IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CIVIL CASE NO: 70/2020**

In the matter between:

NEDBANK SWAZILAND LIMITED	1st Applicant
AFRICAN ECHO (PTY) LTD)	2nd Applicant
ESWATINI NATIONAL PROVIDENT FUND	3rd Applicant
NATIONAL EMERGENCY COUNCIL ON HIV AIDS	4th Applicant

And

PHESHEYA NKAMBULE	1st Respondent
INNOCENT MAPHALALA	2nd Respondent
MAKHOSAZANA JOHNSON	3rd Respondent
THE JUDGE PRESIDENT OF THE INDUSTRIAL COURT AND TWO OTHERS	4th Respondent

In re:

PHESHEYA NKAMBULE	Applicant

And

NEDBANK SWAZILAND LIMITED	Respondent

And

SWAZILAND AMALGAMATED TRADE UNION Applicant

And

STEALTH SECURITY SERVICES LIMITED Respondent

In re:

PHESHEYA NKAMBULE Applicant

And

NEDBANK SWAZILAND LIMITED Respondent

Neutral Citation: *Nedbank Swaziland and 3 Others vs Phesheya Nkambule and Three Others (70/2020) [2020] SZSC 04 (27 February 2023)*

CORAM: **S.P. DLAMINI JA**

S.B. MAPHALALA JA

J.P. ANNANDALE JA

J.M. CURRIE JA

M.J. MANZINI AJA

DATE HEARD: 12 October, 2022

DATE DELIVERD: 27 February, 2023

Summary: *Civil Law and Procedure – Order granted by consent for the consolidation of various matters pending before this Court in its Appellate and/or Review jurisdictions – The common denominator among the matters is the question whether the Superior Court's judicature of eSwatini have jurisdiction to entertain labour related matters* ***vis-a-vis*** *the* ***dictum*** *to the contrary pronounced by the Supreme Court exercising its review jurisdiction in the matter of* ***Cashbuild Swaziland (Pty) Ltd*** *vs* ***Thembi Penelope Magagula Case No.26B/2020 SZSC 31(09/12/2021) (Cashbuild Swaziland)*** *– Held that the* ***dictum*** *of the Supreme Court in the* ***Cashbuild Swaziland*** *judgment calls for review and correction – Held that the Constitutionality of Section 19(5) of the IRA was not properly raised and did not fall for adjudication by the Supreme Court on review – Held that the judgment of the Supreme Court on review is hereby reviewed and set aside save for the order as to costs – Held that the High Court and by extension the supreme Court have powers to review decisions, rulings, orders and judgments of the Industrial Court, CMAC, and labour arbitration Tribunals. – Held that the parties to these proceedings and other parties whose matters were held in abeyance pending the outcome of this matter are now at liberty to pursue same in accordance with the applicable rules. – Held that no order as cost is made.*

JUDGMENT

S. P. DLAMINI – JA

INTRODUCTION

[1] This is an application for a review (second review) of the judgment of the Supreme Court exercising its review jurisdiction as envisaged in Section 148(2) of the Constitution Act No.1 of 2005, of the judgment of this Court in **Cashbuild Swaziland (Pty) Ltd vs Thembi Penelope Magagula Case No. 26B [2021] SZSC 31 (09/12/21) (Cashbuild Swaziland)** delivered by the full Bench of this Court on 9 December 2021(the first review).

[2] Notwithstanding the above, the parties now pursuing the matter before this Court are not the parties in **Cashbuild Swaziland.** This novel legal situation is dealt with below.

[3] The Application raises a complex legal web of several issues, namely;

- Whether the jurisdictional requirements for the launch of proceedings under Section 148 have been met.
- The legal purport of the impugned judgment, namely **Cashbuild Swaziland.**

- The hierarchy of the Courts with the High Court and the Supreme Court on the one hand and the Industrial Court and the Industrial Court of Appeal on the other hand.
- The location of the review authority in labour matters in view of both the existing laws particularly both the Constitution and the common law.
- The existence or lack of review powers of the High Court by extension the Supreme Court over arbitration on CMAC processes post the **Cashbuild Swaziland** Case.

[4] At the outset, I wish to place on record two challenges faced by the Supreme Court in dealing with review applications under Section 148;

Firstly, due to the small size of the Bench it is sometimes unavoidable for the Honourable Chief Justice to empanel a justice or justices who might have heard an aspect of the case subject to the review. For the record, I sat on the **Cashbuild Swaziland** on appeal. Before the hearing I confronted the issue of recusal and was satisfied that I was not conflicted particularly because the second review was concerned with a legal question that had not been subject of the first review.

Secondly, I am troubled by the fact that when a matter comes for a second review such as this one, five judges sit in review of five judges of the same Court. In my humble view at least a Bench of seven judges could be worth considering in a second review application. Again this must be due to the small size of the Bench.

