IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No. 1070/15
Reportable

In the matter between:

ALFRED MAIA **Applicant**

And

THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION **1st Respondent**

THE MINISTRY OF WORKS & TRANSPORT **2nd Respondent**

THE ATTORNEY GENERAL **3rd Respondent**

Neutral citation: *Alfred Maia vs The Chairman of the Civil Service Commission & 2 Others (1070/15) 2016 SZHC 25(17 February 2016)*

Coram: Q. M. Mabuza J
N. J. Hlophe J
M. R. Fakudze J

For Applicant: Mr. S. Jele

For Respondent: Mr. M. Vilakati

Date Heard: 28th October 2015

Date Handed Down: 17th February 2016

Summary

Civil Litigation – Constitutionality of the Industrial Court's powers to review an employer's decision terminating an employees services – Whether the Industrial court has power to review a public employer's decision allegedly contravening the employees right to administrative justice under Section 33 (1) of the Constitution – Nature of the power entailed in the termination of an employee's services considered – Whether the termination of an employees services in the public sector amounts to an exercise of administrative power as opposed to contractual power.

1. ***Matter referred to this court by the Industrial Court for determination of a constitutional question on whether the Applicant was entitled to bring a review application on common law grounds for an alleged contravention of an employees right to Administrative Justice as envisaged by Section 33 of the Constitution of Swaziland, to the Industrial Court***

2. ***Whether feasible or even desirable under the current scheme of the Labour Laws of this country for labour matters where Civil Servants challenge their dismissal to do so on a review basis to the Industrial***

Court and thereby treat them differently from other employees in the country.

3. ***Reviews under the Common Law for an alleged contravention of Section 33 of the Constitution of Swaziland as concerns the decision of a public employer dismissing an employee considered including the feasibility of either the High Court or the Industrial Court to deal with such matters particularly considering the exclusivity of the Jurisdiction of the Industrial Court in labour matters and the High Court's lack of Jurisdiction to deal with such matters. Entitlement and the exclusivity of the High Court in enforcing the constitution and determining reviews on administrative decisions, observed.***

4. ***The dismissal of an employee in terms of the interpretation Section of the Industrial Relations Act 2000, is a dispute and should therefore be resolved in the same way all disputes are resolved which is to follow the route set out in part VIII of the Industrial Relations Act 2000 as amended.***

JUDGMENT

[1] On the 9th August 2012, the Industrial Court per Nkonyane J, referred the present matter to this Court for a directive on the competence or otherwise of the Industrial Court to entertain review proceedings brought to the said court in terms of the Common Law as a result of an alleged contravention of the Applicant's right to administrative justice as guaranteed by Section 33 (1) of Chapter III, of the Constitution of Swaziland.

[2] The specific order of the Industrial Court referring the said matter to this court is couched in the following words which are repeated herein for purposes of accuracy:-

> **"17. Taking into account all the circumstances of this case, the court will accordingly make the following order:**
>
> **1. The current proceedings are stayed pending determination by the High Court of the question that arises whether or not it is competent for this court to entertain review proceedings in terms of the Common Law brought on Notice of Motion based on the alleged contravention of the Applicant's right to**

administrative justice which is guaranteed by Section 33 (1), Chapter III of the Constitution.

2. **The record of these proceedings is referred to the Registrar's office to facilitate the referral of the matter.**

3. **There is no order as to costs".**

[3] The background facts to this matter are that the Applicant, an employee of the Swaziland Government was arrested for an alleged theft of his employer's goods allegedly worth about E20 000.00 and charged with a criminal offence. He was subsequently released on bail pending trial.

[4] Before the criminal charges preferred against him could be finalized in court, he was called upon to appear before the Civil Service Commission and show cause why he should not be suspended from work on half pay pending finalization of an inquiry instituted in terms of the disciplinary processes applicable to such employees. He was eventually suspended without pay. He says he was asked if he knew anything about the allegations of theft levelled against him. After answering in the affirmative confirming knowledge of the allegations concerned as

opposed to admitting guilt, he says he was told not to say much as he was still to be given an opportunity to explain in writing why he should not be found guilty. This, he says was a deviation from his having been asked to say what he wanted to, which he had accepted and had asked his attorney, who was there and prepared to address them, to do so.

[5] The Applicant says he was eventually invited by means of a written letter and asked to show cause within 7 days, why he should not be dismissed from the Civil Service according to Section 36 (b) of the Employment Act of 1980. This was on the 6th October 2011. On the 18th November 2011, although he says he prepared a detailed response in writing on why he should neither be suspended nor dismissed he was nonetheless dismissed by means of a letter dated the 18th November 2015; which alleged that his aforesaid dismissal was in terms of Section 36 (b) of the Employment Act of 1980. In other words the dismissal was allegedly for his having been found guilty of committing a dishonest act which is a dismissible offence in terms of the said Section of the Act.

[6] He contended that his dismissal was irregular and ultra vires the regulations of the Civil Service Commission. He also argued that the

dismissal was an unlawful act as it was pronounced contrary to the provisions of the Regulations aforesaid. He contended as well that Section 38 (3) thereof did not permit his being subjected to a disciplinary enquiry prior to his criminal trial having been concluded unfavourably to him. He further contended not to have been given a hearing in so far as he says no evidence establishing his guilty or otherwise was led against him. He argued as well that the Civil Service Regulations did not provide for the summary dismissal of a public officer. He alleged that before and until the criminal charges preferred against him were dealt with and finalized before the Magistrate's Court; the inquiry could not find him guilty because the criminal case pending before the said court had to be finalized first.

