, while the inferior courts may do nothing which the law does not permit, the superior courts may do anything which the law does not forbid****"*. (My emphasis).

It is recognized that the inherent or original jurisdiction may be subject to derogation in respect of, *inter alia*, subject-matter or amount.

[40] I am not persuaded that the I.C. as a specialized court should be declared equal to the High Court and with all the powers of the High Court. This would be a judicial

[8] Hebstein and Van Winsen **The Civil Practice of the Superior Courts in South Africa,** 3rd ed. p23.

impossibility. The Supreme Court of eSwatini has not the power to legislate that extensively. The declaration prayed for by the Respondent and company would be most irregular. The legislature did not err in retaining section 19(5). In my view, what paragraph [23] (11) of the [majority] judgment does is to perpetuate the mistake of thinking that the exclusive jurisdiction conferred on the IC by section 8(1) read with section 8 (3) includes review; the exclusive jurisdiction of the IC only applies to labour matters properly so-called. For instance, the exclusive jurisdiction does not mean that the IC may legitimately act ultra vires, or commit errors of law, or take into account irrelevant factors or fail/ refuse to hear the other side or purport to act even if not duly constituted. All these issues are not labour-related and the High Court's intervention would not interfere with the IC's exclusive jurisdiction.

[41] In **Alfred Maia**[9] the learned Hlophe J, as he then was, stated *inter alia*:

> *"[54] It has to be clarified that the decision by the Legislature not to accord the Industrial Court review powers should be assumed to have been carefully thought out and it does not render that court ineffective in any way in matters that fall within its jurisdiction... I have no hesitation to say that the Industrial Court does not require the review jurisdiction or power for it*

[9] **Alfred Maia v Chairman, Civil Service Commission** [2016] SZHC 25 (17/2/16)

to be effective. In reality there is no labour matter that is not satisfactorily dealt with because the Industrial Court has no review jurisdiction". See **Connelly v D.P.P.** [1967] 2 All ER 401 (HL) at 409

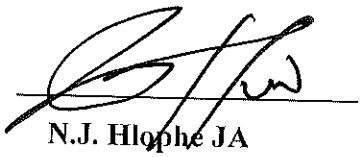
[42] The issue in **Dube v Ezulwini Municipality**[10] was whether the High Court can review the decisions of the Industrial Court of Appeal. The answer was in the affirmative considering that the Industrial Court of Appeal is not a superior court or on the same standing as the High Court or the Supreme Court. I am not persuaded to reconsider the holding in that case.

[43] In the result, and without regard to the issue of prospects, I would dismiss the application and order the matter to proceed on review as originally planned.

MJ Dlamini JA

[10] **Derrick Dube v Ezulwini Municipality and 6 Others,** Civ. Case No. 91/ 2016

I Agree



N.J. Hlophe JA

For the	**Appellant/ Respondant**	**Magagula and Hlophe Attorneys**
For the	**Respondant / Applicant**	**Mkhwanazi Attorneys**