IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CIVIL CASE NO: 73/2021

In the matter between:

NATIONAL EMERGENCY RESPONSE COUNCIL ON HIV AND AIDS (NERCHA)	Appellant
And	
THE JUDGE PRESIDENT OF THE INDUSTRIAL COURT	First Respondent
PHUMELELE DLAMINI	Second Respondent
THE ATTORNEY GENERAL N.O.	Third Respondent

Neutral Citation: *National Emergency Response Council on HIV and Aids (Nercha) v Phumelele Dlamini (73/2021) [2023] SZSC 78 (30 May 2024)*

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

S.K.J. MATSEBULA JA

M.J. MANZINI AJA

DATE HEARD: 17 November, 2023

DATE DELIVERD: 30 May, 2024

Summary:

Review – labour law - review by High Court of ruling of Industrial Court – uncompleted proceedings – question whether ruling final or purely interlocutory irrelevant in context of appealability in that all Industrial Court decisions appealable as of right provided appeal on question of law

Review — uncompleted proceedings – failure of justice amounting to gross irregularity to be shown – applicable to labour law – review by High Court of ruling of Industrial Court - appellant failed to acquit itself of onus – appeal dismissed

Review – labour law - review by High Court of ruling of Industrial Court and restriction of appeals from Industrial Court to appeals on questions of law only - obiter – legislative intervention required to level playing fields in accordance with the Constitution of the Kingdom of eSwatini Act, 2005.

JUDGMENT

S. P. DLAMINI – JA

INTRODUCTION

[1] The matter has its origin in a previous employment relationship between the parties where the Second Respondent had been in the employ of the Appellant. This employment came to an end upon expiry of the contract between the parties. A dispute arose as to what remuneration and/or compensation had been due to the Second Respondent during the currency of contract. The dispute was reported to the Conciliation, Mediation and Arbitration

Commission (CMAC) and failing resolution, a certificate of unresolved dispute issued duly.

[2] Consequently, the Second Respondent as Applicant brought an application against the Appellant as Respondent in the Industrial Court, founded on the contention that: "***The [Appellant's] refusal to compensate the [Second Respondent] for the added responsibilities constituted an unfair labour practice for a number of reasons,***" and the Second Respondent claimed the sum of E 668 139.45 being E 22 271.32 x 30 months in respect thereof.

[3] The Appellant raised the following as points *in limine:*

> ***"1. THE ABOVE HONOURABLE COURT LACKS JURISDICTION TO ENTERTAIN THE DISPUTE SINCE IT IS ONE OF INTEREST***
>
> ***1.1 The Applicant's claim is for a salary increment of 50% above her agreed salary in terms of the contracts of employment she signed with the respondent;***
>
> ***1.2 Disputes of this nature are commonly termed economic type disputes;***
>
> ***1.3 The Industrial Court lacks jurisdiction to entertain such economic type disputes;***
>
> ***1.4 Such disputes are only dealt with through collective bargaining; and on that basis, alone, the applicant's claim should be dismissed with costs."***

[4] One of the main disputes was whether or not a certain letter written by the Appellant to the Second Respondent created a right to the Second Respondent for a salary increase in terms of a certain Circular. The Industrial Court referred this issue to oral evidence.

[5] The Industrial Court, after having heard and considered the relevant oral evidence, held *inter alia* that:

> **5.1** ***" With the aforegoing reason, the Court is persuaded that the Applicant's claim is a dispute of right. The Applicant is entitled to refer that dispute to Court for adjudication - since it is a judiciable dispute. Consequently the point in limine is dismissed;"*** **and on an ancillary aspect:**
>
> ***5.2 " ...The Applicant's claim that she signed the contract of employment under duress requires judicial determination."***

[6] It then was ruled as follows:

> ***"17. At this stage the Court is concerned with the question; whether the Applicant's dispute is a claim of right or claim of interest. The Applicant's counsel correctly captured the point when he said;***
> ***"... but as I understood the Court we are not in the claim yet, we are just determining the issues of paragraph 4 of the letter"***
> ***(Record page 110)***

Wherefore the Court orders as follows:

17.1 The Respondent's point in limine is dismissed.

17.2 The matter is referred to court for determination on the Applicant's claim.

17.3 The Respondent is to pay the costs relating to the point in ***limine."***

[7] Next, the Appellant instituted review proceedings in the High Court seeking as the main relief therein, the review and setting of the above decision.

7.1 The First and Third Respondents were cited in their official capacities. They have no interest in the matter and accordingly, never participated in these proceedings.

7.2 As appears more fully from Paragraph 10 of the Judgment of the Court *a quo,* reported as **NATIONAL EMERGENCY RESPONSE COUNCIL ON HIV AND AIDS (NERCHA) v THE JUDGE PRESIDENT OF THE INDUSTRIAL COURT WITH NOMINATED MEMBERS AND 2 OTHERS (825/2021) [2021] SZHC 188 (14TH OCTOBER 2021),** a number of grounds for review were advanced by the Appellant.

[8] The Second Respondent took the following points *in limine:*

> *"1. COURT LACKS JURISDICTION*
>
> ***The matter is substantially seized with the Industrial Court and is currently pending thereat by virtue of the second order of the court a quo to wit "17.1 the matter referred to court for determination on the Applicant's claim." In the Application or Founding Affidavit, there are no exceptional circumstances which have been advanced to warrant a deviation by this court from the rule that the High Court will not intervene in unterminated proceedings which upon termination the Review or Appeal process will still be available to Applicant.***
>
> ***2. APPLICATION FOR REVIEW PREMATURE***
>
> ***The matter between the parties is still seized with the Industrial Court. The proceedings have not yet terminated at the Industrial Court. The Applicant will advance his defense in terms of the Circulars during proceedings for determination of the claim at the Industrial Court. Review or Appeal will still be an available remedy upon completion or termination of the proceedings at the Industrial Court.***
>
> ***WHEREFORE 2nd Respondent prays that the Application be dismissed with costs at punitive scale to allow the Industrial Court to be functus officio."***

[9] The Court *a quo* confined the adjudication to the second point of prematurity and after consideration of a number of authorities. concluded that the application *"... cannot be entertained as the issues decided by the Industrial Court and complained of in the review application are not appealable."*

9.1 The *ratio decidendi* reads:

> ***"The Order sought did not dispose of any issue in the Court below. In my view what the Court did was to categorize the issues before it, such categorization being not final. The Court did not determine the issues before it. In my view the reasons of the Court a quo affirms the view that the order was not final."***

9.2 An order then issued in the following terms:

> ***"[38] In the result the Court makes the following Orders:-***
>
> ***(1) Applicant's application for review is dismissed;***
>
> ***(2) Matter is referred back to The Industrial Court for hearing and determination.***
>
> ***(3) Each party is to pay its own costs."***

[10] Dissatisfied by the outcome, the Appellant applied for leave to appeal to this Court. Leave was granted by His Lordship Masuku J, in what was termed a "Final Order" that: ***"1. The Applicant is granted leave of this Court to appeal the High Court judgment dated the 14th of October 2021 to the Supreme Court."***

[11] There are two glaring issues *ex facie* this Order. Firstly, there is no explanation at all in the papers of the circumstances leading to the granting of the *"Final Order."* For example, it is not stated if an *interim* order had been granted and if so, when; whether the proceedings were opposed or not and whether the

final Order was by consent or not. Secondly, the Appellant launched its appeal on 3 November 2021 yet the final Order for leave to appeal was only granted on 5 April 2022, about five months after the Appellant filed its appeal before this Court. This begs the question, if prior to the appeal it was necessary to obtain leave to appeal, how the appeal was launched before the order in question had been granted. In my view, therefore, the Order was of no legal consequence. For the sake of progress, however, and since the parties had filed heads of arguments and presented thorough oral argument, this Court will proceed as if the appeal is properly before it.

