IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 1742/17

In the matter between:

SWAZILAND REVENUE AUTHORITY	**1ST APPLICANT**
DIRECTOR CUSTOMS INLAND OPERATIONS	**2ND APPLICANT**
HEAD OF CORPORATE SERVICES	**3RD APPLICANT**
COMMISSIONER GENERAL	**4TH APPLICANT**

And

PRESIDING JUDGES OF THE INDUSTRIAL COURT OF APPEAL	**1ST RESPONDENT**
GUGU FAKUDZE	**2ND RESPONDENT**
ATTORNEY GENERAL	**INTERVERNING PARTY**

Neutral Citation:	*Swaziland Revenue Authority and 3 Others vs. Presiding Judges of The Industrial Court of Appeal and 2 Others (1742/17) [2018] SZHC (209) 26th* September 2018
Coram:	**Mlangeni J, Maseko J and Maphanga J.**
Heard:	**27th August, 2018**
Delivered:	**26th September, 2018**

Flynote: *Constitutional law – superior court of judicature defined in Section 139 (1) (a) of the Constitution – Industrial Court of Appeal not mentioned as a superior court of judicature – whether non-mention has the effect of categorising the Industrial Court of Appeal under Section 139 (1) (b) as a subordinate court or tribunal, and therefore reviewable by the High Court.*

Constitutional Law – High Court powers of review in terms of Section 152 of the Constitution – whether such powers include review of decisions of the Industrial Court of appeal.

Section 21 (4) of the Industrial Relations Act 2000 as amended – meaning of ***"finality"*** *of ICA judgments – whether finality applies equally in respect of appeals and review.*

Rule 53 of High Court rules – whether Section 152 of the Constitution is significantly different from Rule 53 – the only substantive addition that Section 152 brings is the ***"Supervisory"*** *power, which is outside the scope of Rule 53.*

Classification of the Industrial Court of Appeal as a specialist court or tribunal not a basis for overriding the substance of the court in such a manner as to make its decisions reviewable by the High Court whose stature is, for all practical intents and purposes, lower than the ICA.

Review of ICA decisions by the Common Law courts has the insidious and undesirable effect of taking equitable justice away from labour law litigants.

Summary *A labour dispute between the First Applicant and its employee, the Second Respondent, was determined by the Industrial Court. Pursuant to an appeal to the Industrial Court of Appeal, the First Applicant has now approached the High Court to review and set aside the judgment of the Industrial Court of Appeal.*

Second Respondent has raised a point of law in limine, that the High Court does not have the authority to review judgments, decisions and orders of the Industrial Court of Appeal.

After reviewing legal authorities on the subject, as well as relevant legislation, this court holds that:-

The High Court does not have the power to review judgments, decisions or orders of the Industrial Court of Appeal.

Application dismissed, with no order as to costs.

JUDGMENT

Mlangeni J.

PRELIMINARY MATTERS

[1] This application emanates from an employer-employee relationship, and it undoubtedly stands out as an unpleasant example of indefatigable litigation. The Applicant seeks review of a judgment of

the Industrial Court of Appeal, dated 30th October 2017. I capture the relevant prayers in full herein below:-

> **"1. Reviewing and setting aside the judgment and order delivered by the Industrial Court of Appeal on 30th October 2017 under Industrial Court of Appeal case No. 8/2017.**
>
> **2. Substituting that order with an order dismissing the application that came before the Industrial Court under case No. 101/2017.**
>
> **3. Ordering the First and Second respondents…….to pay the costs of this application.**

[2] Given the manner in which the matter has unfolded in this court, a detailed factual background is not particularly relevant. I will, in due course, touch upon it only for the sake of completeness, and even then only briefly.

[3] At the heart of this matter there is an issue regarding the status of the Industrial Court of Appeal, the question being whether or not it is a tribunal or inferior court within the meaning of the relevant legal instruments, in which event its decisions and judgments would or would not fall to be reviewable by the High Court.

[4] After close of pleadings but prior to the commencement of legal arguments, the Attorney-General moved an application for leave to intervene in the proceedings, as *amicus curiae*. The basis for the

application to intervene is aptly captured at paragraph 6, 7 and 8 of the affidavit in support of the application. I can do no better than reproduce those paragraphs and I do so below:-

> **"6. In the main application the question of whether the decisions of the Industrial Court of Appeal are susceptible to review by the High Court has arisen. The intervening party has a sufficient interest in the character of the Industrial Court. That is whether it is an adjudicative tribunal, a subordinate court or a court of limited jurisdiction.**
>
> **7. The intervening party's interest in the aforementioned question of law derives from the fact that the Industrial Court of Appeal is an institution which was established by the legislative organ of Government to exercise judicial power of the state.**
>
> **8. If admitted as an *amicus* the intervening party intends to make submissions drawing from comparative law, on the distinction between a court of law and a tribunal exercising judicial power. Furthermore the intervening party intends to address arguments on the local precedents which bear on the legal issue."**

[5] The Attorney-General's application for leave to intervene was not opposed, and it was accordingly granted by consent of the main protagonists.

