IN THE SUPREME COURT OF ESWATINI

JUDGMENT

CASE NO. 70/2020

HELD AT MBABANE

In the matter between:

Phesheya Nkambule Applicant

And

Nedbank Swaziland Limited Respondent

Neutral Citation: (Phesheya Nkambule vs Nedbank Swaziland Limited)

(70/2020) [2024] SZSC 51 (29 February 2024)

Coram : MCB Maphalala CJ, MJ Dlamini, SB Maphalala, JP Annandale, JM Van Der Walt JJA

Heard: 21 September, 2023

Delivered: 29 February, 2024

Summary: Application for review in terms of Section 148(2) of the Constitution. The power of this Court to review its own decisions is a special constitutional dispensation to be employed in exceptional situations to avoid or ameliorate miscarriage of justice. The power is not intended to provide litigants with a second tier of appeal.

JUDGMENT

M.J. Dlamini JA

Introduction

[1] This Court had jurisdiction to hear this matter on appeal by virtue of section 146 (1), (2) (a) and (3) of the Constitution. This Court is a court of final appeal from decisions of the High Court. If the High court had jurisdiction to hear the matter this Court would have similar power to hear the matter on appeal. It being a labour case, the High Court had the requisite jurisdiction in terms of section 19(5) of the Industrial Relations Act, 2000 to hear the review application giving rise to the appeal to this Court and ultimately to this review in terms of section 148 (2) of the Constitution. Even without section 19(5), the High Court would still have jurisdiction in terms of section 152 of the Constitution on the understanding that the industrial courts fall under section 139 (1) (b) of the Constitution. I agree with the holding in **Nedbank Swaziland** [1] that **Cashbuild Swaziland** [2] had no authority to deliberate and determine the constitutionality of section 19(5) because of the manner in which the issue had arisen.

[2] In **Nedbank Swaziland** this Court took the opportunity to express its concern about the delay in some matters reaching finality due in some instances to forum shopping by litigants or "*the failure to sift matters that are of proper review as opposed to appeal simply*

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[1] **Nedbank Swaziland Ltd and Others v. Phesheya Nkambule and Others** [2020] SZSC 04 (27 February 2023), paras [79] and [80]

[2] **Cashbuild Swaziland (Pty) Ltd v. Thembi Penelope Magagula** [2021] SZSC 31 (9 December 2021)

Couched as reviews before the High Court"[3] It is entirely wrong and unfair in my view to hold and delay reviews before this Court on the basis of matters pending at the High Court. Reference is made to the constitutionality of Section 19 (5) of the Industrial Relations Act, 2000. The current position is that Section 19 (5) is alive and reigns supreme, thus allowing for reviews by the High Court from the industrial relations courts. The constitutionality or otherwise of the section is for now not the business of the Supreme Court. So long as it is not pending before the Supreme Court it cannot be raised before the Supreme Court for the first time. This Court should not be made to wait for an uncertain outcome.

[3] In applications in terms of Section 148 (2) of the Constitution the grounds of review are now virtually settled. These grounds or reasons are now set out under Rule 47 (1) of the Rules of this Court promulgated under Legal Notice No. 294/2023 but for some obvious technical reasons not applicable in this review, except by coincidence. This is so because this review predates Legal Notice 294. Section 148 (2) is not an ordinary review on common law grounds. This must be so from the fact that the Court is reviewing its own judgment – which is itself unusual for a Court. This Court also has no ordinary power to review judgments of the High Court; it only has appellate and supervisory jurisdiction. It is accordingly incumbent on the Applicant under Section 48 (2) to carefully toe the line between appeal and the special review under Section 148 (2). In many instances litigants have relied on High Court (common law) grounds of review in pursuit of a review under Section 148 (2). This should be avoided as it is likely to result in the denial of the application.

[4] The notice of application seeks an order "reviewing, correcting and setting aside the order issued by the Supreme Court on the 1st September 2021" and substituting it with an order of dismissal with costs. Surely a notice of application to review and set aside a particular judgment is not very helpful. An application for review ought to set out the grounds for the review, which grounds may then be amplified in the founding affidavit. It

[3] Loc.cit. NB The correct numbering of this case should be "[2023] SZSC 04" instead of [2020] SZSC 04

is not proper for the Court to have to scour an applicant's affidavit in search of the grounds for the review when these could so easily be set out in the notice. I take it that as the grounds are now set out under Rule 47 of the Supreme Court Rules it will be easy for applicants to meet this concern. Stating the grounds upfront on the notice has the advantage of averting the lapse of applicants into developing a common law review or another appeal in their founding affidavit as it sometimes happens.

