IN THE SUPREME COURT OF ESWATINI

JUDGMENT V1.2

HELD AT MBABANE **Case No.: 21/2024**

In the matter between:

AGRIPPA VELAPHI BHEMBE **Appellant**

And

HIS LORDSHIP R. MURPHY AJ, JUDGE **1st Respondent**

CHAIRMAN OF THE JUDICIAL

SERVICE COMMISSION N.O. **2nd Respondent**

THE ATTORNEY GENERAL N.O **3rd Respondent**

PRINCESS KHULEKILE MALINGA **4th Respondent**

Neutral Citation: Agrippa Velaphi Bhembe vs His Lordship R. Murphy AJ, Judge and Three Others *(21/2024) [2025] SZSC 129 (28/01/2025)*

Coram: **J.P. ANNANDALE, JA;**
S.J.K. MATSELA, JA; and
J.M. CURRIE, JA.

Date Heard: 28 October, 2024.

Date Delivered: 28 January, 2025.

SUMMARY

Labour Law – Appellant challenged the prerogative power of the employer to transfer – Alleging not to have been afforded a hearing before decision to transfer and other inconveniences.

Civil law – Three Judges of the Industrial Court recuse themselves from case on the ground of close working relationship with Appellant – Thereafter all parties agree on recruitment of an independent and foreign justice – Decision of the subsequent hearing does not favour Appellant and takes matter to the High Court alleging appointment of foreign Judge unconstitutional in terms of section 157 (1) of the Constitution – High Court holds section 157 (1) not applicable to Industrial Court – On appeal, Court not pleased with the recusal of the judges of the Industrial Court which resulted in the parties agreeing to recruit a judge outside the country instead of those constitutionally appointed into office – Agreement results in issues to be decided by law principles, doctrines and on technicalities at the expense of the substance of the dispute.

Held: Matter is of public and judicial interest as it impacts on unprecedented increase of applications for judicial recusals and meaning and significance of judicial oaths of due execution of office.

Held: Matter should not be decided on law principles, doctrines and technicalities but on the substance of the dispute, including the examination of the

prerogative of an employer to organize and re-organize his workforce and taking into account the observance of the *audi alteram partem* rule, as well as Constitutional requirements. Parity of office *vis-à-vis* Judicial appointments to High and Industrial Courts,

Held further: Decisions of the Industrial Court and the High Court vacated and matter referred back to the Industrial Court for hearing afresh (*de novo*).

JUDGMENT

As per S.J.K. MATSEBULA JJA, and JP Annandale and JM Currie concurring.

The Parties

[1] The Appellant is Agrippa Velaphi Bhembe, who at the time he initiated the proceedings in 2017 was the Registrar of the Industrial Court.

The 1st Respondent is His Lordship R. Murphy A.J, a South African Justice of the High Court of South Africa (Gauteng Division at Pretoria) who was appointed specifically to preside over this case at the Industrial Court. The 2nd and 3rd Respondents are cited in their official capacities as Chairman of the Judicial Service Commission and the Attorney General respectively.

The 4th Respondent is Princess Khulekile Malinga, a person appointed as Registrar in the place of the Appellant.

Background

[2] The background to this matter is well captured in the 1st Respondent's Heads of Argument, which facts are no different from the judgment of the Industrial Court and it is herein reproduced-

> "1. On 4th December 2017, the Judicial Service Commission transferred the Appellant from the position of Registrar of the Industrial Court and appointed him to the position of Magistrate tenable at Nhlangano Magistrates Court. The Appellant's conditions of service in terms of remuneration were not adversely affected.
>
> 2. The Appellant contested the decision to appoint him as Magistrate and on 12th December, instituted, on an urgent basis, an application at the Industrial Court seeking amongst other relief an order reviewing and setting aside the decision to appoint him as a Magistrate in Nhlangano.
>
> 3. There was a delay in the enrolment of the urgent application, which in part was attributable to the fact that three substantive Judges of the Industrial Court recused themselves on the basis that they had a working relationship with the Appellant.
>
> 4. With the three judges having recused themselves, the next available option was for the Judge President of The Industrial Court to approach the Judicial Service Commission (JSC) to make an *ad hoc* appointment to preside over the matter. The Appellant objected to this proposed course of action on the basis that he contended that the JSC had an interest in the matter and

therefore it would be improper for that body to make the *ad hoc* appointment.