[6] In a quest to answer the apparently vexed question regarding the status of the Industrial Court of Appeal, two recent judgments of this Honourable Court come into sharp focus and scrutiny. Both judgments came to the conclusion that the Industrial Court of Appeal is a tribunal, therefore subordinate to the High Court, and its decisions reviewable by the latter. One of these judgments was by a single judge[1] of the High Court and the other one by a full bench[2].

[7] Because the status of the said court *vis-a-vis* the High Court was interrogated at length in the two judgments mentioned *ante*, Mr. Jele for the Applicant was palpably uneasy about a bench of three High Court judges sitting to effectively review its own judgments, one of which was a full bench of three. He preliminarily raised this concern prior to the commencement of legal arguments, as we understood it, not as an objection but in the spirit of prudence and/or decorum. At face value, this might appear to be an issue of numbers, but we are under no illusion that Mr. Jele's concern was far beyond the numerical factor, as demonstrated by his use of the word **"decorum"**. In other words, goes the argument, it would be rationally more acceptable for a bigger full bench to review a judgment of one comprising three judges.

[8] A poignant and terse response to this concern was offered by *amicus* Counsel Mr. Vilakati who appeared on behalf of the Attorney-General. He submitted that a full bench of the High Court is defined in peremptory terms by the Constitution, per Section 150(3), where it is stated that it **"shall"** comprise three judges of the Superior Courts. It

[1] Aveng Infraset Swazi (Pty) Ltd v Cleopas Dlamini, (722/2017) [2017] SZHC 116,6TH June 2018.
[2] Ezulwini Municipality and Others v Presiding Judges of the Industrial Court of Appeal and Others (661/16) [2016] SZHC 214, 21ST October 2016.

is on that basis that we came to the unanimous conclusion that anything more or less than three judges would not be a full bench of the High Court, and if it sat in purport to be one, its decision would be open to challenge on that basis.

[9] We have therefore heard this matter in full confidence that we are properly constituted and all the parties agree that the doctrine of *stare decisis*[3] does not bar us from departing from an earlier judgment or judgments if there are cogent and persuasive reasons that move us to do so.

THE FACTS IN BRIEF

[10] The Second Respondent is an employee of the First Applicant. For convenience I may refer to the First Applicant as the employer and to the Second Respondent as the employee. The employee was suspended by the employer and disciplinary proceedings instituted against her in terms of the applicable disciplinary code. At the conclusion of the disciplinary enquiry the chairperson recommended that the employee be found not guilty. The employee expected that the suspension would then be uplifted but this did not happen. The employee was subsequently informed, through her Union (SRAWU), that the employer was not in agreement with the findings and recommendation of the chairperson, and that it intended to have the disciplinary proceedings reviewed. In response to this intended course of action the employee approached the Industrial Court on urgent basis to challenge the intended course of action as well as seeking that her continued suspension be set aside. The Industrial Court found in favour of the employer, apparently on the basis of points of law that were raised on its behalf. The employee then appealled to the

[3] For a comprehensive discussion of the doctrine of precedent, see Hlahlo & Kahn, the South African Legal System and Its Background, 1973 Juta & Co. at page 214-216.

Industrial Court of Appeal, which ruled in favour of the employee. The employer has now instituted the present application to review and set aside the judgment of the Industrial Court of Appeal.

SECOND RESPONDENT'S PONTS OF LAW

[11] Full pleadings were filed by the parties. In her opposing papers, the employee raised three preliminary points of law and pleaded over. The points of law are as follows: -

i) The High Court has no jurisdiction to review a judgment or order of the Industrial Court of Appeal, which, in terms of Section 21 (4) of the Industrial Relations Act 2000 (as amended) is final.

ii) Applicant's prayer that the High Court should substitute its own decision for that of the Industrial Court of Appeal is incompetent.

ii) Applicant is abusing the process of the Court.

[12] An objection to the exercise of jurisdiction is by its nature a threshold issue. The court and all the litigants were in agreement that this aspect of the matter should be dealt with first and, depending on the court's finding on this important aspect, the other issues may or may not be canvassed.

[13] On the issue of lack of jurisdiction, the employee and *amicus curiae* made common cause.