PARTIES

[5] The parties are important in any given case. In this matter, however, it is more the relief that the parties are seeking than themselves. As already alluded to above, the parties are now different from those in **Cashbuild Swaziland**.

In the present proceedings we have as Applicants **Nedbank Swaziland Limited and 3 Others vs Phesheya Nkambule and 4 Others** as Respondents. The explanation for these parties to become the litigants before this Court is given below:

In addition, the Attorney General was invited to participate in the proceedings as it was the case in the proceedings in **Cashbuild Swaziland** and accordingly filed his papers before this Court.

CONSOLIDATION OF MATTERS

[6] There were applications for the consolidation of the matters launched by some of the parties on either sides of the present proceedings. These applications for the consolidation of the matters were not opposed and were, therefore, granted by this Court by consent of the parties.

RELIEF

[7] The relief sought by the Applicants in the present proceedings is very difficult to characterize; a strong case can be made in that it is set to review and set aside **Cashbuild Swaziland** yet at the same time it is akin to a general declaratory in the sense that the outcome of these proceedings does not necessarily resolve the individual disputes between the litigants involved. **Cashbuild Swaziland**, it is contended by the Applicants, creates a legal *cul de sac* against litigants pursuing labour related matters before the High Court and the Supreme Court.

[8] If this Court is persuaded by the arguments of the Applicants and grant the relief sought, the consequence of that would be that a legal pathway will be opened for litigants to pursue labour related matters before the High Court and the Supreme Court. This will allow the pending matters on review by the Applicants and others who are awaiting by the sides for the outcome of these proceedings.

BACKGROUND

[9] It is not necessary to give a detailed background of **Cashbuild Swaziland** for two reasons; firstly, as it appears above, the crisp issues to be considered and decided by this Court rest squarely on legal points. Secondly, as already, stated the parties in these proceedings were not the parties in **Cashbuild Swaziland** hence the facts

of **Cashbuild Swaziland** will add no value to the proceedings save for very limited instances.

GENUS

[10] In **Cashbuild Swaziland**, the employer **(Cashbuild Swaziland)** instituted a disciplinary hearing against an employee (**Thembi Penelope Magagula**). Based on the outcome of the hearing, the employer dismissed the employee.

[11] The employee was not happy with the dismissal, and firstly approached **CMAC** but the dispute was not resolved and then the Industrial Court ordered reinstatement and compensation arguing that her dismissal was unfair and she was successful.

[12] The employer launched review proceedings before the High Court seeking to review and set aside the judgment of the Industrial Court. The High Court dismissed the employer's application for a review and confirmed the judgment of the Industrial Court.

[13] The employer proceeded to launch an appeal against the judgment of the High Court before this Court. The appeal was dismissed with costs.

FIRST REVIEW

[14] The employer proceeded to launch review proceedings in terms of Section 148(2) of the Constitution to review and set aside the judgment of this Court in its appellate jurisdiction.

[15] The Court at paragraph 2 of the impugned judgment *mero motu* states that;

" [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 motu, 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***
   - ***1.2 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 specialized, subordinate and Swazi Courts or Tribunals exercising a Judicial function as Parliament may by law establish.***
   - ***1.3 The resultant dichotomy between the Courts of general jurisdiction namely the superior Courts and the specific jurisdiction of the specialized 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 argument relating to the above issues and if appropriate, the merits of this Review Proceeding".***

[16] Firstly with respect, my interpretation of Section 148(1) does not give the Court the powers it exercised in granting the above order.

Furthermore, the Court does not give any explanation as to the basis and nature of the supervisory powers it exercised herein and, most importantly, over whom were the supervisory powers being exercised.

[17] In my view, the Supreme Court cannot supervise itself subject to the provisions of Section 148(2); at least not in terms of Section 148(1).

[18] The point that the Supreme Court is not a Court of first instance was made in the matter of **Tswelokgotso Health (Pty) Ltd vs Rivi (Pty) Ltd and 4 Others (07/2019) [2019] SZSC 36 (17/09/2019)** per Lordship Currie AJA (As she then was). Her Ladyship cited with approval what Justice Ota said in the matter of

Clement Nhleko vs MH Mdluli and company and Another Civil Case No. 1393/09 (unreported) where her Ladyship stated that;

> ***"I find it expedient to add here, that it is undoubtedly the duty of the Court to guard its jurisdiction jealously. It is however not the duty of the Court to expand its jurisdiction, that is the province of legislation. For a court to assume jurisdiction that it clearly lacks is to tow a dangerous path. This is because jurisdiction is the soul and foundation of every case. Without it all the labourers, the Court, Attorneys as well as litigants labour in vain. This is due to the fact that the decision of the court at the end of the day will amount to a nullity by reason of that lack of jurisdiction"***

[19] Secondly, the Court acting in the manner it did in my view did not take into consideration sections 146, 147 and 151 of the Constitution. Section 146 states, *inter alia,* that:

> **" (1) The Supreme Court is the final Court of Appeal. Accordingly, the Supreme Court has appellate and such other jurisdiction as may be conferred on it by this Constitution or any other law. (My own underlining).**
>
> **Section 147 states, *inter alia*, that "(1) An Appeal shall lie to the Supreme Court from a judgment, decree or order of the High Court". (My own underlining).**
>
> **Section 151 provides, *inter alia*, that "(1) The High court has –**
>
> **(a) Unlimited original jurisdiction in Civil and Criminal matters as the High Court possesses at the date of commencement of this constitution; ...."**

[20] A perusal of the papers demonstrates that the issue of the Constitutionality of Section 19(5) and the related matters was never raised in the proceedings before

the Industrial Court (IC), the High Court (HC) and the Supreme Court in its appellate jurisdiction. The matter was raised for the first time by the Supreme Court itself in its review jurisdiction under Section 148(2).

[21] It is trite that the Supreme Court is a creation of the Constitution and may only exercise such powers as conferred by this Constitution namely Appellate, Supervisory and Review powers in accordance with the law.

[22] In my view, the exercise of the powers by the Supreme Court to raise a Constitutional matter in the manner the Court did was not in accordance with the law and the Court's judgment stands to be reviewed and set aside on this ground alone.

[23] Even if one takes the view that the Supreme Court was correct to conclude that Section 19(5) was relevant, it did not lie with the Supreme Court in its review jurisdiction to proceed and determine the issue. I dare say that even the Supreme Court in its Appellate jurisdiction would not be so entitled. The matter would have had to be referred to the High Court to entertain the constitutionality issue as the Court empowered by the Constitution to exercise original jurisdiction over all

civil and criminal matters save for those that come to it in its appellate jurisdiction as enshrined in the law.

[24] This should be of serious concern in that the constitutionality issue raised in the manner it was raised by the Court, it became the ultimate basis on which the impugned judgment was anchored.

[25] Notwithstanding the aforegoing and for the sake of completeness, I will proceed to deal with the other related issues that were canvassed at the hearing and the conclusions in the impugned judgment.

[26] The main issue dealt with in the first review has been canvassed multiple times in eSwatini case law. This core issue is whether the High Court has the power to review decisions made by the Industrial Courts – the Industrial Court (IC) and the Industrial Court of Appeal (ICA). The High Court is vested with inherent power to review all decisions by subordinate courts and tribunals or any lower adjudicating authority, as per Section 152 of eSwatini's Constitution. The core question then includes an enquiry into whether the IC and the ICA are subordinate courts, tribunals or lower adjudicating authorities.

[27] The Court in the impugned judgment ruled that the High Court does not have the power to review the IC or the ICA, as the IC and the ICA are not subordinate courts. The Supreme Court in **Cashbuild Swaziland** found that the IC and ICA are specialised courts in terms of Section 139(b) of the Constitution, not subordinate courts. The Court in **Cashbuild Swaziland** went further, stating that the IC is on the same level as the High Court and the ICA the same level as the Supreme Court, thus courts on the same hierarchical level cannot review each other's decisions. Section 152, prescribing the High Court's review powers, does not apply to the IC and ICA, according to **Cashbuild Swaziland**.

[28] The Court concluded that the IC and ICA are equal to the High Court and Supreme Court, respectively. This is partly due to the High Court having no original or exclusive jurisdiction in matters for which the Industrial Court has exclusive Jurisdiction, as per Section 151(3) of the Constitution. Further, Judges of the IC and ICA are appointed on the same terms and criteria as Judges of the High Court and the Supreme Court – Judges are appointed by the Appointing Authority on the recommendation of the Judicial Service Commission (JSC). Cashbuild Swaziland found that neither the High Court or Supreme Court have review jurisdiction over the IC or ICA.

[29] The Court therefore, found that Section 19(5) of the Industrial Relations Act (IRA) was unconstitutional. Section 19(5) reads as follows:

> ***"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."***

Section 19(5) provided a review power to the High Court of the IC, and as per the Supreme Court decision in **Cashbuild Swaziland**, the impugned Section was ruled unconstitutional.

[30] The dissenting judgment found that the IC and the ICA could not, short of a Constitutional amendment, be equal to the High Court and the Supreme Court. The dissenting judgment did acknowledge that the ICA is the final stop in terms of appeals; no appeals are to be heard against decisions of the ICA. This is due to the express appeal power given to the ICA by Section 21(4) of the IRA – The ICA is empowered to hear appeals from the IC. The dissenting judgment pointed out that the power to review is not bestowed upon the IC or the ICA, and if it were, it would be expressly provided for by the legislature.

[31] The dissenting judgment opined that, because the IC has jurisdiction to hear labour - related matters while the High Court has original and unlimited jurisdiction in civil and criminal matters, the former cannot be said to be equal to

the latter. In the Court's hierarchy in eSwatini, the dissenting judgment placed the IC and the ICA under or below the High Court.