[5] The Applicant's grouse in this matter is about the conclusion and order of this Court on appeal which reads:

> "[37] Consequently, I have come to the conclusion that the court *a quo* should have reviewed, corrected and set aside the decision of the Industrial Court on the basis that the said Court had misdirected itself in law or had unjustifiably adhered to a fixed principle when it concluded that it could not give a purposive interpretation of Section 39 (2) of the Employment Act of 1980, yet that amounted to it abdicating its responsibilities in the context of the matter.
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> [38] Accordingly this Court makes the following order-
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> 1. The order of the court *a quo* be and is hereby set aside and substituted with the following order:
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> 1.1. The decision of the Industrial Court upholding the application of the First Respondent asking for an interdict restraining the withholding of the 1st Respondent's salary during the time of his suspension and when judgments of other courts were awaited including the order that arrear salaries for the same period be paid by the Appellant be and is hereby set aside.
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> 1.2. In so far as the delay in concluding the disciplinary proceedings between July 2019 and June 2020 is not attributable to either of the

parties, neither of them should [either] suffer prejudice as a result of it or benefit from it.

1.3. Given that the period between July 2020 and the end of September 2020 was attributed to an on-going disciplinary process after the judgments hitherto awaited had been delivered, the Appellant is ordered to pay the First Respondent's arrear salaries for that period including all the benefits that would have accrued to him during that period.

1.4. Each party will bear its own costs."

[6] The Applicant avers that in June 2019, following delays in holding and completing the disciplinary hearing, the Respondent, as employer, withheld payment of his salary in terms of section 39 (2): *"The section is clear under subsection (2) that an employee's salary shall not be withheld for a period exceeding one (1) month. However, the Respondent exceeded one (1) month period still withholding my salary..."* In July 2019, the Applicant approached the Industrial Court resulting in a hearing in November 2019. The Applicant also avers that in January 2020 a new chairperson continued the disciplinary hearings which the Applicant duly attended until September when he was summarily dismissed by the Respondent. The November 2019 hearing before the Industrial Court culminated in a judgment in March 2020 which the Respondent challenged on review at the High Court, further appealing to this Court, giving rise to the judgment now on review.

[7] The Applicant has presented some four or five "grounds for review", hashed as follows:

1. "The court *a quo* [Supreme Court] determined the appeal using non-existent law when ultimately it ordered that I should be paid for only three (3) months, yet my salary had been withheld for over fourteen (14) months..."

2. "The court *a quo* in its judgment could not point out to any interruption that occurred in the hearing from December 2019, to then warrant a discount of the other eleven (11) months from being awarded".

3. "The court *a quo* in its basis for setting aside the judgment of Her Ladyship Q. Mabuza PJ was due to a statement made in *obiter* from para. 34 of the High Court Judgment. Such is an unusual element and which occasions a glaring miscarriage of justice in that there is no decision that was overturned for an *obiter dictum* as it has been done in my case..."

4. "The court *a quo* disregarded clear averments in the record of proceedings wherein I had submitted that since the appointment of the new Chairperson ...in December 2019, I have never at any point interrupted the disciplinary hearing. Instead, the court *a quo* took occurrences of pre-the suspension without pay in June 2019 and alluded to them as having interrupted the hearing up until July 2020. Such is a bias consideration of the facts of the matter and it is an injustice and it immediately prejudices me,..."

5. "The judgment of the court *a quo* has an unusual element of seeking to suppress employees from approaching the court even when there is a glaring unfair labour practice or illegality occurring during a disciplinary hearing..."

6. "The case before this Honourable Court is a case upon which this Honourable Court has inherent power to reconsider and revise its earlier decision wherein particular such decision result in miscarriage of justice as it is in my case".

[8] The Applicant concludes by contending *that "this is one typical case in which exists exceptional circumstances as set out in the preceding paragraphs which warrant that this Honourable Court invokes its sparingly used authority to review its own decision."*

[9] Against the application and the foregoing grounds for review the Respondent took a preliminary procedural point to the effect that the application advanced no cogent grounds for review: *"The review is being brought in terms of section 148 (2) of the Constitution, it will be submitted that the application singularly fails to establish grounds for review as envisaged in the statutory matrix."* The Respondent's deponent points out that the jurisdiction of the Supreme Court to review its own judgment under section 148 (2) *"is exercisable where there are exceptional circumstances in the interest of justice to prevent a manifest injustice and to ensure fairness. It is designed to correct a manifest injustice which would have been brought about by the judgment of the Supreme Court."* And that the *application "is bereft of the necessary primary facts and legal conclusions to sustain an application for review under Section 148 (2); as it is, "the applicant seeks to have a recapitulation and re-hearing"* of the appeal.