PROCEEDINGS BEFORE THIS COURT

[12] The Appellant, in terms of the Notice of Appeal dated 3 November 2021, advanced three grounds of appeal. The appeal is opposed by the Second Respondent. The three grounds of appeal advanced by the Appellant are as follows:

> *"1. The court a quo erred in finding that the Industrial Court did not dispose of any issue before it and its order not susceptible to review as the merits of the dispute had not been determined ..."*
>
> *2. The court a quo erred in law and in fact in holding the judgment and/or order of the Industrial Court was not final and/or definitive of the rights of the parties ..."*
>
> *3. The court a quo erred in not granting the review application as the Record indicated that the Industrial Court took into account*

irrelevant considerations or failed to apply its mind to the matter and evidence before it and committed an error of law when it held that the letter created a right to the Second Respondent to be paid higher wages."

DISPUTE

[13] The Court is called upon to determine;

13.1 whether or not the High Court was correct in dismissing the Appellant's application to review and set aside the ruling of the Industrial Court;

13.2 whether the ruling of the Industrial Court was interlocutory or not and the legal consequences flowing from the proper determination of this issue; and

13.3 whether jurisdiction is a question of fact or law and the legal consequences flowing from the finding of the court; and

13.4 whether the superior courts have powers to intervene in unterminated proceedings of the other courts either by way of appeal or review.

THE APPELLANT'S CASE

[14] The issues became reduced to the pivotal question whether the High Court was wrong in law to rule that a dismissal of a jurisdictional point is not final and thus not "*appealable*" as of right. It was contended for the Appellant in terms of the Heads of Argument and submission before this Court that the Court *a quo* misdirected itself as follows:

14.1 The issue before this Court is accordingly both crisp and legal and concerns an enquiry into whether the High Court was wrong in law to rule that a dismissal of a jurisdictional point is not final and appealable.

14.2 In terms of the prevailing legal authorities, a dismissal of a plea of lack of jurisdiction of a Court is final and appealable or reviewable as of right, as is with *locus standi* for example.

14.3 In holding that the Industrial Court did not dispose of any issue before it and its matter not susceptible to review and the merits remained alive for the determination by the Industrial Court.

14.4 The finding of the Industrial Court that the claim was a dispute of right and not a dispute of interest was final and the Appellant was entitled to approach the High Court for the review of the Ruling.

14.5 In finding that the Ruling of the Industrial Court was interlocutory.

14.6 In not reviewing and setting aside the ruling of the Industrial Court.

(The Appellant relied on the following authorities for its submissions and arguments: RYCROFT AND JORDAAN, A GUIDE TO SOUTH AFRICAN LABOUR LAW, JUTA 1992 AT 169, MINEWORKERS UNION & ANOTHER v AECI EXPLOSIVES AND CHEMICALS LIMITED, MODDERFONTEIN FACTORY [1995 BLLR 58 (IC) AD 64G, a paper entitled "CRITERIA IN INTEREST ARBITRATION" by PROFESSOR PAK LE ROUX delivered at the IMSSA NATIONAL CONFERENCE IN 1992, SWAZILAND RAILWAY v PUBLIC AND PRIVATE SECTOR TRANSPORT WORKERS UNION, INDUSTRIAL COURT CASE 456/2014 (8TH OCTOBER 2014), HERBSTEIN AND VAN WINSEN, THE CIVIL PRACTICE OF THE HIGH COURTS AND SUPREME COURT OF APPEAL OF SOUTH AFRICA POPE 1208, J.B. vs M.C.S, SUPREME COURT OF SOUTH AFRICA, CASE No. 489105 (unreported) AND JAMES NCONGWANE V SWAZILAND WATER SERVICES CORPORATION (52/2012) [2012] SZSC 65 (30 NOVEMBER 2012).

THE SECOND RESPONDENT'S CASE

[15] It was contended and submitted for the Second Respondent that the court *a quo* did not commit any misdirection and the Appellant's appeal is without merit on the following grounds:

15.1 this being a labour dispute, the Supreme Court and the High Court lack jurisdiction to entertain the matter.

15.2 the ruling of the Industrial Court is interlocutory and Appellant ought to have sought and obtained leave to appeal against the judgment as envisaged by Section 147 (1) of the Constitution.

15.3 the matter is pending before the Industrial Court as per sub paragraph 17.1 of the impugned judgment wherein in the Court ordered that ***"... the matter is referred to Court for determination on the Applicant's claim."***

15.4 there are no exceptional circumstances that have been advanced by the Appellant before the Court *a quo* justifying the intervention of the Court *a quo* to intervene in the unterminated proceedings before the Industrial Court.

15.5 Nothing in the ruling of the Industrial Court precluded the Appellant to advance its defence against the Respondent's claim at the hearing of the matter by the Industrial Court. If only once the Industrial Court has finalized the matter or the proceedings are terminated that the right to appeal or review the outcome would be open to the Appellant.

(The Respondent relied on the following authorities to support its arguments and submissions; **CASHBUILD SWAZILAND (PTY) LTD vs THEMBI PENELOPE MAGAGULA (26B/2020) [2021] SZSC 31 (09 (12/2021) ABEL SIBANDZE v STANLIB SWAZILAND AND TWO OTHERS, SUPREME COURT OF APPEAL OF ESWATINI, CASE NO. 57/2009 and SWAZI OBSERVER (PTY) LTD v HANSON NGWENYA AND OTHERS CIVIL APPEAL CASE 19/2006 (unreported)).**

APPLICABLE LAW AND ANALYSIS

JURISDICTION

[16] Okpaluba, Chuks in the article "Labour adjudication in Swaziland: the exclusive jurisdiction of the Industrial Court" (Journal of African Law, 1999) argues that the significance of jurisdiction in adjudication can be

demonstrated through guiding principles concerning jurisdiction. It is a well-established practice that when the question of the court's jurisdiction is raised, it must be addressed as a priority. Either a court possesses jurisdiction, or it does not, it cannot assume jurisdiction that it lacks, nor can jurisdiction be conferred upon it through acquiescence. Consequently, objections to jurisdiction should ideally be raised at the outset of proceedings. Furthermore, it is customary for the issue of a court's jurisdiction to be raised at any stage of the proceedings, whether during the trial phase or on appeal, either by the parties or by the court itself, in the interest of procedural fairness.

In the absence of jurisdiction, the court lacks the authority to proceed with adjudication on the merits. Should it do so, the outcome is *coram non judice*, rendering any judgment null and void. Conversely, when the court has jurisdiction, its decision on the merits holds binding force, even if the outcome results from a flawed process or leads to an erroneous conclusion.

[17] Okpaluba, Chuks in "Labour adjudication in Swaziland: the exclusive jurisdiction of the Industrial Court." ***Journal of African Law* 43.2 (1999):** 184-200 describes the different types of jurisdiction:

17.1 Subject Matter Jurisdiction: This refers to a court's authority to hear cases of a particular type or subject matter. For example, a

family court may have jurisdiction over family law matters, while a bankruptcy court may have jurisdiction over bankruptcy cases.