JURISDICTIONAL REQUIREMENTS UNDER SECTION 148(2)

[32] The law relating to Section 148(2) ought to be settled by now. Unfortunately, there are aspects of the jurisprudence relating to the application of Section 148(2) that are far from settled and are fraught with inconsistencies, manifested in several judgments of this Court.

[33] I have termed the proceedings before this Court a "second review". In addition to usual jurisdictional requirements, it raises the immediate question how many reviews are permissible under Section 148(2). There are judgments of this Court that have adopted two different approaches. One approach interprets Section 148(2) to permit a single review and the other approach interprets the Section to allow more than one review subject to an application made and granted by the Court for such a review to proceed. In this regard see: **Siboniso Clement Dlamini vs Walter P. Bennet and 3 Others (45/2015) [2015] SZSC 21 (30th May, 2017) and Pius Henwood N.O. vs Effie Sonia Henwood N.O. and Another (10/2018) [2019] SZSC32 (11/09/2019).**

[34] There is neither a formal application under Section 148(2) nor a declaratory before this Court. Notwithstanding this unothordox legal scenario a case may be made for either on the papers filed of record. Therefore, the matter before us is *sui generis* in that it is not the standard review application. However, both in terms of the relief sought and the Heads of Argument filed by the parties this is effectively a review application of **Cashbuild Swaziland.**

[35] In view of the fact that the issue of the struck down of Section 19(5) of the IRA was ordered by this Court in its review jurisdictions, I am inclined to proceed on the basis that this matter is substantively a second review; the Applicants on the one hand are seeking for this Court to review and set aside the impugned judgment on various grounds of review that they have advanced in the papers before this Court. On the other hand, the Respondents oppose the Applicants' application and contend that the impugned judgment is legally not susceptible to be reviewed and further that it must accordingly be upheld and the Applicants' application dismissed.

[36] In my view, a review is the only approach to reopen, reconsider and either confirm or set aside the **Cashbuild Swaziland** judgment.

[37] Apart from a review any other approach such as an appeal is legally bound by **Cashbuild Swaziland** and as a matter of fact matters have been halted by the Courts pending the outcome of this matter. See **National Emergency Council on HIV AIDS ('NERCHA') vs Presiding Judge of the Industrial Court and 22 Others (CIV 73/21) [2022] SZSC 4 (08 April 2022).**

[38] Therefore, it is in the interest of justice that this Court review and confirm or set aside **Cashbuild Swaziland.**

[39] What is not expected and would amount to a legal farce would be that this judgment co-exists with the judgment in **Cashbuild Swaziland.** This is particularly the case where this judgment arrives at a different conclusion to **Cashbuild Swaziland.** This would result in total chaos in this area of law.

[40] The Courts and the litigants expect from this Court a definitive direction regarding the rights of parties in so far as to the existence or otherwise the review powers of the High Court and by extension this Court over labour matters.

[41] In **Queen Sibongile Winnfred Zulu and Queen Buhle matter and 19 others, the High Court of South Africa Case No. 2751/2021P, consolidated with case**

No. 2752/2021P (unreported), His Lordship Madondo AJA cited with approval AC Cilliers *et al*: Civil Procedure of the High Courts and the Supreme Court of Appeal of South Africa S ed (2009) at Ch43-138 and **JT Publishing (Pty) Ltd and Another v Minister of Safety and Others 1997 (3) SA 514(CC); 1996(12) BCLR 1599 (CC)** para 15, had this to say;

> ***"... this court should have regard to various factors, namely whether the law is clear on the subject matter, the existence or absence of a live dispute, the utility of the declaratory relief and whether, if granted, it would settle the question in issue between the parties. The courts will not grant relief in respect of an issue which is moot, abstract, hypothetical or academic".***

While the learned judge in that particular case was concerned with a declarator, in my view this principle applies to other areas of law such as the substantive issues before this Court.

[42 Notwithstanding all the genuine questions that linger on the characterization of the proceedings before this Court, I think as shown above it makes good legal sense to proceed with this matter as a second review.

[43] The Courts are legally enjoined to hear and resolve disputes between parties and not to engage in a colourful academic discourse leading to nowhere. However couched, the proceedings before this Court are that this Court is ultimately invited

to review its judgment in its review jurisdiction in terms of Section 148(2) in Cashbuild Swaziland as the unavoidable legal conclusion.

[44] I remain doubtful that all the jurisdictional requirements for the review before this Court have been met and this is more so because there was no application made and granted by this Court allowing a second review to proceed.

[45] Be that as it may, there is too much water under the bridge, as it were. The hearing was proceeded with and there were no challenges to the matter being heard as falling under Section 148(2). This is not to say the Courts must not interrogate matters judiciously simply because there is no opposition.

[46] The Court is also not lost to the uncertain state of affairs currently prevailing regarding the review of labour matters in our jurisdiction.