[7] The Applicant then approached the Industrial Court where he sought the following orders from that court:-

> **"1. Reviewing correcting and setting aside the first Respondent's decision to dismiss the Applicant from the Public Service with effect from the 9th November 2011.**
>
> **2. Declaring the termination of the Applicant's employment as irregular and ultra vires the Civil Service Board (General) Regulations.**

3. **Directing the Respondents to reinstate Applicant to his post as store man at the Central Transport Administration.**

4. **Directing the Respondent to pay the Applicant's salary unpaid up to the order of this Honourable Court.**

5. **Costs of this application.**

6. **Further and/or alternative relief.**

[8] In response to the application, the Respondent filed only a notice to raise points of law, contending therein that the application by the Applicant was a common law review complaining only about procedural unfairness yet, it was alleged, according to the Industrial Relations Act, a dismissal would be enforced if it is found to be procedurally unfair just as it would be if it was found to be substantively unfair. The Industrial Relations Act, it was argued further, had empowered the Industrial Court to give redress in the case of an unfair dismissal whether procedurally so unfair or substantively so. It was argued further that the said Act had taken away the right of an employee to seek common law review in cases of an alleged unfair dismissal.

[9] Although expressed in a rather complicated or somewhat confusing manner, the Respondent's point raised in limine was effectively that the Industrial Court had no power or jurisdiction to review the decision of an employer dismissing an employee on the basis of the common law. Where there is a dissatisfaction with the decision taken as expressed in the dismissal of an employee, there was sufficient redress in terms of the labour legal framework obtaining in the country. This redress entailed both the procedural and substantive reliefs obtainable by an employee in a given situation. The process embarked upon by the Industrial Court in resolving such matters necessitates that in order for an employer to escape liability for an alleged unfair dismissal he must first show that the dismissal was fair both procedurally and substantively. In short it did not make sense for a public employee to be allowed to enforce only a procedural irregularity in court in the exclusion of all the other employees when following the established legal framework design to addresses all the shortcomings arising from a dismissal, is available and does not prejudise such an employee in any way.

It was the respondent's case before the Industrial Court that the practice of having matters of dismissal of Public Sector employees enforced differently from those of Private Sector employees should not be allowed

as it was inherently discriminating between the two sectors of employment. The court was in this regard referred to the case of ***Chirwa v Transnet Ltd & Others 2008 (4) SA 364 (CC)*** which, it was submitted, is authority for the proposition that the Public Sector/Private Sector dichotomy in the determination of the fairness or otherwise of a dismissal was no longer applicable, as it was allegedly discriminatory.

[10] It was argued further that if the Applicant intended to enforce a violation of his right to Administrative Justice he would ordinarily have had to approach the High Court in terms of section 35 (1) because that is the court given the power to enforce the provisions of the Constitution. The Industrial Court was however quick to point out that this move was not feasible in the circumstances of this matter when considering that the alleged violation of the right concerned was expressed in the dismissal of an employee which according to the Industrial Relations Act is a matter for the exclusive jurisdiction of the Industrial Court. Furthermore a dismissal is in the said Act defined as a dispute which means that like all disputes, the fairness or otherwise of a dismissal should be determined following the procedure that commences in adherence to the provisions of part VIII of the Industrial Relations Act, 2000 as amended.

[11] It was argued as well that it is settled law that the enforcement of a violation of any of the provisions of Chapter III of the Constitution can only be by the High Court. In fact where the question of such a violation arises before the Industrial Court as allegedly happened in this matter, then the said court ought to stay the proceedings before it and refer the question concerned to the High Court for determination. This is provided for in Section 35 (3) of the Constitution.

[12] The question for determination before this court is, simply put, whether or not it is competent for the Industrial Court to hear a matter brought before it as a review in terms of the Common law allegedly enforcing the Applicant's right to administrative justice, which is guaranteed by Section 33 of the Constitution.

[13] The Industrial Court is a creature of statute. In that sense it has no inherent power in itself but can only exercise the power accorded it by the statute that establishes it. In this jurisdiction the Industrial Court is established in terms of Section 6 of the Industrial Relations Act 2000. Section 6 (1) of the Act provides as follows in this regard:-

"(1) An Industrial Court is hereby established with all the powers and rights set out in this Act or any other law, for the furtherance, securing and maintenance of good industrial or labour relations and employment conditions in Swaziland".

[14] On the jurisdiction of the Industrial Court, Sections 8 (1) and 8 (3) of the Act, which are the relevant ones for consideration, provide as follows:-

> **" 8 (1)The Court shall, subject to Section 17 and 65, have <u>exclusive jurisdiction</u> to hear, determine and grant an appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court or in respect of any matter which <u>may arise at Common Law between an employer and an employee in the cause of employment</u> or between an employer or employer's association and a trade union or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof.**

(3) In discharge of its functions under this Act, the court shall have all the powers of the High Court, including the power to grant injunctive relief".