Has the Applicant made out a case for review under 148(2)

[10] Where the question is raised, it is important to determine the issue even at an early stage. For if a case has not been made out there would be no point in the

proceedings. An applicant may make a case for review under common law but not necessarily a case for review in terms of section 148(2). The impression should not be created that this Court on appeal is not the final Court in this jurisdiction. The review under section 148(2) is therefore a leeway which the Constitution has permitted in special circumstances in the interest of justice. It should only be narrowly and sparingly employed, bearing in mind the need for finality of litigation. The purpose of section 148 (2) is not to avail a second appeal, a second bite at the cherry. Cases of attempted second appeal under the cloak of review are not unheard of in this jurisdiction. They must not be permitted.

[11] The Respondent avers that the Court's jurisdiction to hear this specific application has not been properly exercised: *"The applicant has failed to establish the requisite jurisdictional facts to move that this court exercise its review powers"*. It must be remembered that the Supreme Court is not infallible. No court is infallible. Litigants will always be unhappy with a judgment one way or the other, even where the judgment is by all reasonable accounts impeccable. Section 148 (2) does not seek to remove all possible errors a court of final appeal might commit. It is only in the not-so usual instance of a lapse in the judicial reasoning giving rise to an unconscionable miscarriage of justice that section 148(2) kicks in. It is not every lapse that gives rise to a reviewable case under section 148(2).

[12] In paragraphs 13 and 14 of his affidavit, Applicant in part contends that this Court on appeal *"determined the appeal using non-existent law when ultimately it ordered that [he] should be paid for only three (3) months..."* and that the judgment on appeal *"occasions miscarriage of justice, contains an unusual element and an element of bias among other things...."* It seems to me that the Applicant's complaint about 'non-existent law' is in effect a misguided challenge of the Court's

interpretation /elucidation of the substantive rule in section 39 (2). The Court's interpretation of a provision casting a new light, rightly or wrongly, does not give rise to a new provision which may be described or characterised as 'non-existent law.' If, indeed, the Court on appeal relied on 'non-existent law' in coming to its conclusion now challenged by the Applicant then that would be a serious miscarriage of justice, indeed. In this case, the instance referred to as 'non-existent law', in my view, is patently misguided. It is accordingly not correct that the Court on appeal relied on non-existent law and there is nothing 'unusual' in such an interpretative process as the appellate Court applied.

[13] It may be noted: In paragraph 52.3 of his heads of argument at the High Court (see para [32] of the judgment on appeal) it is stated: *"The Court failed to apply principles of interpretation when it gave a literal interpretation to section 39 (2) of the Act...."* It seems to me that it was the High Court which gave a 'literal interpretation' of the subsection, that is, that the subsection means what it *verbatim* says, which is in effect the position contended for by the Applicant in this review. The non-literal interpretation does not mean that the provision is reworded; it only means that its understanding may vary depending on the context in which it is called upon to apply. That is, time and context may affect the meaning of a provision meant to regulate human life or conduct. In the process, it may become necessary to widen or narrow, lengthen or shorten the meaning of the provision. It is therefore not correct as the Applicant contends that this Court on appeal *"in determining the matter simply disregarded (the) provisions of section 39 (2)..."* The purpose of interpretation is precisely to bring to light what might otherwise be hidden in the wording of a provision.

[14] The Applicant's rather terse heads of argument contained in four pages and 11 paragraphs do not come anywhere close to supporting a review in terms of section 148 (2). From the following beginnings of the paragraphs of the heads it becomes clear that no proper grounds of review have been presented:

1. "Serving before this Honourable Court is an application to review and set aside judgment of the Supreme Court. . . .

2. The legal question brought by this application is whether the above Honourable Court has jurisdiction when it comes to labour matters and whether or not the Judiciary can play the role of the Legislature....

3. The Applicant was employed by the Respondent where he held the position of....

4. The matter has its genesis in disciplinary proceedings that were instituted by the Respondent.... The Applicant had been placed on precautionary suspension on...

5. The Applicant instituted proceedings at the Industrial Court to compel the payment... In the application to compel salary payment the Industrial Court found in the employee's favour...

6. It is due to not being satisfied with the judgment of the Supreme Court Case No. 70/2020 that the Applicant herein has moved this application to review...the order issued by the [Supreme Court] on 1st September 2021 and substituting it with the following orders..."