[47] Without setting any form of precedent regarding the jurisdictional requirement for a further Section 148(2) application, this Court proceeded to hear the merits of the Application.

[48] This is more so because after more than 15 years from the promulgation of the Constitution there is neither an Act nor Rules operationalizing Section 148 as envisaged by the Constitution, hence the inconsistences. These inconsistences harm our justice system. Any day that goes by without the envisaged Act or Rules is one day too many. Hopefully, the participation of the Attorney General in these proceedings will result in some impetus to resolve this legal anomaly.

HEARING BEFORE THIS COURT

[49] On the one hand, the Applicants seek to have the impugned judgment of this Court reviewed and set aside, contending that there were misdirections on various grounds on the part of the Court.

[50] On the other hand, the Respondents contend that the application to have the impugned judgment reviewed are set aside is without merit and ought to be dismissed.

[51] The Attorney General aligned himself with the stance taken by the Applicants.

APPLICANTS' CASE

[52] It was submitted for the Applicants that there are three types of review applicable to our law namely, "the review of inferior courts, the common – law review of administrative authorities and a "wider" form of statutory review".

The case of **Johannesburg Consolidated Investment Company** vs **Johannesburg Town Council 1903 TS 111 and 116** was advanced as the basis for the above argument wherein Innes CJ stated that;

> ***"Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear irregularity in the performance of this duty, this Court may be asked to review the proceedings complained of and set aside or correct them. There is no special machinery created by the Legislature; it is a right inherent in the Court".***

[53] It is contended for the Applicants that the High Court has inherent power of review and that at common law the Superior Courts especially the High Court retains the inherent power to review a decision of an administrative body such as Conciliation, Mediation and Arbitration Commission (CMAC). This power, according to the Applicants, is confirmed by Sections 151(1) and 152 of the Constitution with regard to the Industrial Court (IC) and the Industrial Court of Appeal (ICA). It is submitted that in terms of Section 152 of the Constitution the legislature gives the High Court "Review and Supervisory" powers;

> ***"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."

It is contended for the Applicants that whilst there are certain exclusions curtailing the jurisdiction of the High Court per Section 151(3) of the Constitution, such exclusions only relate for example on curtailing the jurisdiction of the High Court in so far as original and Appellate jurisdiction is concerned over the IC. Therefore, according to the Applicant, the High Court does not have concurrent original jurisdiction to consider issues that are exclusively for determination by the IC.

It is, however, contended for the Applicants that when the High Court exercises the power of review, the court is neither exercising original nor appellate jurisdiction over the IC.

It is further contended that in terms of the hierarchy of the Courts, the Industrial Court of Appeal is not at par with the Supreme Court. Furthermore, it is submitted for the Applicants that the Industrial Court is subordinate to the High Court as per Section 152 of the Constitution.

It is contended for the Applicants that when looking at the jurisdiction of the Industrial Court, particularly Section 6 of the Industrial Relations Act (IRA) read with Sections 8, 17,19 and 65, Section 19(5) is crafted specifically to order for a residual area namely review not covered by both the IC and ICA. It is contended for the Applicants that the provisions of Section 19 and especially Section 19(5) are not inconsistent to the Constitution.

RESPONDENTS' CASE

[54] The Respondents' Heads of Argument were very brief and did not mount any significant challenge regarding the striking down of Section 19(5), at best.

It is contended for the Respondents that the ICA is the apex Court in labour matters and therefore its decisions are final. Reliance is placed on the matter of **Arthur Mndawe and 74 Others vs the Central Bank of Swaziland High Court Case No: 40/2011)[2011] SZSC 19 (31 May) 2011** for this proposition. The case of **Memory Matiwane vs the Central Bank of Swaziland** – Industrial Court of Appeal – (*infra)* is also relied upon by the Respondents.

ARGUMENTS FOR THE APPLICANTS

THE CASE LAW AND ANALYSIS

[55] Throughout the case law on this issue, what is clear is the need to differentiate between the processes of appeal and review. Appeals are, broadly, necessary whether there is question regarding the correctness or incorrectness of a decision. Review, broadly, entails an inquiry into the lawfulness of a decision. Appeals are generally accepted to be statutorily regulated. They may only take place in situations where a statute provides for an express right to appeal. Review, on the other hand, is an inherent power that exists at the common law level. In many cases, the ability to appeal exists only when it is mentioned in a statute, and the

ability to review is only excluded when such an exclusion is mentioned in the statutes.