(My underlining or emphasis)

[15] What is clear from Section 6 of the Industrial Relations Act, is the fact that the powers of the Industrial Court are those given it by the enabling Act, and any other law that extends jurisdiction to it. The question to resolve here is broadly stated, whether the Industrial Court has the power to entertain review applications under the common law. Clearly Section 6 does not accord the Industrial Court the power to entertain a Common law review. I am not aware of any law either at Common Law or in terms of any statute that accords the Industrial Court the power to hear and determine review applications brought before it. In so far as there is some judgments of the Industrial Court of Appeal or the Industrial Court that do so, I shall revert thereto later on in this judgment, including a comment in my view, on the correctness or otherwise of such judgments.

[16] In so far as Section 8 (1) refers to "any matter which may arise at Common Law between an employer and employee in the cause of employment", I have no hesitation this does not refer to review

proceedings. This I say because review proceedings are by no means "any matter which may arise at Common Law between an employer and an employee in the course of employment". This phrase refers to Common Law remedies the law avails an employee or an employer which may attach to issues that may arise between the two such as for instance an employee committing a Common Law offence such as absenteeism or theft or an employer repudiating a contract of employment. Otherwise a review is merely the exercise of reconsidering an administrative decision made by a statutory authority, which is not ordinarily an employer and employee relief as the nature of it is more administrative than contractual. On the distinction between the contractual and administrative power, see ***Chirwa vs Transnet LTD and Others 2008 4 SA 367*** at paragraph 142 and as quoted in paragraph 60 of this judgment.

[17] It is also clear that the jurisdiction of the Industrial Court in hearing and determining review applications brought in terms of the Common Law or in terms of any existing statute is not provided for. All sub-sections 8 (1) and 8 (3), which are relevant subsections say is that the Industrial Court shall have jurisdiction to hear, determine and grant an appropriate relief in respect of an application brought against an infringement of any of the

legislations that extend jurisdiction to the said court or to any matter that arises at Common Law between an employer and an employee.

[18] As regards the Legislations that extend jurisdiction to the Industrial Court, this court is not aware of a single one that empowers the Industrial Court to review a decision of an employer be it a Public Sector one or a Private Sector one. This court was also not referred to any such legislation during the hearing of the matter.

[19] According to Section 8(3) of the Act, the Industrial Court shall, in the exercise of its functions under the Industrial Relations Act 2000, have all the powers of the High Court, including the power to grant an injunctive relief.

[20] It could be argued that this subsection refers to among other powers of the High Court, the power to review decisions of lower courts and tribunals. This however cannot be. It cannot be because the Section does not give the Industrial court all the powers of the High Court. It only gives it those powers of the High Court when it discharges its functions under the Act. The section itself states what functions of the Industrial

Court it discharges. There can be no doubt this refers to those functions as are enumerated in Section 8 (1) of the Act. Whatever the position, these functions cannot include a review of a decision dismissing an employee because a dismissal is defined in the Act as a dispute which can only be dealt with after following the procedure set out in part 8 of the Act. This means that a review instituted to challenge a dismissal without it having been preceded by conciliation would be against the express provision of the Act on how disputes between an employer and an employee should be resolved.

[21] As already indicated above, a review is not one of the appropriate reliefs to be granted by the Industrial Court, because as a creature of statute that power is not extended to it anywhere. It also could not have been part of those powers given the Industrial Court under the broad reliefs it is entitled to grant, which are those that arise between employer and employee, as it does not so arise.

[22] Considering what was stated by the court *a quo*, in terms of paragraph 14 of its Judgment as well as in terms of what was stated by Counsel in court, it is clear that a practice has developed where the Industrial Court

has now been taken to have the power to review the decisions relating to Public Sector employees on the basis of the Common Law. The reality is that this happens where there has been an alleged violation of the right to administrative Justice as accorded public officers. It was brought to the attention of this court that there are several judgments of the Industrial Court and Industrial Court of Appeal in this regard. This court was referred to such judgments as ***Moses Dlamini v The Teaching Service Commission and Another, Industrial Court of Appeal Case No. 17/2005, Mathembi Dlamini v Swaziland Government ICA Case No. 4/2005*** as well as ***Melody Dlamini v The Secretary of The Teaching Service Commission and 3 Others, Industrial Court Case No. 121/2008.***

[23] It seems to me that there is something fundamentally wrong about the power of the Industrial Court to review decisions of employers relating to the dismissal of employees be it in the Public Sector or in the Private Sector. It seems settled that the review of a decision of an employer dismissing his employees only applies in favour of a particular type of employees or against a particular type of employers. It applies in the Public Sector setting leaving out the Private Sector employer and employee. On the face of it, this smacks of discrimination in the treatment of certain employers and employees. In other words it has the

tendency of treating one type of employees and employers differently from the others and therefore not uniformly with the same practice being extended to the other employees and employers. It encourages a different law for one sector of employees and another for the other sector, which is untenable and is in my view a recipe for disaster.