17.2 **Personal Jurisdiction:** Also known as *in personam* jurisdiction, this refers to a court's authority over the parties involved in a case. It determines whether a court has the power to bind a particular individual or entity to its rulings. Personal jurisdiction typically depends on factors such as residency, presence within the court's geographical area, or consent of the parties.

17.3 Territorial Jurisdiction: This refers to a court's authority over cases that arise within a specific geographical area or territory. It determines whether a court has the power to adjudicate matters that occur within its prescribed boundaries.

[18] For a court to have the authority to hear a case, it must possess all three fundamental types of jurisdiction: subject matter jurisdiction, personal jurisdiction and territorial jurisdiction.

18.1 Original Jurisdiction: This refers to a court's authority to hear a case for the first time, as opposed to appellate jurisdiction, which involves reviewing decisions made by lower courts.

18.2 **Appellate Jurisdiction:** This refers to a court's authority to review decisions made by lower courts. Appellate courts typically do not re-examine the facts of a case but instead focus on whether the lower court applied the law correctly.

18.3 **Exclusive Jurisdiction:** This occurs when only one court or level of government has the authority to hear certain types of cases. For example, federal courts have exclusive jurisdiction over cases involving federal laws or treaties.

18.4 **Concurrent Jurisdiction:** This occurs when more than one court or level of government has the authority to hear a particular case. In such instances, parties may choose which court to file their case in, subject to certain limitations.

[19] **Jurisdiction of the High Court High Court to review and set aside a ruling of the Industrial Court:** "The principles of interpretation relating to jurisdiction of which referred to and which SCHREINER, J.A., addressed in *Standard Chartered and President of the Industrial Court & Israel Mahlalela* can be summarized thus:

> ***"The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction***

of an inferior court but that which is so expressly alleged. Thus before the jurisdiction courts can be ousted by an ouster provision, the policy of the ouster must cover the subject matter in question, that is, on the facts and in the circumstances particular case, the ouster provision does not protect a determination of what is a nullity or an act done by authority sought to be sheltered by the ouster provision. But where the jurisdiction is clearly ousted, the court cannot inquire into the merits of the matter; it will only have the jurisdiction to decide whether it has jurisdiction."

JURISDICTION OF THE HIGH COURT:

[20] Section 2 of the High Court Act, 1954:

"2. Jurisdiction of the High Court of Swaziland

(1) 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.

(2) The jurisdiction vested in the High Court in relation to procedure, practice and evidence in criminal cases, shall be exercised in the manner provided by the Criminal Procedure and Evidence Act, No. 67/38."

POWERS OF REVIEW

[21] Section 4 of the High Court Act, 1954:

"4. Powers of review

(1) The High Court shall have full power, jurisdiction and authority to review the proceedings of all subordinate courts of justice within Swaziland, and if necessary to set aside or correct the same.

(2) Such power, jurisdiction and authority may be exercised in open court or in chambers in the discretion of the judge."

Section 19(5) of the Industrial Relations Act, 2000 provides that:

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

Nedbank Swaziland and 3 Others v Phesheya Nkambule and Three Others of (70/2020) [2020] SZSC 04 (27 February 2023) at page 37 of the judgment confirmed the jurisdiction of the High Court to review decisions of the Industrial Court. In this matter the Court, made an order, *inter alia* that;

> ***"The High Court and by extension the Supreme Court has power to review decisions, Rulings, Orders of the Industrial Court, Conciliation, Mediation and Arbitration Commission (CMAC) and Labour Arbitration Tribunals."***

JURISDICTION OF THE INDUSTRIAL COURT:

[22] Section 8(1) of the Industrial Relations Act, 2000 provides that:

"The Industrial Court has original jurisdiction to hear and determine a range of matters outlined in the Employment Act, Workmen's Compensation Act, and labour disputes. This jurisdiction encompasses cases arising from dismissals,

disciplinary actions, and other unlawful disadvantages experienced by employees. Through its authority, the court adjudicates disputes between employers and employees, safeguarding equitable treatment and compliance with labour laws".

[23] Section 8(5) provides that any decision of the court shall have the same force and effect as a judgment of the High Court.

Section 8(6) provides that:

"Any matter of law (emphasis my own) arising for a decision at a sitting of the court and any question as to whether a matter for decision is a matter of law or a matter of fact (emphasis my own) shall be decided by the presiding judge of the court provided that on all other issues, the decision of the majority of the members shall be the decision of the court. "

JURISDICTION OF THE INDUSTRIAL COURT OF APPEAL

[24] **Right of Appeal or review from the Industrial Court**

Section 19(1) of the Industrial Relations Act, 2000 provides that:

"There shall be a right of appeal against the decision of the court on a question of law (emphasis my own) to the Industrial Court of Appeal."

Section 21 of the Industrial Relations Act, 2000 provides that:

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

ON THE FIRST GROUND OF APPEAL: WHETHER THE RULING OF THE INDUSTRIAL COURT WAS INTERLOCUTORY OR FINAL

[25] The first ground of appeal questions whether the ruling of the Industrial Court was interlocutory or final. However, it is immaterial in the determination of appealability. The appealability of decisions from the Industrial Court is not dependent on their nature or effect (whether final or interlocutory). Section 19(1) mandates that the appeal be rooted in a question of law, regardless of the ruling's classification.

A QUESTION OF LAW, A QUESTION OF FACT, OR A MIXED QUESTIONS OF LAW AND FACT?

[26] The duty and jurisdiction of any court is to say what the law is. A duty and jurisdiction which presupposes that the court will in each case be able to differentiate those questions which are legal from those questions which are not and presupposes that the court will in each case be able to achieve that differentiation through the transparent and predictable application of a legal principle.

[27] Dickinson, John. Administrative justice and the supremacy of law in the United States. Vol.2 Harvard University Press, 1927 states that;

> ***"Matters of law grow downward into roots of fact and matters of fact reach upward without a break, into matters of law. The knife of policy alone effects an artificial cleavage where the court chooses to draw the line."***

[28] Issues that arise in a matter often involve questions of fact, questions of law, and mixed questions of law and fact. The distinction between these categories can sometimes be challenging to delineate, as demonstrated in various judicial pronouncements.

Despite efforts to establish clear boundaries between questions of fact and law, the distinction remains elusive. While certain general principles offer guidance, they may prove less applicable in complex cases. The application of these principles to specific cases often requires careful analysis and consideration of the particular factual and legal nuances involved as per the House of Lords decision in ***Cozens* v. *Brutus* [1973] A.C. 854.**

[29] In ***Collector of Customs v Pozzolanic Enterprises Pty Ltd FCA 322*** the Full Court of the Federal Court of Australia stated five general propositions in attempting to distinguish legal from factual questions:

> ***"[23] Distinctions between a question of fact and a question of law can be elusive. The proper interpretation, construction and application of a statute to a given case raise issues which may be or involve questions of fact or law or mixed fact and law. Nevertheless there are five general propositions which emerge from the cases:***
>
> ***1. The question whether a word or phrase in a statute is to be given its ordinary meaning or some technical or other meaning is a question of law - Jedko Game Co. Pty Ltd v. Collector of Customs (1987) 12 ALD 491; Brutus v. Cozens (1973) AC 854.***