[56] This Court has previously concluded that the High Court may review decisions of the IC. In 1997 the Supreme Court in **Dlamini vs President of the Industrial Court (23/97) [1997] SZSC 1(01 January 1997)** made sure to differentiate between appeals and reviews, stating that the High Court did not have appeal jurisdiction but it did have review jurisdiction over the IC under common law grounds. The grounds include ***"the fact that the decision in question was arrived at arbitrarily of 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".***

[57] In 2000 this Court confirmed that the High Court may review decisions of the IC in **Memory Matiwane vs Central Bank of Swaziland [2000]SZSC 25(01 December 2000**. The Supreme Court stated that it is ***"abundantly clear therefore... that the Legislature gave jurisdiction to the High Court to review decisions of the Industrial Court only."*** In this case, **"only"** meant that the High Court could not review the decisions of the ICA. The Supreme Court argued that if Parliament intended to give the High Court the power to review the ICA's decisions it would have expressly provided for that. Remaining within the ambit of the ICA, the Supreme Court decided in **Swazi Observer (Pty) Limited vs Ngwenya and others (19/2006) [2006] SZSC 3(01 May 2006)** that the Court of Appeal did not have jurisdiction to hear appeals from the ICA.

[58] The position of the law on the core issue canvassed in **Cashbuild Swaziland** was summarized as follows in **Swaziland Revenue Authority and Others vs Presiding Judges of the Industrial Court of Appeal and Others (1743/2017) [2018] SZSC 209 (25 September 2018):**

> ***"The constitution of this country was promulgated in the year 2005. On both sides of 2005- before and soon thereafter, the position of the law on this subject pointed in one direction – that judgments of the Industrial Court of Appeal are final, per Section 21(4) of the creating statute, and therefore neither reviewable nor appealable."***

[59] According to the High Court in **Swaziland Revenue Authority**, the norm established in law was for the High Court to have review jurisdiction over the ICA. The Supreme Court held that "***There is absolute agreement that prior to the advent of the constitution of this country decisions of the Industrial Court of Appeal were not reviewable by the High Court***", as per the **Memory Matiwane** judgment. The 2005 eSwatini Constitution, mentioned in the quote above, brought with it a clearer delineation of the judiciary in Section 139 and 140. Primarily, Section 139(1) provides:

> ***" The Judiciary consists of -***
>
> ***a. the Superior Court of Judicature comprising -***
>
> ***i. The Supreme Court, and***
>
> ***ii. The High Court;***
>
> ***b. Such specialized, subordinate and Swazi courts or tribunals exercising a judicial function as Parliament may by law establish."***

[60] What constitutes subordinate courts and where the IC and ICA fit into the above judicial hierarchy has provided grounds for disagreement within the eSwatini Judiciary ever since. In the **Swaziland Revenue Authority** case, the Court did

not deal with whether the High Court has review jurisdiction over the IC. It did however, stress the importance of Section 152 of the Constitution which states:

> ***"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 purposes of enforcing or securing the enforcement of its review or supervisory powers."***

[61] Whether the IC falls within the review jurisdiction of the High Court was therefore not decided in the **Swaziland Revenue Authority** case. The High Court in this case did refer to the change in the position on the ICA, stemming from the 2016 judgment in **Ezulwini Municipal and Others vs Presiding Judges of the Industrial Court of Appeal and Others (661/16) [2016] SZSC 214, October 2016** which concluded that the ICA's decisions are reviewable by the High Court.

[62] The crux of the decision in **Ezulwini Municipality and Others** was that the ICA is a specialized tribunal or court and not a superior court under the meaning of Section 139(1) of the Constitution, and therefore reviewable by the High Court. The High Court in Swaziland Revenue Authority criticized the judgment in **Ezulwini Municipality and Others** because it diverged from the established position in law in the ICA's reviewability. Flowing from **Ezulwini Municipality and Others** the High Court in **Aveng Infraset Swazi (Pty) Ltd vs Dlamini**

(722/17)[2018] SZSC 49 (30 November 2018) decided that the decisions of the ICA are reviewable by the High Court.

[63] The Court in **Aveng Infraset Swazi** reasoned that the ICA has final jurisdiction over appeals from the IC but has no jurisdiction to review decisions of the IC. Any party thus seeking review of the ICA's decision would do so through the High Court, according to **Aveng Infraset Swazi**. This is based on the conclusion that the ICA is not a superior court, but a subordinate court.

[64] A major decision on this matter came in **Dube vs Ezulwini Municipality and Others (91/2016) [2018] SZSC 49 (30 November 2016),** wherein the Supreme Court decided that the IC is reviewable by the High Court. The Supreme Court in **Dube vs Ezulwini Municipality** reviewed the historical development of the very matter it had to hear: under the IRA of 1980, the decisions of the IC were appealable and reviewable by the High Court and from there to the Court of Appeal. The ICA was established in 1996 so that the decisions of the IC could only be appealable to the ICA, but the review power of the High Court remained unaffected. After 1996, instead of two appeals to the High Court and Court of Appeal, there was one appeal route to the ICA.

The judgment in **Dube vs Ezulwini Municipality** noted that there is nothing that says that the High Court can't review the ICA's decisions much like the IC.