[24] This is because only Public Sector employees seem to be allowed to review the decision of their employers dismissing them. Clearly this practice is against one of the fundamental principles of Employment Law or Labour Law that employees in similar situations ought to be treated equally or similarly. I have no doubt it was in realization of this principle when the Legislature promulgated Section 3 of the Industrial Relations Act 2000 which reads as follows:-

> **"3. This Act shall apply to employment by or under the Government in the same way and to the same extent as if the Government were a private person but shall not apply to –**
>
> **(a) Any person serving the Umbutfo Swaziland Defence Force established by the Umbutfo Defence Force order, 1977.**
>
> **(b) The Royal Swaziland Police Force Order, 1977.**

(c) His Majesty Correctional Services established by the Prison Act No. 40 of 1964".

[25] The significance of this Section is that it contradicts what the proponents of the view that the Industrial Court has the power to hear review applications brought only by Public Sector employees against their employers. Clearly this cannot be just on the basis of this Section as it provides against it by legislating that the Act shall apply the same way to employment be it by the Private Sector or Public Sector.

[26] In the Republic of South Africa there was a time when the review of decisions of a Public Sector employer dismissing its employee would be entertained by the High Court in exercise of its inherent review of administration decisions power and not by the Industrial Court, which had no such power. This power of the High Court in so far as it relates to the review of the decisions of an employer dismissing or terminating the services of an employee has since been done away with in the Republic of South Africa, it having been found to be discriminatory in its effect. See in this regard ***Chirwa v Transnet Ltd and Others 2008 (4) SA 364 (CC),*** which shall is discussed in greater detail herein below.

[27] As indicated above the Industrial Court is a creature of statute and has not been given any power by the enabling Act to hear and determine review applications at Common Law. This I say despite what was said in matters like ***Moses Dlamini vs the Teaching Service Commission (Supra) and Melody Dlamini v The Secretary, Teaching Service Commission (Supra).*** I shall revert to these cases later on in this judgment. It suffices to point out that the Constitution also does not extend any power to the Industrial Court to enforce the Bill of Rights under Chapter III of the Constitution. According to Section 35 (1) of the Constitution, it is the High Court that is empowered to hear any matter where any person complains of a violation of any Section of Chapter 3 of the Constitution to which Section 33 (1) is a part.

[28] If indeed the dismissal of an employee would amount to the violation of any of the provisions of Chapter 3 of the Constitution, which includes Section 33 (1), then this would have called for enforcement by the High Court as the court empowered to give redress to such violations in terms of Section 35 (1) of the Constitution. This however cannot be, because matters of dismissals are what are loosely referred to as labour matters. While Section 151 (1) of the Constitution gives the High Court unlimited and inherent jurisdiction or power in Civil and Criminal matters, Section

151 (2) is clear that only that court has the power or jurisdiction to enforce the fundamental human rights and freedoms guaranteed by the Constitution as well as the jurisdiction to hear and determine constitutional matters. Section 151 (2) (a) and (b) are instructive in this regard.

[29] Section 151 (3) (a) of the Constitution on the other hand observes that the High Court has no inherent jurisdiction in any of those matters in which the Industrial Court has exclusive jurisdiction. It in fact puts the position as follows:-

> **"151 (3) Notwithstanding the provisions of subsection (1), the High Court –**
>
> **(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction".**

[30] The Industrial Relations Act 2000 as amended underscores the exclusive power or jurisdiction of the Industrial Court over labour matters in what it says in Section 8 (1) as captured above; which is that it shall have exclusive jurisdiction to determine and grant any relief in matters where

there is a violation of any of the provisions of the Industrial Relations Act or any of the other statutes broadly referred to as labour statutes as well over an alleged violation of any of the rights arising from the common law between an employer and an employee, among other parties in the labour setting.

[31] What is certain in my view is that the Industrial Court is given exclusive power by this Section to enforce any issue or dispute that may arise between an employer and an employee, be it from an alleged violation of the Industrial Relations Act, the Employment Act, the Workmen's Compensation Act, or under the Common Law of Employers and Employees often referred to as the law of Master and Servant. In other words the High Court has no power or jurisdiction to enforce any issue or dispute as may arise between an employer and an employee as that is now preserved for the Industrial Court. It is for this reason therefore that in the context of Swaziland, it is unfathomable that the High Court could assume jurisdiction to review the decision of an employer dismissing an employee as indicated above. It is easy to confuse the part of Section 8 (1) expressed in the words, "… in respect of any matter which may arise at Common law between an employer and employee in the course of employment…" as the one that gives the Industrial Court the power to

review employer and employee decisions. It has already been clarified however that such a view would be erroneous, if one considers the words closely. This is because as already stated, a review is not a matter that "may arise at Common Law" between an employer and an employee. The phrase referred to envisages the violation of the Common Law existing rights between an employer and an employee, which a review is not one of.

[32] There is another apparent point on what is actually intended by Section 8 (1) with regards the jurisdiction of the Industrial Court. It says this at the opening or beginning of Section 8 (1) when it provides; "The court shall, subject to sections 17 and 65 (of the same Industrial Relations Act) have exclusive jurisdiction…" This phrase obviously means that the exclusive jurisdiction of the Industrial Court is to be exercised with full regard to Sections 17 and 65 of the same Act which can be said to be the only court given the power to enforce labour disputes either arising from the labour statues themselves or from the common law of Employer and Employee. . Section 17 extends the remedial powers of the Industrial Court to the arbitrator appointed in terms of Section 16 to carry out the arbitration functions the same way as the Industrial Court would. Section 65 on the other hand provides for the establishment of the Governing Body of the

Conciliation, Mediation and Arbitration Commission (CMAC). This Section is found under Part VIII of the Act which is the Part headed Dispute Resolution Procedure. The thrust of this part is that a dispute between an employer and an employee has to be dealt with in a particular way before it gets to court. In other words it has to be dealt with by the Commission referred to above as a means to conciliate between an employer and an employee for an amicable resolution of the dispute.