2. *The ordinary meaning of a word or its non-legal technical meaning is a question of fact - Jedko Game Co. Pty Ltd v. Collector of Customs (supra); NSW Associated Blue Metal Quarries Ltd v. Federal Commissioner of Taxation (1956) 94 CLR 509 at 512; Life Insurance Co. of Australia Ltd v. Phillips (1925) 36 CLR 60 at 78; Neal v. Secretary, Department of Transport (1980) 29 ALR 350 at 361-2.*

3. *The meaning of a technical legal term is a question of law. Australian Gas Light Co. v. Valuer General (1940) 40 SR (NSW) 126 at 137-8; Lombardo v. Federal Commissioner of Taxation (1979) 28 ALR 574 at 581.*

4. *The effect or construction of a term whose meaning or interpretation is established is a question of law - Life Insurance Co. of Australia v. Phillips (supra) at 79.*

5. *The question whether facts fully found fall within the provision of a statutory enactment properly construed is generally a question of law - Hope v. Bathurst City Council (1980) 144 CLR 1 at 7 per Mason J with whom Gibbs, Stephen, Murphy and Aickin JJ agreed; Australian National Railways Commission v. Collector of Customs (supra) at 379 (Sheppard and Burchett JJ)."*

[30] In **COLLECTOR OF CUSTOMS V AGFA GEVAERT [1996] HCA 36; 186 CLR 389; 71 ALJR 123; 141 ALR 59; 24 AAR 282; 43 ALD 193; 96 ATC 5240; 35 ATR** 249 the Court stated that:

> ***"The distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding***

the line between the two questions, no satisfactory test of universal application has yet been formulated (emphasis my own).

Such general expositions of the law are helpful in many circumstances. But they lose a degree of their utility when, as in the present case, the phrase or term in issue is complex or the inquiry that the primary decision-maker embarked upon is not clear."

[31] In **VETTER v LAKE MACQUARIE CITY COUNCIL [2001] HCA 12; 202 CLR 439; 75 ALJR 578; 178 ALR 1** it was stated that;

"Whether facts as found answer a statutory description or satisfy statutory criteria will very frequently be exclusively a question of law. To put the matter another way, indeed, as it was put by Priestley JA in his judgment, whether the facts found by the trial court can support the legal description given to them by the trial court is a question of law. However, not all questions involving mixed questions of law and fact are or need to be susceptible of one correct answer only. Not infrequently, informed and experienced lawyers will apply different descriptions to a factual situation."

A QUESTION OF LAW

[32] A question of law involves the interpretation of legal principles and norms found in statutes, rules, and judicial interpretations. It encompasses issues that can be resolved by applying established legal norms. When jurisdiction is regarded as a question of law, it signifies that the court must interpret and apply legal principles, statutes, and precedents to determine whether it has the

authority to hear and decide a particular case. Technical legal terms, including the meaning of terms like "law" and "fact," are traditionally regarded as questions of law, as established in cases such as: In ***Australian Gas Light Co. v. Valuer General*** (1940) 40 SR(NSW) 126 at 136 and *Lombardo v. Federal Commissioner of Taxation* (1979) 28 ALR 574 it was stated that;

> ***"Even when the meaning or interpretation of a term is established, determining its effect or construction remains a question of law, as demonstrated in Life Insurance Co. of Australia v. Phillips at 79."***

[33] Professor Gavit's analysis underscores that a question of law often involves the use of legal terminology (in this case jurisdiction) where common language would suffice. Furthermore, Lord Denning suggests that questions a trained lawyer can answer typically fall within the realm of law, contrasting them with matters that can be understood by laypersons, which are considered questions of fact.

[34] Jurisdiction is fundamentally a question of law. It entails the interpretation and application of legal rules to ascertain whether a court possesses the *requisite* legal authority to adjudicate a specific matter.

In this matter, the legal question regarding jurisdiction as determined by the Industrial Court raises the questions; whether the evidence admitted or

dismissed by the Industrial Court was admissible or inadmissible, and whether facts fall within the provision of a statutory enactment is a question of law (In this regard see Hayes v Federal Commissioner of Taxation [1956] HCA 21; 96 CLR 47).

[35] An inference drawn from facts can also constitute a question of law. For example, consider a scenario where a court is tasked with applying legal principles regarding jurisdiction to determine whether the established evidence satisfies the requirements of the law. This process falls within the realm of a question of law. Consequently, the ultimate determination of jurisdiction relies on an inference drawn from the facts found, guided by the application of the appropriate legal principles. In such cases, it is accurate to assert that an inference drawn from facts is indeed a question of law.

[36] If there is no factual dispute about jurisdiction, but only a question of law about whether the agreed-upon facts are sufficient to confer jurisdiction, the court should follow a specific approach. First, it assesses whether the legal prerequisites for jurisdiction are met. If affirmative, it then examines if any significant changes in law or facts have occurred since the initial ruling, rendering the jurisdictional provision inapplicable. Jurisdiction might be

raised as a preliminary matter when neither disputed facts nor mixed legal and factual issues need resolution.

[37] When identifying a question of law, consider factors such as whether:

37.1- it pertains to interpretation of the law,

37.2- if it can be resolved by fixed legal principles, and

37.3 - if it requires expertise typically possessed by trained lawyers.

A QUESTION OF FACT

[38] When jurisdiction is treated as a question of fact, the court is tasked with determining the circumstances surrounding the issue of jurisdiction without application of any principle of law. This entails scrutinizing evidence, hearing witness testimonies, and drawing factual conclusions based on presented evidence. Such inquiries purely involve factual determinations, wherein the application of legal principles is not implicated alongside the ascertainment of basic facts.

The factual elements/inquiry involve establishing the relevant facts related to jurisdiction. For instance, in a civil case, factual elements might include where the events occurred, where the parties reside, or where the property in dispute

is located. In a criminal case, factual elements might include where the alleged crime took place and where the defendant was at the time.

[39] When identifying a question of fact, consider whether:

39.1 it involves matters other than particular law.

39.2 if its resolution relies on the parties involved (and can be understood by a layperson), and

39.3 if it concerns the application of ordinary English language, which typically falls outside the realm of legal interpretation.

MIXED QUESTIONS OF FACT AND LAW

[40] Questions of application are often called mixed questions of fact and law. The determination of jurisdiction often requires a court to assess both the relevant facts and the applicable legal standards, this blend of factual inquiry and legal analysis is why jurisdiction is considered a mixed question of fact and law. It has sometimes been supposed that a court cannot entertain mixed questions of fact and law:

> ***". . . the appeal tribunal has no jurisdiction to consider any question of mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law."***

INDIAN POSITION:

[41] In legal proceedings, the question arises whether jurisdiction can be tried as a preliminary issue. It is established that when the determination of facts is involved, such an issue cannot be tried as a preliminary matter. Similarly, in cases where there exists a mixed question of law and fact, it is not permissible to treat jurisdiction as a preliminary issue.