[15] In paragraph 7 of his heads, Applicant deals with the jurisdiction of the Supreme Court in light of **Cashbuild Swaziland (Pty) Ltd v Thembi Penelope Magagula,** (supra). In paragraph 8 Applicant addresses section 39 (2) of the Employment Act, 1980, and states: *"We submit that the section is clear that an employer who intends to invoke the provisions of section 39 does not have unfettered powers. As per the Employment Act of 1980, the suspension without pay cannot exceed a period of one month. There is no reason to go beyond the normal meaning of the section so as to give it any other interpretation. 9. The purpose of section 39 (2) is to ensure that an employer held and completed a disciplinary hearing within reasonable time... Section 39 (2) is clear that an employee (sic) who intends to invoke the provision of the section does not have unfettered powers. The suspension without pay cannot exceed a period of one month. The court's jurisdiction [is] to promote harmonious industrial relations... To interpret section 39 (2) in any other way that it limits suspension without pay to a period not exceeding one month would be judicial overreach into the area of the legislature".* A House of Lords case is then cited where Lord Bingham C.J. wrote: *"Where a time limit is laid down and no power is given to extend it, the ordinary rule is that the time limit must be strictly observed."* [4] Unfortunately, that case is not always helpful. I do not believe that Lord Bingham meant that regardless of the circumstances of the particular case, once a month of suspension without pay elapses the employee must willy-nilly be paid if the disciplinary hearing has not been completed and employee is to blame for the delay. Thus the 'time limit' under the section in question is flexible and not static.

[16] With respect, throughout the limited heads of argument nothing establishes a case for review in terms of section 148 (2). I am inclined to agree with the

[4] **R v.Weir (2001)** Cri. App. 141 Part 2 (HL) at 147 [Or see **Petch v. Gurney** [1994] 3 ALL ER 731]

Respondent that no case for review has been made out by the Applicant. If anything Applicant wages a battle for appeal which itself would be irregular as it could be a second appeal. In **Xolile Gama,** [5] the learned Justice SP Dlamini JA, cited Justice Dr BJ Odoki JA where the latter cited from Justice M J Dlamini AJA (as he then was) in **President Street** case[6]:

> *"27. It is true that a litigant should not ordinarily have a 'second bite at the cherry', in the sense of another opportunity of appeal or hearing at the court of last resort. The review jurisdiction must therefore be narrowly defined and be employed with due sensitivity if it is not to open a floodgate of reappraisal of cases otherwise res judicata. As such this review power is to be invoked in a rare and compelling or exceptional circumstance as ... It is not review in the ordinary sense.*
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> *"[32] The review jurisdiction of this Court under section 148 (2) of the Constitution is an exceptional remedy to the well-known legal principles of* functus officio *and* res judicata *whose object is to ensure finality in litigation. This legal remedy does not allow for a second appeal to litigants whose appeals have been heard and determined. Being an exceptional remedy, the review is intended to prevent, ameliorate and correct a manifest and gross injustice to litigants in exceptional circumstances beyond the normal court processes".*

[17] *In casu*, in my view, the Court is faced with a similar situation where no special circumstance causing the Applicant some unusual injustice has been shown. The weight of Applicant's submissions favour an appeal rather than a review under section 148 (2). Incidentally, in his four page heads of argument, in which not a

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[5] **Xolile Gama v.Foot the Bill Investments,** Supreme Court Case No 68 of 2018

[6] **President Street Properties (Pty) Ltd v. Maxwell Uchechukwu and Others,** Supreme Court case no. 11/2014

relevant case is quoted, the Applicant under paragraph 1, second sentence, writes: *"This appeal is made in terms of Section 148 (2) of the Constitution of Eswatini..."* (My underlining). In light of the overall position presented by the Applicant, the reference to 'appeal' instead of review is very unfortunate. Worse still, I could not find any bundle of authorities presented by the Applicant in support of this application.

[18] The Respondent in the second paragraph of its heads of argument, writes: *"At the outset, we submit with respect that there is no basis for this Court to review the judgment of this Court and that each of the applicant's arguments [is] incorrect and stands to be rejected for the reasons set out hereunder."* With regard to section 148 (2), the Respondent under paragraph 8 of its heads of argument, observes: *"...it allows for a review in exceptional circumstances only – where it is necessary to correct a manifest and significant injustice caused by an earlier order for which there is no alternative remedy"*. See **Vilane and another v Lipney Investments (Pty) Ltd**, Supreme Court Case No. 78/2013.

Conclusion

[19] All in all, I am persuaded to agree with the Respondent that a case for review in terms of section 148 (2) of the Constitution has not been made out by the Applicant. In the result, the application is dismissed with costs. It is so ordered.

M J Dlamini JA

I agree

MCB Maphalala CJ

I agree

S B Maphalala JA

I agree

J P Annandale JA

I agree

J M Van der Walt JA

M. Ndlangamandla for Applicant

Z. Jele for Respondent