[33] The disputes that need to be dealt with by the Commission before they could be dealt with by the Industrial Court, which itself has to be after conciliation and the issuance of a certificate of an unresolved dispute, are themselves defined. According to Section 2 of the Act, the word "dispute" is defined as follows; that is "dispute" "includes a grievance, a grievance over a practice, trade dispute and means any dispute over among others; disciplinary action, dismissal, employment, suspension from employment or reengagement or reinstatement.

[34] As indicated above, before a dispute over dismissal can be taken to the Industrial Court for determination such first has to be subjected to the procedure set out for the resolution of disputes as provided for under part

VIII of the Industrial Relations Act, which is the part in which Section 65 is found. (I must clarify that the reference to Section 65 in Section 8 (1) of the Industrial Relations Act 2000, could be erroneous. This is because in the Act preceding this one, Section 65 provided for the resolution of disputes itself).

[35] It was stated in ***Swaziland Fruit Canners (PTY) LTD vs Phillips Vilakati and Another Industrial Court of Appeal Case No. 2/1987 (Unreported)***, that the Policy of the Act was that a dispute can only be heard or entertained by the Industrial Court, where such shall have first been conciliated upon, and only be referred to the said court if a certificate of an unresolved dispute shall have been issued upon a failure of the conciliation process to resolve the matter. This position was put in the following words:-

> **"Looking at the matter generally, the policy of the Industrial Relations Act is that before a dispute can be ventilated before the Industrial Court, it must be reported to the Labour Commissioner who is obliged to conciliate with a view to achieving a settlement between the parties. Where the conciliation is successful, machinery exists for the agreement arrived at to be made an order or award of the court but where the dispute remains unresolved the Labour Commissioner is obliged to issue a certificate to that effect and then, and only**

then, may an application be made to the Industrial Court for relief".

[36] I only need to clarify that the Judgment referred to hereinabove, was actually based on the 1980 Industrial Relations Act which has since been succeeded by two successive Acts, namely the Industrial Relations Act, 1996 and the Industrial Relations Act 2000. Whilst all these Acts embraced the process of conciliation with the dispute only having to be dealt with by the Industrial Court, if it could not be successfully conciliated upon, and upon a certificate of an unresolved dispute to that effect issuing, it is apparent that with the first two Acts, the conciliation had to be by the Labour Commissioner unlike in the current one (that is the 2000 Act) where it has to be by CMAC as established in terms of Sections 62 to 65 of the Current Act. This distinction however does not detract from the fact that in all the Acts in question, a dispute would only get to be dealt with by the Industrial Court if it could not firstly be resolved by CMAC.

[37] This position of the Industrial Court's policy was further underscored by Rule 3 (2) of the Industrial Court Rules which provides as follows:-

"The court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VIII of the Act".

[38] This court is therefore convinced that the reference to Section 65 of the Industrial Court as the one upon which the jurisdiction of the Industrial Court is premised upon in terms of Section 8 (1) of the current Act, is more than anything underscoring the Policy of the Industrial Court referred to in the foregoing paragraphs which is primarily that the court can only entertain a dispute between an employer and an employee after such a dispute shall have been conciliated upon without same getting resolved so as to result in a certificate of an unresolved dispute being issued. This court has not been given a justification nor a legal basis for any matter having to serve before the said court without it fully adhering to this statutory and policy requirement.

[39] It would seem that the Industrial Court has, by hearing Common Law reviews, in the past, suggested that it has power to review the decisions of an employer who has dismissed his employee without the dispute involved having firstly been conciliated upon. One such decision or

judgment of the Industrial court suggesting this is that of ***Melody Dlamini vs The Secretary, Teaching Service Commission and others Case No. 121/2008***.

[40] Expressing its genesis for the review power it exercised, the Industrial Court in that matter, per the then Industrial Court President, Judge Dunseith, put the position as follows at paragraphs 6-9:-

> **"6. An employee of the Government who is unhappy with a disciplinary ruling made against her by the relevant Service Commission has two alternative routes to seek redress.**
>
> **6.1 She may follow the route prescribed by Part VIII of the Industrial Relations Act 2000 (as amended) by reporting a dispute of unfair dismissal or treatment to CMAC. If the dispute cannot be resolved by conciliation, it may be referred to the Industrial Court or arbitration for determination. This is the protection provided to workers by Section 32 (4) (d) of Chapter 3 of the Constitution. Where the matter comes before the Industrial Court by this route, the court is not limited to merely reviewing the disciplinary decision of the Commissioner. It hears the matter de novo and arrives at its own decision.**
> ***Swaziland United Bakeries v Armstrong Dlamini (Unreported) ICA case No. 117/94.***

6.2 Alternatively, the employee has a right to apply to a court of law for review of the disciplinary proceedings and/or ruling on the grounds that she has not been treated justly and fairly by an administrative authority in accordance with the requirement imposed by law. This is the protection of the right to administrative justice provided by section 33 (1) of chapter 3 of the Constitution.