In ***Shyam Dutt v Ashok Kumar And Anr.* on 4 May, 2007** **AIR2007HP93, 2007(2) SHIMLC122** citing "*the decision of the High Court of Orissa in* ***Madhubananda Ray and Anr. v. Spencer and Co. Ltd.,*** *holding that the issue relating to jurisdiction is an issue of fact or mixed question of law and fact and cannot be decided as a preliminary issue. My attention was drawn to paras-11 and 15 of the judgment. Their Lordships held as under:*

> ***"11...Under Order 14, Rule 2, C.P.C. it is not permissible for the Court to decide an issue of fact as a preliminary issue. It, therefore, follows that where an issue of fact is necessary to be decided before an issue of law relating to jurisdiction comes up for consideration, such issue cannot be taken up as a preliminary issue within the meaning of Order 14, Rule 2, C.P.C.***
>
> ***15. ...Thus, it would not be correct to assume that any question touching upon the jurisdiction of a Court would automatically become an issue of law as this question may as well depend on factual aspects.***
>
> ***If no investigation is necessary and it is not necessary to go into controversial facts, the question relating to jurisdiction may be treated and decided as an issue of law only under the amended provision. If, on the***

other hand, it would be necessary to decide a factual controversy before arriving at a conclusion with regard to the question of jurisdiction of the Court, such a question cannot be treated to be a pure question of law. When the institution of the suit is incompetent under the law or when the Court finds that it has no jurisdiction and to come to such a conclusion, no investigation is necessary and no evidence is necessary to be recorded, the Court has jurisdiction to decide the case or any part thereof on an issue of law only."

IS THE DISTINCTION NECESSARY?

[42] Given the vexing nature of the distinction between questions of fact and questions of law, is the distinction necessary?

The distinction between questions of law and questions of fact appears to hold particular significance in eSwatini's legal system, notably in regulating the appellate process and determining the jurisdiction of higher courts, in employment and labour related issues.

[43] In terms of Section 8(6) of the Industrial Relations Act, 2000 provides that the presiding judge of the court decides any legal matters arising from a court decision or any questions regarding whether a matter is a question of law or fact, while decisions on other issues are determined by majority vote.

[44] Section 19(1) of the Industrial Relations Act, 2000 provides that the Industrial Court of Appeal has jurisdiction to hear and determine appeals from the Industrial Court on questions of law.

[45] Section 15 of the Court of Appeal Act, 1954 provides that the Court of Appeal has jurisdiction to hear and determine an appeal from the High Court Civil Appellate jurisdiction on a question of law but not on a question of fact with the leave of the Court of Appeal or upon the certificate of the High Court judge who heard the appeal.

[46] Section 17 of the Court of Appeal Act, 1954 creates a requirement for a question of law raised in the High Court to be considered on appeal by the Court of Appeal upon referral by the High Court.

[47] Section 147(1) of the eSwatini Constitution, 2005, states that Supreme Court has jurisdiction where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest.

NECESSARY

[48] Proponents of the distinction between questions of fact and questions of law argue that a legal system, which operates based on established norms (such as rules and principles of law), inherently requires differentiation between these norms and the factual circumstances calling for their application.

[49] One primary purpose of delineating between questions of fact and questions of law is to allocate decision-making power and responsibility effectively. This serves to enhance administrative decision-making by ensuring that courts adhere to a normative system for allocating the duties and powers. This was emphasized in **Kostas v HIA Insurance Services Pty Limited [2010] HCA 32.**

[50] The crucial point in distinguishing between questions of fact and questions of law is to establish the court's interpretation of what the law mandates as a boundary for its jurisdiction. This becomes particularly necessary in legal systems where statutory grounds for judicial review based on errors of law exist, compelling courts to determine the existence or absence of such questions.

[51] Furthermore, the concept of distinguishing between questions of fact and questions of law holds significance in classifying situations where the court may find it necessary to modify the ordinarily applicable norm to suit the specific needs of a case.

[52] In the United States, for instance, the allocation of decision-making authority between judges and juries traditionally rested on this distinction, with questions of fact typically left for the jury's determination and questions of law for the judge's adjudication.

Ultimately, categorizing an issue as a "question of fact" or a "question of law" plays a crucial role in shaping the scope of appellate review, as it significantly influences the extent to which a decision may be challenged or modified on appeal.

UNNECESSARY

[53] Professor Wigmore and Holdsworth both acknowledge the distinction between fact and law, though they question its practicality. Holdsworth even suggests that it's not the appropriate context to delve into the intricate boundary between the two **(Wigmora, evidence 1 (2nd Ed. 1923) And Ote l.31 Holdsworth, History of the English Law 298 (3rd ed. 1922), as cited**

in Phelps, Arthur W. "What is a Question of Law." U. Cin. L. Rev.18 (1949): 259.). Despite considering the distinction as primary, neither Wigmore nor Holdsworth elaborate on its significance or practical implications. On the other hand, Professor Isaacs, through a comprehensive analysis of contexts where "law and fact" is invoked, concludes that there's essentially is no generic difference between questions of law and questions of fact.

[54] The distinction between questions of law and questions of fact has often led to confusion rather than clarity in resolving legal issues, particularly concerning the jurisdiction of appellate courts in labour disputes. Merely defining the terms "law" and "fact" fails to provide a satisfactory resolution for any case. Instead, adopting a pragmatic approach to identifying questions of law is preferable over an analytical approach. This entails judges considering what questions would be beneficial to treat as questions of law, rather than attempting to rigidly categorize them. It is essential to closely examine the techniques judges have developed to address this issue. While these techniques may vary and sometimes be unclear, a common principle emerges: when statutory language necessitates a singular interpretation, the question of its application constitutes a question of law.

[55] Lord Lowry's technique for identifying questions of law, as formulated in **Inland Revenue Commissioners v. Scottish & Newcastle Breweries Ltd.,** [1982] 1 W.L.R. 322 at p.327. involves asking whether the question can be answered "as a matter of law." Additionally, the **Edwards v. Bairstow** doctrine, frequently referenced due to Lord Radcliffe's speech, offers another technique of asking whether a question can be answered "as a matter of law". Another technique proposed by Beazley is focusing on the reviewing court's jurisdiction and pinpointing the specific stage of the decision-making process where the question arises—whether it pertains to finding facts, determining applicable law, or applying the law to the facts established. These techniques aid in navigating the distinction between questions of law and questions of fact.

WHETHER THE REVIEW PROCEEDINGS WERE PREMATURE OR NOT? APPEAL VS REVIEW

[56] The general rule is that Superior Courts only interfere (by way of appeal or review) in unterminated proceedings in inferior courts in rare cases.

Cola Hoexter & Glenn Penfold "Administrative Law in South Africa" Third Edition, Juta 2022 (reprint) at pages 137 and 138 Hoexter and Penfold assert that appeal and review are distinct mechanisms for scrutinizing a decision. Although the motivation behind choosing one over the other is

often similar—dissatisfaction with the outcome—appeal and review serve different purposes. Appeal is suited for cases where it is believed that the decision maker erred in reaching a conclusion on either the facts or the law. It delves into the substance of the case, allowing the appellate body to render the initial decision either correct or incorrect. Conversely, review typically does not assess the merits of the decision but rather focuses on whether it was arrived at through an acceptable process. The emphasis lies on scrutinizing the decision-making process, including the impartiality of the decision maker and the admissibility of evidence considered. Notably, a decision may be overturned on review even if the reviewing court believes that an impartial decision maker would have reached the same conclusion based on proper evidence—an indication that merit is not the primary concern. Thus, while review does not inquire into whether the outcome is supported by relevant considerations, this falls within the purview of appeal, which assesses whether the decision itself was correct or incorrect.