[65] **Dube vs Ezulwini Municipality** located the uncertainty in Parliament's silence, for which the Court had to answer. The Court, considering whether Parliament sought finality for the ICA by having decisions of the IC appealable to the ICA but no further, pondered on whether Parliament intended for that to extend to review too. The Court acknowledged that judges of the IC, ICA, High Court and Supreme Court are recruited from same law schools and given the same training, thus judges of the High Court and Supreme Court are not unsuitable to hear labour matters. However, the Court found that due to the limited scope of the Industrial Court and Industrial Court of Appeal, they simply cannot be said to be equal to the High Court and Supreme Court.

[66] The judgment in **Dube vs Ezulwini Municipality** concluded that the IC is reviewable by the High Court, and as the ICA and IC are connected conceptually, the ICA too is reviewable by the High Court. **Dube vs Ezulwini Municipality** considered the inherent differences between appeal and review; the former is statutorily dependent, and the latter is provided for by the common law. Beyond the common law, review is provided for by section 4 of the High Court Act 20 of 1954 and High Court Rule 53 - providing for the review of all subordinate courts.

[67] The Court opined that the High Court had been ousted by Section 151(3) (a) of the Constitution in terms of original and appellate jurisdiction in matters for which the IC has exclusive jurisdiction. It noted, however, that there is no express ousting of the High Court's review powers for matters in which the IC has exclusive jurisdiction. Further, as the jurisdiction of the ICA is predicated on the jurisdiction of the IC, this includes the High Court review of the ICA. The Court found that the only other way to exclude review is for ICA to be a superior court, which it refused to accept.

[68] The **Cashbuild Swaziland** decision came after that of **Dube vs Ezulwini Municipality** and found instead that the IC and ICA are not subordinate courts but specialised tribunals with exclusive jurisdiction over all labour related issues. The status of specialised tribunal rendered the industrial courts beyond the scope of High Court review, according to **Cashbuild Swaziland**. The above shows that the position of the law on this matter has been anything but uniform.

OTHER JURISDICTIONS

BOTSWANA

[69] The Court of Appeal in Botswana, in **Botswana Railways Organisation vs Setsogo and Others (Civil Appeal No.51 of 1995) [1996] BWCA 3: [1996] BLR112 (CA) (1 January 1996),** had to decide on the status of its Industrial

Court. The Court of Appeal found that the Industrial Court was not in fact a division of the High Court and was a subordinate court. This decision was relied upon in **Dube vs Ezulwini Municipality's** position toward the IC being a subordinate court, however, it must be noted that the majority judgment in **Cashbuild Swaziland** points out that the Constitution of Botswana at the time stated that a subordinate court was any court other than the Court of Appeal. The 2002 constitutional amendment now provides that subordinate courts are those other than the Court of Appeal, High Court, Court Martial or Industrial Court.

SOUTH AFRICA

[70] In South Africa, the Constitutional Court in **Chirwa vs Transnet Limited and Others (CCT 78/06)[2007] ZACC 23; 2008 (4) SA 267(CC); 2008 (3) BCLR 251 (CC);[2008] 2 BLLR 97(CC); (2008) 29 ILJ 73 (CC) (28 November 2007)** found that the High Court has concurrent jurisdiction with the labour courts in labour matters. It reasoned that Section 157(1) of the LRA does not completely oust the High Court's jurisdiction on labour-related matters, only that it does not have jurisdiction over labour-related matters for which the LRA prescribes exclusive jurisdiction to the labour courts. The Constitutional Court labelled the labour court as a specialist tribunal.

[71] The Constitutional Court in **Baloyi vs Public Protector and Others [2020] ZACC 27** followed the reasoning of **Chirwa vs Transnet**, finding that the High Court shares concurrent jurisdiction with the labour courts in labour disputes, particularly the allegedly unlawful termination of fixed-term contracts. The Constitutional Court found that the labour court has exclusive jurisdiction over labour-related matters for which the LRA prescribes exclusive jurisdiction, but not that all labour-related matters fall within such exclusive jurisdiction. These cases may speak to the potential equality of the labour court (Industrial Court) and the High Court.

LESOTHO

[72] The Courts in Lesotho have also grappled with the review powers of the High Court. In **Teaching Service Commission and others vs Learned Judge of Labour Appeal Court and Others (CIV/APN/412/07) [2001] LSHC 150 (03 October 2001)** the High Court decided that the High Court cannot review decisions of the Labour Appeal Court (LAC). The Lesotho Constitution at Section 119(1) provides for the power of the High Court to review decisions of subordinate or inferior courts, court-martial, tribunals, boards or officers exercising judicial, quasi-judicial or public administrative functions. This review power is also provided for in Section 7 of the High Court Act.

[73] The core issue, therefore, was whether the LAC was a subordinate or inferior court. The High Court found that the LAC was not such a court and, as the Labour Court has exclusive jurisdiction over labour matters, the LAC did too. The High Court further reasoned that the LAC can't be an inferior court as it is headed by a judge of the High Court.