7. It has been held by the Swaziland Industrial Court of Appeal that the Industrial Court has jurisdiction to review the disciplinary proceedings and decisions of an administrative body such as a Public Service Commission where such body acts in its capacity as an employer.
Mathembi Mhlanga v Swaziland Government (Unreported) ICA Case No. 4/2003.

8. Where an employee elects to approach the Industrial Court by way of administrative review, then the Industrial Court is bound to enquire whether he/she has been "treated justly and fairly in accordance with the requirements of fundamental justice or fairness" – Section 33 (1) of the Constitution. If however the decision of the administrative body (qua employer) has been justly and fairly arrived at upon a point which lies within its discretion, then the court may not interfere with the decision merely because, it is not one at which the court would itself have arrived.
African Reality trust v Johannesburg Municipality 1906 T.H. 179 at 182.

9. What this means is that where an employee comes to the Industrial Court by way of Administrative review, as has the Applicant in the present matter, the scope for interference by the court with the decision of the employer is more limited than if the application is brought as an unresolved dispute under the provisions of the Industrial Relations Act".

[41] It is clear that the Industrial Court in the ***Melody Dlamini v The Secretary, Teaching Service Commission and Others case (Supra)*** did not critically deal with the question whether or not it did have the power to review the decision of a public employer but approached that matter from the angle that, that question was settled by the Industrial Court of Appeal in the two previous matters referred to above. That is to say a public sector employee has a choice to decide whether to enforce or challenge a dismissal by a public sector employer by instituting review proceedings before or by approaching the Industrial Court via CMAC. In other words when it approached the matter, the Industrial Court assumed that that question was satisfactorily answered, namely that the Industrial Court did have the power to review the decision of a Public Sector employer. It is of course appreciated that the Industrial Court in that judgment could have taken the position it did because of the fact that in terms of protocol, it is required not to deviate from the judgments of the Industrial Court of Appeal as they are binding on it.

[42] It is worthy of note that where it relates to the power to review an employer's decision, the Industrial Court at paragraph 6.2 of the said Judgment, does not say the power to review an administrative decision resulting in a dismissal lies with the Industrial Court. Instead it says the "employee has a right to apply to a Court of Law for the review of the disciplinary proceedings". This far it could not be disputed that if the court referred to as having the power to review administrative decisions was the High Court as opposed to the Industrial Court, there prima facie would not have been a problem with that proposition except for the subsequent provision by the Constitution that such a court has no jurisdiction to deal with those matters in which the Industrial Court has exclusive jurisdiction granted by the enabling statute.

[43] Concluding that it had review powers to review administrative decisions in the Public Sector, the Industrial Court simply relied on what it said had been found to be the position in the matters of ***Mathembi Dlamini v Swaziland Government ICA Case No. 4/2005*** and that of ***Zeblon Mhlanga v Swaziland Government (Unreported) ICA Case No. 210/2003***, both of which matters are not reported and are decisions by a court whose judgments bind the Industrial Court and not necessarily this court. This means that the matter of ***Melody Dlamini v The Secretary, Teaching Service Commission (Supra)*** is not realistically one that

decided whether the Industrial Court had original review power in administrative decisions of an employer as it merely applied a decision by a superior court. This however, it was required to do given its hierarchical standing towards the Industrial Court of Appeal. In this regard the Industrial Court had simply said the following in ***Melody Dlamini v Swaziland Government (Supra):-***

> **"It has been held by the Swaziland Industrial Court of Appeal that the Industrial Court has jurisdiction to review the disciplinary proceedings and decisions of an administrative body such as a Public Sector Service Commission where such body acts as employer".**

For the judgments that made this holding the Industrial Court referred to ***Mathembi Dlamini v Swaziland Government (Unreported) ICA Case No. 4/2005*** and ***Zeblon Mhlanga v Swaziland Government (Unreported) ICA Case No. 210/2003.***

[44] Although I have not been able to find the ***Zeblon Mhlanga v Swaziland Government (Supra)*** judgment, I have been able to find the ***Mathembi Dlamini v Swaziland Government Case (Supra)***. In deciding that the Industrial Court had the power to review the decision of the public sector

employee, the Industrial Court of Appeal said the following at page 16 of the Judgment, paragraphs 46 – 48:-

> **"46. There is one more matter to deal with. The Respondent most surprisingly, raised a point of law in its Heads of Argument to the effect that "The Industrial Court does not have jurisdiction to review a decision of an employer".**
>
> **47. The Respondent apparently lost sight of the enabling provisions of Sections 6 (1), 8 (1) and 8 (3) of the Act.**
>
> **48. Thus, in discharging its functions under the Act, the Industrial Court may exercise the power to review decisions of statutory boards and bodies acting qua employer, provided, in terms of Section 8 (1) of the Act, that the decision relates to an infringement of Labour Legislation or any matter which may arise at Common law between an employer and an employee in the course of employment.**
>
> **49. The decision of the Industrial Court in the case of *Moses Dlamini v The TSC and Another (Case No. 402/2004*) seems to be clearly wrong".**

[45] It is clear that the Industrial Court of Appeal did not really analyze the position on whether or not the Industrial Court had the power to review the decision of an employer in the public sector. It seems to have simply

taken a view that Section 6 (1), 8 (1) and 8 (3) of the Act extends review power to the Industrial Court. This is apparent without any critical analysis of it, if one looks at what it said at paragraph 47 of its judgment as cited above. I have already dealt with an analysis of Sections 6 (1), 8 (1) and 8(3) of the Act above, where I respectfully came to the conclusion that the said Sections did not give the Industrial Court the power to review decisions of employers even in the public sector.