[57] This description of review was supported in a *dictum* in the case of ***DERRICK DUBE AND EZULWINI MUNICIPALITY*** **(91/2016) [2018] SZSC 49:**

[3.1] "it should be noted that the court on review is not concerned with the merits or demerits of the decision reviewed: "...review concerns the regularity and validity of proceedings, whilst appeal concerns the correctness of the decision arrived at in legal proceedings in respect of the relief claimed therein

and, as such, are distinct and dissimilar remedies. They are also irreconcilable remedies in the sense that, where both are available, the review must be disposed of first as, if the correctness of the judgment appealed against is confirmed, a review of the proceedings is ordinarily not available (see ***Mahomed vs Middlewick N.O. & Another 1917 CPD 539, 540; R v D and Another 1953 (4) SA 384 (A) at 390D – 391B.***"

[58] In **WAHLHAUS V ADDITIONAL MAGISTRATE, JOHANNESBURG AND ANOTHER 1959 (3) SA 113 (A)) at 119 H – 120 E**): it was stated;

'*It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict, or* mandamus– *against the decision of a magistrate's court given before conviction. (See* **Ellis v. Visser and Another,** ***1956 (2) SA 17 (W), and*** **R. v Marais,** ***1959 (1) SA 98(T),*** *where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of* Gardiner and Lansdown *(6th ed., vol. 1 p. 750) state:*

"***While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by*** **mandamus** ***or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the***

power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained... In general, however, it will hesitate to intervene; especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress by means of review or appeal will ordinarily be available."

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts. I would merely add two observations. The first is that, while the attitude of the Attorney-General is obviously a material element, his consent does not relieve the Superior Court from the necessity of deciding whether or not the particular case is an appropriate one for intervention. Secondly, the prejudice inherent in an accused's being obliged to proceed to trial, and possibly conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps fundamental, contention raised by the accused, does not per se *necessarily justify the Supreme Court in granting relief before conviction (see too the observation of MURRAY, J., at pp. 123 – 4 of* Ellis' *case,* supra).

As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal.'

[59] **SIBANDZE V STANLIB SWAZILAND (PTY) LTD (57 OF 2009) [2010] SZSC 42 (28 MAY 2010),**

Per His Lordship I.G. Farlam JJA where in the following appears in the summary; **"Review by High Court of Industrial Court – rule that Superior Courts only interfere in unterminated proceedings in inferior courts in rare cases applied – availability of appeal on point raised to Industrial Court of Appeal on termination of proceedings in Industrial Court relevant factor".**

[60] *The Learned Judge further states at paragraph 8 of the judgment that;*

"In her judgment in the court a quo Agyemang J, referred to the well-established principle that as a general rule superior courts decline to interfere by way of appeal or review in unterminated proceedings in inferior court's **(as to which see, e.g.,WAHLHAUS V ADDITIONAL MAGISTRATE, JOHANNESBURG AND ANOTHER 1959 (3) SA 113 (A)) but she held that the circumstances in the present case were exceptional, justifying a departure from the general rule.** In this regard she said:

> ***'I find that the exclusion of paragraphs 28, 29, and 30 will unnecessarily affect the prosecution of the applicant's suit before [the Industrial Court] in that it may prevent him from having his case adequately heard. That course will not be in the pursuit of justice. The intervention of this court at this stage, for the reason I have given, will not pre-empt the decision of the***

court a quo: nor can the applicant be accused of merely making an academic argument or showing contempt for the court a quo - matters canvassed in the [first and second respondents'] heads of argument.'

[61] The Court states further in the judgment that;

"Apart from the fact that the circumstances set out by the judge in her are not so exceptional as to warrant a departure from the general rule which, as appears from the passage I have quoted from the *Wahlhaus* case, happens in rare cases, the power to depart from the rule being 'sparingly exercised') there is another factor which the court *a quo* appears to have overlooked but which affords a strong reason against intervention on review by the High Court in this case. If proceedings in the Industrial Court do not terminate in the Appellant's favour he will have the right to appeal on a question of law to the Industrial Court of Appeal. The question as to whether the evidence struck out by the Industrial Court was inadmissible, being a question of law, will be able to be argued in the Industrial Court of Appeal in terms of section 9 (1) of the Industrial Relations Act 1 of 2000. It will not be necessary for the point to be taken by way of review as the evidence excluded is fully set out in the record. As appears from the heads of argument filed in the appeal one of the contentions raised by the First and Second Respondents in support of the argument that the evidence struck out by the Industrial Court was inadmissible related to the ambit of the concept of a dispute between parties in an industrial context. The Industrial Court of Appeal, if the matter should come before it in due course, will be well equipped to consider this aspect of the case, in view of the fact that it is a specialist tribunal established to hear appeals in industrial matters, from which no further appeal lies to this Court: see SWAZI OBSERVER PTY) LTD V HANSON NGWENYA AND OTHERS, an unreported decision of this Court given in Civil Appeal 19 of 2006."

[62] The Learned Judge proceeded to conclude that;

> **" In the circumstances I am satisfied that the Court *a quo* erred in entertaining the application brought by the Appellant to review the ruling made by the Industrial Court.**
>
> **It follows that the Appellant's appeal directed at obtaining an order intervening even further than the Court *a quo* did with the ruling made in the Industrial Court must fail. It also follows that the first and second respondents' cross-appeal seeking the reversal of the court *a quo's* order setting aside the striking out of paragraphs 28, 29 and 30 must succeed, albeit on a basis not raised by the first and second respondents in their notice of appeal. In the circumstances I am of the view that it would be appropriate to make no order as to costs in this court or in the court below."**

[63] When the proceedings in the Industrial Court did not terminate in the Appellant's favour, it had the right to appeal on a question of law to the Industrial Court of Appeal. The question as to whether the High Court lacked the necessary jurisdiction to hear and determine the application for review, being a question of law, will be able to be argued in the Industrial Court of Appeal in terms of section 9 (1) of the Industrial Relations Act 1 of 2000. It was unnecessary for the point to be taken by way of review.

[64] Furthermore, the appellant's application for review in the High Court failed to meet the requirements for a review. Consequently, the High Court lacked

jurisdiction to hear and determine the matter. The matter should proceed in the Industrial Court of Appeal.

[65] The Second Respondent, in my view correctly, abandoned the ground that the - Supreme Court and High Court have no jurisdiction over labour matters in that this issue was settled in the matter of **NEDBANK SWAZILAND AND 3 OTHERS vs PHESHEYA NKAMBULE AND THREE OTHERS OF (70/2020) [2020] SZSC 04 (27 FEBRUARY 2023)** at page 37 of the judgment. In this matter the Court, made an order, inter alia that;

> ***"The High Court and by extension the Supreme Court has power to review decisions, Rulings, Orders of the Industrial Court, Conciliation, Mediation and Arbitration Commission (CMAC) and Labour Arbitration Tribunals."***

[66] This matter concerns the jurisdiction of the Industrial Court. It was common cause that a claim of right is justiciable in the Industrial Court whereas a claim of interest, an economic type of dispute, can only be dealt with through collective bargaining and cannot be adjudicated by that courts.

[67] The Industrial Court held the Second Respondent's claim to be one of right and consequently, that the Industrial Court would have jurisdiction over the dispute. This finding, according to the Appellant, was final and the Appellant

therefore was entitled to approach the High Court for the review of the Ruling.