5. The judge President, the Appellant's attorney and the first Respondent's attorney, eventually reached a compromise on the following terms-

5.1 The Judge President of the Industrial Court would seek a special dispensation from the JSC to appoint a judicial officer from without our borders.

5.2 That the Judge President would be responsible for identifying the judicial officer to be appointed.

5.3 That the JSC would only carry out the procedural role of effecting the appointment once the judicial officer had been identified.

6. There was an important consideration that came to the fore prior to the decision to appoint the first Respondent:

6.1 There were deliberations between the respective counsel and the Judge President on the propriety of appointing a judicial officer from without our borders having regard to the provisions of Section 157 (1) of the Constitution. The text of the provision reads that:

"A person who is not a citizen of Swaziland [eSwatini] shall not be appointed as Justice of a Superior Court after seven years from the commencement of this Constitution".

6.2 The respective counsel submitted to the Judge President that on a proper construction, section 157 (1) of the Constitution referred to superior Courts and that Superior Courts were identified as being the Supreme Court and High Court as per section 139 (1) (a) of the Constitution.

7. It was on these bases that the first Respondent, who at the material time was a Judge of the Labor Court of Appeal stationed in Cape Town, came to be appointed to preside over this matter.

8. There was no objection to the first Respondent's appointment when he sat to preside over the matter. The first Respondent delivered his judgment dismissing the application for review in December 2018.

9. After the lapse of an inordinate period, the Appellant instituted proceedings at the High Court seeking two substantive items of relief.

9.1 First, he sought an order reviewing and setting aside the judgment of the Industrial Court on review grounds permissible at common law. This was predicated on section 19 (5) of the Industrial Relations Act.

9.2 Second, he sought a declaratory order, declaring that the appointment of the first Respondent was unconstitutional and therefore there was no "judge" presiding over his matter at the Industrial Court."

Progression of the Matter

[3] The matter was heard by the Industrial Court and it found against the Appellant. He applied for review at the High Court and it too found against him. Being dissatisfied with the decision of the High Court, he has appealed to this Court and his grounds of appeal are herein reproduced as Appellant's case.

Appellant's Case

[4] The Appellant's grounds of appeal are as follows-

"1. *That the Court a quo erred in law and in fact in holding that Section 157 (1) of the Constitution of Eswatini (2005) that disqualifies non-citizens of Eswatini to be appointed as Justices of a Superior Court after seven years from commencement of the Constitution, does not apply to the Industrial Court Justices, but only High Court Justices.*

2. *That the Court a quo erred in law and in fact by holding that section 6 (3) of the Industrial Court Act, 2000 does not subject Justices of the Industrial Court to the provisions of section 157 (1) and that the prohibition in section 157 (1), it excludes Justices of the Industrial Court.*

3. *That the Court a quo erred in law and in fact in holding that the common law principle of acquiescence overrides a constitutional prohibition [section 157 (1)]. The Court a quo should have held that no common law principle can stand against statutory prohibition, let alone a constitutional prohibition.*

4. *That the Court a quo erred in law and in fact to have dismissed the point on the legality of the Judicial Service Commission (JSC) when their term had expired and therefore, had no power to deal with the Appellant's case. The Court a quo erred in dismissing this point fully, on the basis that the JSC had not been cited as a party to the proceedings. The Court a quo ought to have held that the JSC could not be cited, served and its supplementary affidavit be in issue to as it at the time had no locus standi it's term having expired.*

5. *The Court a quo erred in law and in fact in rejecting the submissions of the Appellant regarding the late supplementary affidavit filed by the Respondent. The Court a quo ought to have held that even without an objection to its filing, the minute attached to it by the JSC ought to have been rejected by the Court a quo on the basis that the JSC was illegally in office.*