[46] At paragraph 8 of the ***Melody Dlamini Judgment,*** the Industrial Court simply said, without setting out a basis for it, that "the Industrial Court may exercise the power to review decisions of statutory boards and bodies acting qua employer, provided in terms of Section 8(1) of the Act, that the decision relates to an infringement of labour legislation or any matter which may arise at Common Law between an employer and an employee". I have already stated in the paragraphs referred to above why I cannot agree with this conclusion. Section 8 (1) as stated above merely relates to the ordinary jurisdiction of the Industrial Court. The phrase "any matter which may arise at Common Law" cannot include a review because a review is not a matter that "may arise at Common Law between an employer and employee in the course of employment.

[47] It was held further in the ***Mathembi Dlamini Judgment (Supra)*** that Section 6 (1) of the Industrial Relations Act 2000 also gives the Industrial Court the power to review employer decisions. That Section is couched in the following terms:-

> **"6(1) An Industrial Court is hereby established with all the powers and rights set out in this Act or any other law, for the furtherance securing and maintenance of good Industrial or Labour Relations and employment conditions.**

[48] Clearly the temptation for one to end up concluding that the Industrial Court has power to review the decisions of employers in the public sector is that the Industrial Court is empowered to "further, secure and maintain good Industrial Relations and employment". Whereas the said court is so empowered, it can only guarantee these good Industrial Relations because the enabling Act gives it such power. It is not enough to rely on its being a court of equity.

[49] I say this because the Industrial Court under its normal practice, of determining matters that have run the full gauntlet before the Conciliation, Mediation and Arbitration Commission (CMAC) has all the power not only just to enforce the substantive elements in a dispute, but to enforce the procedural elements as well. It is a fact that in some

matters where the employer may have dismissed his employee or acted against him without paying attention to the procedural requirements, such that the employee may have been prejudiced, the Industrial Court would in an appropriate case grant a relief to the employee concerned notwithstanding that in the merits or substantively, the employee's case may not have been that good.

[50] I have also read the other judgment of the Industrial Court of Appeal which concluded that the Industrial Court had the power to review decisions of a public sector employer. This is the ***Moses Dlamini v The Teaching Services Commission and Another, ICA Case No. 17/2005***. My view as expressed in the foregoing paragraphs with regards the power of the Industrial Court to review such decisions remains unchanged, as it in a nutshell advances the same argument as advanced in ***Mathembi Dlamini vs The Teaching Services Commission (Supra).***

[51] I can only comment that in my reading of the judgment concerned, I found the Industrial Court of Appeal to be suggesting that simply because the Industrial Court was given exclusive jurisdiction to enforce the Labour Laws of this country, it must then be construed to be having inherent jurisdiction in that area to the extent that it can perform acts that would otherwise be beyond its jurisdiction, as long as that enabled it to

act effectively in the exercise of its jurisdiction. This I say bearing in mind the extract captured in the said judgment from the ***Connelly v Director of Public Prosecutions (1967) 2 ALL E.R. 401 (HL) at 409***. The extract reads as follows:

> **"There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process".**

[52] I can only assume that this excerpt applies where an interpretation of a certain Section is being made. This should be where there is some ambiguity. Otherwise where there is no ambiguity on what the section being considered says, it cannot be used to extend the jurisdiction of a court like the Industrial Court. I have no doubt if the Industrial court extended its jurisdiction outside of the enabling Act, it would be acting ultra vires that Act.

[53] At paragraph 36 of the ***Moses Dlamini Judgment***, the Industrial Court of Appeal said the following:-

> **"36. That there is a clear distinction between the inherent and the particular jurisdictional powers of the High Court and the Industrial Court is thus clear. The Legislature particularly endowed the latter court with the powers it requires to fulfil it special task. The Constitution does like wise. There is no doubt in my mind that if this specialist jurisdiction were to be partially <u>divested</u> of it by holding that it lacks the <u>power of review</u> in labour matters and Industrial disputes, which gives <u>rise</u> to approach that court to effectively deal with such disputes, it would undermine the aim and purpose of the rationale behind the establishment of the Industrial Court".** (Emphasis added).