[74] Prior to **Teaching Service Commission and Others**, the High Court in **Scott Hospital vs Lerata and Others (CIV/APN/235/95)[1995]LSCA 174 (06 November 1995)** found that the Labour Court was a subordinate Court and thus the High Court could review its decisions. In **Seleke vs the Minister of Trade and Industry (CIV/APN/437/2020)[2021] LSHC 67(16 August 2021)** the High Court reaffirmed the review powers of the High Court as found in Section 119 of the Constitution and Section 2 of the High Court Act. The High Court found that the exclusive jurisdiction of the labour courts over labour matters did not oust the High Court's inherent power to review. The Court reasoned that if Parliament had intended to oust the High Court's review powers it would have expressly done so.

CONCLUSION

[75] The case law on this matter reveals two opposing views on whether the High Court can review decisions of the IC. There is a lack of consensus resulting in judgments that change the legal position with regularity. On labour related

matters, it could be said that the IC and the High Court are equal, and the ICA and the Supreme Court are equal. This position becomes more difficult to maintain when the HC's jurisdiction and powers are considered as a whole. The HC has original and unlimited jurisdiction to hear civil and criminal matters and has the inherent common law and statutory powers to review subordinate courts. If the HC has an inherent common law power to review, it follows that the only thing that will clearly oust this power is an express provision in the legislation excluding the power to review.

[76] What is said above, *mutatis mutandis*, applies to the ICA. In any event, what was said in **Cashbuild Swaziland** regarding the ICA could only at best be *obiter* because the jurisdiction of the ICA was never an issue in the proceedings. As a result the law prevailing regarding the ICA hitherto **Cashbuild Swaziland** remains unaltered.

[77] The majority in **Cashbuild Swaziland** does raise an important issue in their decision. If the High Court does have the power to review decisions of the IC or the ICA, or both, those seeking redress will have a longer and more laborious route to justice. Matters may make their way through the IC, then the ICA and then the High Court instead of benefitting from legal finality. This is an important

issue to consider. However, the current uncertainty regarding the position of the law could arguably be said to have created its own kind of lack of finality.

[78] There is no denying the valid consideration of the hardship faced by litigants in such a truncated legal framework. The tortuous journey through all the legal *fora* of **Cashbuild Swaziland** is a good example of this.

[79] In addition to these considerations, forum shopping by litigants for one reason or another cannot be ruled out.

[80] However part of the cause for delay is the failure to sift matters that are of proper review as opposed to appeals simply couched as reviews before the High Court.

[81] In my view it was not the call for the Supreme Court in review to struck down Section 19(5) notwithstanding the very valid considerations. Such a step constituted judicial overreach that is not legally permissible. This is based on the fundamental doctrine of separation of powers.

[82] The Attorney General is better placed to consider the issues raised in the impugned judgment and other relevant judgments and evaluate the efficacy of the law and make recommendations for legislative interventions.

[83] This is more so since the law in other jurisdictions continue to evolve and may have an impact in our jurisdiction. In this regard see the South African case of **Z. Sidumo and Congress of South African Trade Unions vs Rustenburg Platinum Mines Ltd, Commission for Conciliation, Mediation and Arbitration and Commissioner Moropa (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007).**

COURT ORDER

[84] In view of the aforegoing, the Court makes the following Orders;

1. The judgment of the Supreme Court exercising its review powers in terms of Section 148(2) delivered on 22 November 2021 be and is hereby reviewed and set aside.

2. The Constitutionality or otherwise of Section 19(5) of the IRA was not properly raised before the Supreme Court on review and did not fall for the

Court's adjudication at law and as such it remains of full legal force and effect.

3. The High Court and by extension the Supreme Court has powers to review decisions, Rulings, Orders and Judgments of the Industrial Court, Conciliation, Mediation and Arbitration Commission (CMAC) and labour arbitration tribunals.

4. The parties herein and/or litigants in the matters that are pending before the Courts and which were held in abeyance pending the outcome in this matter are at liberty to proceed with their matters in accordance with the applicable Rules of the respective Courts.

5. No Order as to costs is made.

S.P. DLAMINI
JUSTICE OF APPEAL

I AGREE

S.B. MAPHALALA
JUSTICE OF APPEAL

I ALSO AGREE

J.P. ANNADALE
JUSTICE OF APPEAL

I ALSO AGREE

J.M. CURRIE
JUSTICE OF APPEAL

I ALSO AGREE

M.J. MANZINI
ACTING JUSTICE OF APPEAL

Counsel for the First and Second Applicants: Advocate Heidi Barnes
Instructed by Robinson & Bertram Attorneys
And Musa N. Sibandze Attorneys

Counsel for the First Respondent: Mr. M. Ndlangamandla
M.L.K. Ndlangamandla Attorneys

Counsel for the Third Respondent: Mr. B. Dlamini
B.S. Dlamini and Associates

Amicus: The Learned Attorney General
Mr. S. Khumalo