6. *The Court a quo erred in law and in fact to have held that the Appellant was consulted by the JSC before the decision to transfer was taken. The Court a quo ought to have held that it was unreasonable and irrational with no basis for the Industrial Court to hold that the Appellant was consulted.*

7. *The Court a quo erred in law and in fact to have admitted minutes of a Judicial Service Commission which was not legally appointed to produce such minutes or depose to a Supplementary Affidavit on the 1st December, 2024.*

8. *The Court a quo erred in law and in fact to have allowed the 2nd Respondent to be represented by a private attorney in the office of the current attorneys representing them in this appeal other than the Attorney General."*

1st Respondent's Case

[5] (a) The Respondent's contention is that Section 157 (1) does not apply to the present case as the Industrial Court is not a Superior Court (High Court and Supreme Court).

(b) The Appellant acquiesced to the appointment of the 1st Respondent (in fact he instigated the appointment) and therefore should be estopped from now contesting the validity of the appointment.

(c) The JSC exercised its powers when it transferred and appointed the Appellant to the position of Magistrate and he was accorded his procedural right (hearing and representations) including consultation prior to decision.

(d) The issue of the expiry of the term of office of the JSC was not canvassed in the papers before the Industrial Court and further not argued as a point of law. And it is denied that the term had expired.

(e) The issue of the Respondents being represented by a private attorney was not canvassed at the Industrial Court and did not form part of the record for review proceedings.

Analysis of the Case and the Law

[6] It is unfortunate that this case has been allowed to go as far as the doors of the Supreme Court in either its form or character. The blame for this lies on all the parties involved. That would be the attorneys involved, the Industrial Court and lastly the Judicial Service Commission. The lame excuse given for recusal by the Judges of the Industrial Court is unaccepted. It creates unequalness before the law between the ordinary citizens of this country and officers attached or employed under the judiciary. This is unlawful. Officers working under the judiciary do not enjoy immunity from having their cases heard and tried by constitutionally appointed judges of the Courts.

[7] Decisions on recusal of judicial officers by Industrial Court Commissioners and Judges is a serious matter and should only be allowed or exercised in exceptional circumstances. Working in a Court's office is not an exceptional circumstance. It does not set one apart from the rest of the citizens of this country. Though an all-inclusive and exclusive list cannot be formulated what consists or justification for allowing for recusal orders, the reasons are diverse and circumstances may not be the same. A judicial officer may step aside from a case because of a potential conflict of interest or bias. Recusal seeks to ensure the proceedings are fair and impartial. A judicial officer can still hear and determine a case involving an employee of the offices of the judiciary and still be fair and impartial. There is always a higher Court where an appeal or review can check if there was miscarriage in the form of unfairness or impartiality of the trial or decision. In civil cases this miscarriage is minimal compared to criminal cases where there are limitations on DPP to appeal decisions.

[8] As stated above, circumstances differ, where in one case the set of facts may justify recusal while in another it may not. Obvious facts for recusal are financial interest, prior involvement in the case, deep rooted beliefs or public opinions, prior comments on the case and such other cases and issues of similar magnitude. Judges should not readily self-censure themselves, but it

may be necessary to permit an application for recusal to be made so that the facts are ventilated either in chambers or open Court. This helps to gauge the seriousness of the accusations or seriousness of the application.

[9] The issue of recusal or the legal process for recusal seems to be abused. There is an unwarranted increase of applications for recusals which is against the good of the greater public interests. If not handled well, public confidence in the judiciary may be eroded. If unchecked, litigants may usurp the Chief Justice's prerogative to determine a Court roll, with the likelihood of litigants selecting and choosing judges of their liking through recusal applications.

[10] As mentioned above, this is a matter of public interest and needs re-instatement from this Court. Judges are noble and persons of integrity and the proverbial last soldiers standing. With that in the equation, judges are the last persons to abdicate their duties and their thrones. The rules and expectations is that judges should without fear or favor handle and determine every case and dispute coming before them. There are very limited exceptions to this rule such as conflict of interest judicially recognized as stated above.