[54] It has to be clarified that the decision by the Legislature not to accord the Industrial Court review powers should be assumed to have been carefully thought out and it does not render that court ineffective in any way in matters that fall within its jurisdiction. I say so because the procedure for the hearing of matters that have run the full conciliation procedure by the Industrial Court does not render the said court ineffective at all. The normal procedure for the enforcement of employer/employee disputes before the Industrial Court, does recognize the procedural aspects of any

decision taken by the employer to the extent such an aspect could be enforced independently and outside of the substantive aspect of the same decision in a befitting matter. There is therefore no doubt that the extending of the Industrial Court's jurisdiction to include the power to review the employer's decision under the guise that not to review such decisions would partially divest it of its jurisdictions was in my humble view a clear misdirection. I have no hesitation to say that the Industrial Court does not require the review jurisdiction or power for it to be effective. In reality there is no labour matter that is not satisfactorily dealt with because the Industrial Court has no Review Jurisdiction.

[55] The fallacy of the view that the Industrial Court must be rendered effective through extending its jurisdiction so as to include review powers becomes apparent when one considers the fact that it is not every decision of an employer that must be reviewed by the said court but only that of the public sector employer. It is true that an employee who brings a matter to the Industrial Court having followed the dispute resolution process is not made any worse off from that of the one who reviews his matter without following the conciliation path.

[56] Clearly this partially applied jurisdiction of the Industrial Court to review the powers of the public sector employers is undesirable because it is not

consistently applied against all employers as it only applies against a particular sector employer. In other words it is discriminatory. This, as pointed out above, is clearly against Section 3 of the Industrial Relations Act which says that the Industrial Relations Act shall apply to employment by Government in the same way and to the same extent as if the Government were a private person.

[57] In any event it was observed in the ***Chirwa v Transnet Ltd And Others 2008 (4) SA 367*** that an Applicant "could not go forum shopping simply because she was a public sector employee; the Labour relations Act (in RSA, as similar to ours here) did not differentiate between the state and other employers ". This is at paragraph 66 of the judgment.

[58] One cannot help but embrace the other observation made by the South African Constitutional Court in the same ***Chirwa v Transnet and Others (Supra) case*** to the effect that in view of the specialized structures for the resolution of labour disputes, these were the structures to be used by employees; expressed in the following words:-

> **"…Since the LRA (IR ACT) and associated legislations had created a specialized framework for the resolution of labour disputes, it was primarily through the mechanisms established by the LRA (our IR ACT) that an employee had to pursue his or her claims".**

It shall be noted that the reference to the LRA in the South African setting should be substituted for the Industrial Relations Act in our setting as that is the equivalent of the South African statute.

[59] Whilst what I have said above does in my view resolve the question on whether or not the Industrial Court has review power over the public sector employer's decision, there remains the question on whether the decision of the employer in this matter was an administrative one which I must also cover herein. It is not in dispute that the decision sought to be reviewed by the Applicant in this matter is that of his dismissal from his employment by the Respondent following allegations of his having allegedly stolen certain property belonging to his employer.

[60] The question that arises for determination is whether this decision was an administrative one calling for review or was merely a contractual one, arising from the employment of the Applicant by the Respondent. It seems to me that this question cannot be answered any better than was answered by ***Ngcobo J in the Chirwa v Transnet LTD and Others (Supra) case*** when he said:-

> **"142. The subject-matter of the power involved here is the termination of a contract of employment for poor work performance. <u>The source of the power is the</u>**

employment contract between the Applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the Applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of state which exercises public power does not transform its conduct in terminating the Applicant's employment contract into an administrative action. Section 33 is not concerned with every act of administration performed by an organ of state. It follows therefore that the conduct of Transnet did not constitute administrative action under Section 33.

143. Support for the view that the termination of the employment of a public sector employee does not constitute administrative action under Section 33 can be found in the structure of our Constitution. The Constitution draws a clear distinction between administrative action on the one hand and employment and labour relations on the other. It recognizes that employment and labour relations and administrative actions are two different areas of law. It is true they may share some characteristics. Administrative law falls

exclusively in the category of Public law, while labour law has elements of administrative law, procedural law, private law and commercial law.

144. The Constitution contemplates that these two areas will be subjected to different forms of regulation, review and enforcement. It deals with labour and employment relations separately…" (Emphasis added).

[61] I am of the view that the foregoing is apposite to the present matter, in particular the distinction between an employment contract and administrative action on the other hand. It is clear therefore that the decision by the Applicant's employer dismissing him from his employment is not an administrative one but an employment and labour relations one or a contractual one, as it is based on an employment contract. This means it is not a matter for a review than it is a matter for enforcement through the structures established in terms of the Industrial Relations Act and the Employment Act to deal with labour disputes.

[62] For the foregoing considerations and reasons I am convinced that the Application for review as instituted before the Industrial Court is misdirected. Consequently this court makes the following order:-

1. The Industrial Court has no jurisdiction to entertain review proceedings brought on the basis of the Common Law for an alleged contravention of an employee's alleged right to Administrative Justice as covered under Section 33 (1) of the Constitution.

2. A dismissal of an employee is defined as a dispute in the Industrial Relations Act, which means that it be resolved in the same manner like all the other disputes in the said Act.

3. The decision sought to be reviewed is not an administrative decision as envisaged under Section 33 of the Constitution but a contractual one in the Labour Relations setting which should be determined in terms of the structures established by the relevant law.

N. J. HLOPHE J
JUDGE – HIGH COURT

I agree

Q. M. MABUZA J

JUDGE – HIGH COURT

I also agree

M. R. FAKUDZE J

JUDGE – HIGH COURT