[68] In the Industrial Court, there were two primary questions at stake, the second being entirely reliant on the first:

68.1 Firstly, the nature of the claim i.e., of right or of interest. If the answer to this question was restricted to interpretation of a document it would be a pure question of law in that interpretation is a matter for the court and not for witnesses. See **KPMG CHARTERED ACCOUNTANTS (SA) v SECUREFIN LTD AND ANOTHER 2009 (4) SA 399 (SCA)** paragraph 39 and the authorities cited therein. However, should there be a commixture with factual issues, in the end analysis it may not be a legal question after all.

68.2 Secondly, jurisdiction. It is common cause that a claim of right is justiciable by the Industrial Court, whereas a claim of interest is not. Some jurisdictional questions can take the form of mixed fact and law in some instances, however, in *casu* the question whether a claim of right is justiciable and of interest not, is a very simple and straight forward question of law which has been answered by the courts.

APPEAL OR REVIEW

[69] In considering the matter in *casu*, the Court also is mindful of two particularly important distinctions between the civil and the industrial

courts regarding appeals: firstly, appeals from the Industrial Court to the Industrial Court of Appeal are limited to appeals on questions of law only in terms of Section 19(1) of the Industrial Relations Act, 2000 as was restated in the ABEL SIBANDZE v STANLIB (*supra*). Secondly, it has been held by the Industrial Court of Appeal, albeit after the judgment of the court *a quo* had issued, that the current legal position is that it is irrelevant whether or not the decision appealed against is final or interlocutory in nature or in effect; a party has a right to appeal from the Industrial Court to the Industrial Court of Appeal as of right, and leave to appeal is not required. See **STANDARD BANK OF ESWATINI v FREEMAN LUHLANGA, and NHLANGANO TOWN COUNCIL V JEREMIAH KUHLASE & 4 OTHERS (CONSOLIDATED) (11 & 18/2021) [2022] SZICA 8 (23 AUGUST 2022).**

[70] The High Court is the next in the hierarchy from the Magistrate's Courts and serves as both court of review and court of appeal in respect of those courts.

70.1 The Magistrate's Courts previously were known as subordinate courts in terms of the Subordinate Courts Proclamation (*Cap.* 20), as appears from section 3 and the note at the end of the Magistrate's Court Act, 1938. In assessing appealability for purposes of review, the High Court assesses appealability to itself.

70.2 Under section 5(4) of the 1980 Industrial Relations Act both appeals and reviews went to the High Court i.e., as is the case with Magistrate's Courts, the High Court assessed appealability to itself.

70.3 Under section 19(5) of the 2000 Industrial Relations Act, however, the High Court may review Industrial Court decisions and by necessary implication, consider and decide appealability to another court altogether, being to the Industrial Court of Appeal. This apparent incongruity will be addressed later hereunder.

FINDINGS

[71] Reverting to the case in hand: It is immediately clear that the final or interlocutory nature of an Industrial Court ruling or other judgment is neither here nor there. In fact, it appears *in casu* that the nature of the ruling, i.e., final or interlocutory *vis-à-vis* appealability, inadvertently had become a red herring and the focal point of the argument.

[72] The need to make and maintain a clear distinction between an appeal and a review is an important one concerning the course of action to be adopted in a particular matter, more so since the respective jurisdictions of the High Court (review) and the Industrial Court of Appeal (appeals) are governed by different legal dictates.

[73] Mr. Jele, Counsel for the Appellant, when asked by this Court as to whether the matter was one of review or appeal he responded that it could be both. He further stated that *ex lege* the Appellant's right to appeal to the Industrial Court of Appeal was limited to a point of law and not fact, as a result of which the open legal path to challenge the ruling of the Industrial Court *a quo*, was by way of review by the High Court.

[74] Mr. Jele's submission can be faulted on two fronts;

Firstly, as already shown above, jurisdiction is essentially a question of law and therefore a party who was not satisfied with the Industrial Court's finding had jurisdiction was entitled to appeal to the Industrial Court of Appeal.

Secondly, it is based on legal incongruity that simply because a litigant's path to an appeal from the Industrial Court to the Industrial Court of Appeal faces a legal *cul de sac* then such a litigant is entitled on the basis of some presumed necessity to approach the High Court for relief by way of review even where the required grounds for a review do not exist such as in the present matter.

[75] The relevant principles to this question were considered in the following cases; ESWATINI CIVIL AVIATION AUTHORITY v SABELO DLAMINI [2021] (13/2021) SZICA 01 (9 FEBRUARY 2022), TREVOR SHONGWE v MACHAWE SITHOLE N.O. ESWATINI ROYAL INSURANCE CORPORATION and ANOTHER [2021] (08/2020) SZCA 1 (10 AUGUST 2021), AFRICAN ECHO /119 TIMES OF SWAZILAND v INNOCENT MAPHALALA (55/2021)[2024] SZSC 65 (29 FEBRUARY 2024) and JAMES NCONGWANE v SWAZILAND WATER SERVICES CORPORATION (52/2012][2012] SZSC 65 (30 NOV 2012).

INCOMPLETE PROCEEDINGS

[76] A further concern is that the general principles enunciated through the cases concerning review and **intervention in incomplete proceedings** do not appear to have been afforded sufficient weight. For instance, it was held in MASWANGANYI v ROAD ACCIDENT FUND 2019 (5) SA 407 (SCA) that:

> ***"[22] Even where there is a power of review, as is the case with uncompleted proceedings in a magistrates' court, there is long-standing authority that such proceedings will not ordinarily be reviewed by the High Court until they have run their full course, at which stage an appeal or review may be brought. In Ismail and Others v Additional Magistrate, Wynberg and Another Ismail v Additional Magistrate, Wynberg and Another*** **[1963 (1) SA (A)] applying** ***the decision in Wahlhau*** **[Wahlhaus**

and Others v Additional Magistrate, Johannesburg and Another 1959 (3) SA 113 (A)] *referred to the following was stated:*

'(I)t is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. . . . (W)here the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the . . . decision under appeal at a stage when no appeal lies."

[23] The appellant's case was premised on the claim that the judge's decision was wrong. No appeal or interlocutory proceeding to reverse that decision lies whilst the proceedings are ongoing. The full court was therefore correct in holding that the application was misconceived and the relief sought in prayers 1 and 2 incompetent..."

[77] The Second Respondent's first point *in limine* in the court *a quo* contained the wording: "…. ***there are no exceptional circumstances which have been advanced to warrant a deviation by this court from the rule that the High Court will not intervene in unterminated proceedings which upon termination the Review or Appeal process will still be available to Applicant."*** This point was only partially quoted in Paragraph 17.1 of the judgment of the Court *a quo*, the phrase highlighted above having been omitted therefrom. The Second Respondent repeated this point in argument before this Court.

77.1 The case of **ABEL SIBANDZE v STANLIB (*supra*),** wherein the **WAHLHAUS** principle was affirmed by this Court and which was referred to by the Second Respondent's Counsel, was alluded to in Paragraph 27 of the judgment of the court *a quo*. The Summary in the **SIBANZE** case reads:

"Review by High Court of Industrial Court – rule that Superior Courts only interfere in unterminated proceedings in inferior courts in rare cases applied – availability of appeal on point raised to Industrial Court of Appeal on termination of proceedings in Industrial Court relevant factor."

77.2 The court *a quo* appeared to place the emphasis on the portion dealing with appealability of interlocutory orders, as if appealability was the decisive question and not only a factor to be taken into account. The Court *a quo* then decided the matter with reference to second point *in limine* relating to prematurity.