[11] This is one case where substantive law should prevail over technicalities. Deciding cases on technicalities has its values such as speedy and less expensive determination of cases but it also has its shortcomings. The real substance of the dispute is left undetermined in most cases, thereby resulting in partial or incomplete justice. The root cause of problems visiting this case stems from an agreement by the parties to look for a judicial officer to preside over the case which agreement on the face of it, without interpretation of the provisions of the Constitution, seems unconstitutional. What followed up to this Court is arguments based on legal principles and technicalities at the expense of substantive law. Two citations from Justice Ota J. should drive this point home.

[12] In *Savannah N. Maziya Sandanezwe v GDI Concepts and Project Management (Pty) Ltd, High Court Case No. 905/2009* (Eswatini LII) Justice Ota, J said-

> *"The universal trend is that Courts are interested in substance rather than mere form.*
>
> *This is because the spirit of justice does not reside in forms and formalities, nor in technicalities, nor is the triumph of the administration of justice to be found in successfully picking ones was between the pitfalls of technicalities. Justice can only be done, if the substance of the matter is considered. Reliance on technicalities leads to injustice. The Court will therefore, not answer that mere form or fiction of law introduced for the sake of justice should work wrong, contrary to the real truth or substance of the case before it. I am delighted to note that I am not above in the foregoing proposition. The Supreme Court of Swaziland, the Apex Court in the land, made a similar pronouncement in the celebrated case of Shell Oil Swaziland Ltd v Motor World Pty Ltd trading as Sir Motors Case No. 23/2006 at page 23."*

[13] The Supreme Court together with its Appellate jurisdictional power under section 146 and its supervising powers under section 148 of the Constitution reminds judges of the oath of due execution of office and what it entails. The oath is found on the Second Schedule of the Constitution and states-

> *"I .....do swear (or solemnly affirm) that I will well and truly serve King....., his heirs and successors in the office of (here insert description of the judicial office) and I will do right to all manner of people according to the law without fear or favour, affection or ill will."*

[14] To all manner of people, means all people in Eswatini unless the Constitution has clothed them with immunity for appearing before Courts. All manner of

people includes people, even if attached, *in casu*, to the judiciary. There is no different set of judges for the officers under the judiciary. Judges are to administer the law to all without fear or favor, affection or ill will. The limited exceptions, recognized in law, have been pointed out as above, on conflicts of interest, but being a workplace-mate or lower ranking appointee is not amongst the exceptions. Judges should not abdicate their judicial duties or their impartial thrones of adjudication.

[15] This oath applies to all judicial officers. Section 143 of the Constitution in respect of the Supreme Court and High Court judges and section 6 (5) of the Industrial Relations Act, 2000 in respect of the President and all judges of the Industrial Court (the section refers to the Schedule 2 of the Constitution) is clear on this.

[16] The oath may seem a matter of form and procedure but goes further than that as it transforms, in application, to a matter of substance. It becomes the corner- stone of justice, judicial existence and its integrity without which there would be no truth, no trust and no confidence in the judicial system leading to its inevitable collapse. The content of the oath is an issue of substance and necessary for its survival.

Conclusion

[10] It is our firm belief that the substantive issue in this matter and such similar matters require to be heard and determined by Judges of the Industrial Court as constituted on the strength of their oaths of due execution of office.

Orders

[18] In view of the foregoing, the Court makes the following orders-

1. The judgment of the High Court is vacated.
2. The judgment and orders of the Industrial Court are vacated.
3. The matter is referred back to the Industrial Court to start afresh (*de novo*).
4. No order to costs.

S.J.K. MATSEBULA

JUSTICE OF APPEAL

I agree

J.P ANNANDALE

JUSTICE OF APPEAL

I agree

J.M. CURRIE

JUSTICE OF APPEAL

Nkosinathi Gumedze for the Appellant (Howe Masuku Attorneys)

Z.D. Jele for 1st Respondent (Robinson Bertram Attorneys)