77.3 In the circumstances, the phrase: "... ***no exceptional circumstances which have been advanced to warrant a deviation by this court from the rule that the High Court will not intervene in unterminated proceedings...***" sounded a lone clarion call in a review battlefield that unfortunately spilled over onto the terrain of appealability.

CONCLUSION

[78] Shorn of embellishment, the gravamen of the Appellant's complaint is that the Industrial Court erred in holding that the nature of the claim was one of right and not of interest;

78.1 Whether the Second Respondent's claim was justiciable in the Industrial Court or not, depends on that determination.

78.2 Whether that determination as to the nature of the right was a pure legal question and thus appealable. or a factual question and thus not appealable, is a matter perhaps best decided by the Industrial Court of Appeal should it be raised as a ground of appeal therein and I do not intend to decide this matter on this basis.

78.3 Either way, the Appellant's complaint is that the decision was wrong. In law; review is not concerned with merits of the decision but with whether it had been arrived at in an acceptable fashion.

[79] That the Ruling by the Industrial Court was against the Appellant and the Appellant was dissatisfied therewith, therefore does not alone suffice as a good ground for a review. A proper analysis of the proceedings before the Industrial Court and the application for a review before the Court *a quo* clearly demonstrates that the application for the review of the ruling of the Industrial Court was essentially an appeal in disguise, and not a review. Nothing in the grounds of appeal before this court and the Founding Affidavit before the Court *a quo* demonstrated either a failure of justice amounting to a gross irregularity or like impropriety in the hearing before the Industrial Court, and which would bring the matter within the ambit of interference in *"rare cases."*

[80] By virtue of the conclusion that the Appellant failed to demonstrate any reviewable irregularity, the judgment of the Court *a quo* must be confirmed on that basis and the appeal must be dismissed, and I would so hold.

[81] The Court however does not find itself able to sign off on this judgment without addressing the judicial elephant in the room, being the inequality of playing fields for labour law litigants on the one hand, and civil or criminal law litigants on the other. Reviews are permitted from Industrial Court decisions but not from High Court decisions. The judges of the High Court hearing such reviews hold the same, and no higher qualifications than the Industrial Court judges. Appeals from the High Court can be noted against questions of fact or law but from the Industrial Court to the Industrial Court of Appeal, whose Judges hold the same qualifications as the Judges of this Court, as on questions of law only. The civil courts may not hear labour matters as courts of first instances or courts of appeal; the Legislature exclusively preserved that as the province of the Industrial Courts.

[82] Prior to the creation of the first Industrial Court in 1980 by the 1980 Industrial Relations Act, the Industrial Conciliation and Settlement Proclamation, 1963 provided for labour adjudication by tribunals staffed by non-judges and lay members. Presumably the High Court review clause, which first was inserted

in the 1980 Act, was to enable the High Court to cast a big brotherly eye over a court newly created, by way of both of review and appeal – the Industrial Court of Appeal was only created in the 1996 Industrial Relations Act. Since the first Industrial Court was established almost 45 (forty five) years ago, a large body of jurisprudential wisdom has been accumulated and the labour Courts can rightly be said to have become highly specialized courts in their own right.

[83] All the Industrial Relations Acts were enacted prior to the advent of Constitution of the Kingdom of Swaziland Act, 2005 and when the 1968 Constitution still was in force. The 1968 instrument did not provide for fundamental rights and freedoms, including the rights to equality before the law and fair hearing, as does the 2005 Constitution, which enshrines the rights to equality before the law (section 20) and the right to a fair hearing (section 21). Section 38 under the heading "*Prohibition of certain derogations*" reinforces the above protections.

[84] The statutory and common law principles relating to appealability are different and the fact that interlocutory Industrial Court orders may be appealable as of right, poses difficulties in the application of authorities on judicial review, such as **WAHLHAUS** in terms of which appealability is a factor in the case of intervention in uncompleted proceedings.

84.1 The question also arises whether the Industrial Court of Appeal then properly, fairly and reasonably is to be bound by a determination of appealability by the High Court, in the context of whether it involves a question of fact or of law, and prior to the STANDARD BANK case, in the context of finality. Does this not amount to usurpation by the High Court of the powers of the specialized Industrial Court of Appeal, who in terms of statute is supposed to enjoy exclusive jurisdiction over Industrial Court appeals? And is the Industrial Court of Appeal to be so bound by the decision of a single High Court Judge who needs or holds lesser qualifications than the Judges of the Industrial Court of Appeal, who sit as a trio? (This Court is not bound by decisions of the High Court.)

84.2 Often questions of fact and of law can become intertwined, for instance in respect of some jurisdictional aspects. This more often than not results in mental acrobatics by Counsel and judicial headaches on the part of the Judges, as reflected in the reported Industrial Court of Appeal decisions. Even worse, the exclusion of appeals on questions of fact occasions the by now very familiar route undertaken by some litigants to take the review route to circumvent this and to have questions of fact judicially revisited.

[85] Equity is supposed to prevail in the adjudication of labour law, with the intention to have labour disputes resolved quickly, cost effectively and expeditiously. However, due to the above anomalies, these laudable aims and objectives remain elusive and the mischief sought to be prevented easily can proliferate. If one considers the instant matter, it started from CMAC, then came before the Industrial Court, then the High Court and now before this Court, and with the added review jurisdiction of this Court under Section 148(2) of the Constitution, another bite is still possible. This can hardly be termed quick and expeditious resolution of disputes let alone justify the costs involved.

[86] In this day and age, therefore, and in the spirit of our Constitution, there does not appear to be any justification either for Industrial Court decisions to be subject to review, or to restrict the right of appeal to appeals on question of law.

[87] For these reasons, it would be premature for this Court to pronounce itself on the issue of whether the Appellant's claim is a dispute of right or a dispute of interest. This issue was not adjudicated upon by the Court *a quo* and it is immaterial at this stage in view of the findings of this Court.

[88] This Court, albeit *via* a largely different route reaches the same conclusion as the High Court. Accordingly. the matter is not one for adjudication by the High Court or the Supreme Court but falls within the preview of the Industrial Court and the Industrial Court of Appeal.

[89] The need for a legislative intervention in these issues has been the subject of various judgments of this Court. Unfortunately, this much needed intervention has so far not been heeded. Like many similar judgments before, the Registrar of the Supreme Court must deliver this judgment to the Learned Attorney General and it is hoped that the necessary action will be taken.

[90] That being said, there is nothing preventing the President of the Industrial Court to seek the concurrence of the Honourable Chief Justice, for the determination of the constitutionality of the distinction between fact and law in the appealability of a matter from the Industrial Court to the Industrial Court of appeal by the High Court sitting in its jurisdiction as a Constitutional Court.

COSTS

[91] The usual principle followed in civil matters is that costs follow the cause. However, the Industrial Court usually do not make costs orders partly in consideration of employer–employee relationships and equity. In the circumstances of this case which has been going on for a while and yet not near completion and the merits and demerits of this appeal, I am of the that the Second Respondent must be awarded costs.

COURT ORDER

[92] In the result, the Court makes the following order:

1. The appeal is dismissed.
2. The Second Respondent is awarded costs.

S. P. DLAMINI

JUSTICE OF APPEAL

I AGREE

S. K. J. MATSEBULA

JUSTICE OF APPEAL

I ALSO AGREE

M. J. MANZINI

JUSTICE OF APPEAL

Counsel for the Appellant: **N.D. JELE**

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