APPLICANT'S POSITION ON JURISDICTION

[14] The Applicant's position that the High Court has power and authority to review judgments of the Industrial Court of Appeal is based, in the main, on two judgments of this court, namely EZULWINI MINICIPALITY AND OTHERS v DERRICK DUBE AND OTHERS[4] and AVENG INFRASET SWAZI (PTY) LTD v CLEOPAS DLAMINI.[5] Prior to that, almost two decades intervening, this same court had come to the conclusion that it does not have the authority to review decisions of the Industrial Court of Appeal. This was in the case of MEMORY MATIWANE v THE INDUSTRIAL COURT OF APPEAL AND ANOTHER[6], per Masuku J. In the said case the Learned Judge made the following momentous observations:-

> **"One of the unfortunate ramifications of reviewing I.C.A. decisions would be that the channels open to dissatisfied litigants would firstly be too long, too costly and also result in considerable delay……A dissatisfied litigant would first have to undergo the conciliation procedures set out in the Industrial Relations Act, approach the Industrial Court, appeal to the I.C.A, review the decision of the I.C.A. and if still dissatisfied, then appeal to the court of Appeal of Swaziland. This would indeed be burdensome financially and otherwise and can hardly be said to have been Parliament's intention."[7]**

[15] Most interestingly, the judgment of Masuku J. in MEMORY MATIWANE, was taken on appeal to the then Court of Appeal where, on exactly the same question of jurisdiction, it was upheld. Then, at the advent of the present constitutional era in this country, in the case of SWAZI

[4] See note 2 above.
[5] See note 1 above.
[6] Civil Case No. 2378/98.
[7] At pages 11-12 of the judgment.

OBSERVER (PTY) LTD v HANSON NGWENYA & 68 OTHERS[8], a full bench of the Supreme Court held, per Browde AJP, that in labour matters the Industrial Court of Appeal is the dead end. At paragraph 19 of the judgment Browde AJA made the following pertinent remarks.

> **"There remains one further indication, perhaps of a peripheral nature, for the conclusion that in industrial matters the Industrial Court of Appeal is the end of the road. As the position now stands employees who contend that they have been unfairly treated by their employers have to undertake a fairly laborious process to obtain compensation or other forms of relief. They first have to embark on a procedure of conciliation set out in the Industrial Relations Act. If that is unsuccessful they may then proceed to sue in the Industrial Court after which…… an appeal lies to the Industrial Court of Appeal. Having in mind the financial burden involved in the process and the length of time it would take to obtain the compensation sought…..the drafter of the constitution can hardly be said to have had the intention to lengthen the process even further."[9]**

[16] I pause here to observe that the issue at hand in the Observer case was in relation to an appeal from the Industrial Court of Appeal to the Supreme Court, rather than review. It is, however, of no less relevance to the present matter. I say so because, in theory and in principle, our judgment in this case, one way or the other, might be said to be appeallable to the Supreme Court, and the profound observations of Masuku J. and Browde A.J.A would in that event come alive once again.

[8] Appeal No. 19/2006.
[9] At paragraph [10] of the judgment.

[17] So, what we have is a history of judicial precedents that is as clear as a crystal, dating back to the period prior to the present constitution, such history inclusive of a judgment of the present Supreme Court shortly after promulgation of the constitution, in which it has been stated that, for several reasons, of law and logic, labour relations litigation must end at the Industrial Court of Appeal. This was the accepted position, until the judgment of the full bench of the High Court in EZULWINI MUNICIPALITY AND OTHERS, supra, which was followed in AVENG INFRASET SWAZI (PTY) LTD, as recently as June 2018. Is there a legal basis for the watershed that has apparently occurred?

THE RELEVANT LEGISLATION

[18] I take a short journey to capture the legislation that has generated what is arguably the most ferocious debate in the judicial history of this country. I do so in the hope that this judgment will make a humble contribution towards the urgent and dire need to clear the uncertainty that has been created, no doubt with the best of intentions.

[19] The starting point, perhaps, could be the Industrial Relations Act 2000, as amended, which is the main legal framework for the resolution of labour relations disputes, and which has created the Industrial Court of Appeal[10] whose judgment is the subject of review in this application. Section 21(4) of this Act is in the following terms:-

> **"21(4) The decision of the majority of the judges hearing an appeal shall be the decision of the court and such decision shall be final."**

[10] Per Section 20 of the I.R. Act 2000.

19.1 The word **"final"** means the last one in a series, ultimate, no other. **"of or occurring at the end…….having no possibility of further discussion, action or change."**[11]See, also, the Concise Oxford English Dictionary, 10th Edition, which defines the word in the following manner:-

> **"Coming at the end of a series ……allowing no further doubt or dispute."**

19.2 I observe an interesting contrast between the wording of the current clause 21(4) and the preceding legislation of 1996 – The Industrial Relations Act No.1 of 1996. Section 19(4) thereof was in the following terms:-

> **"19(4) The decision of the majority of the judges hearing an appeal shall be the final decision of the court".**

19.3 Clearly, the older clause was ambiguous surplasage and inconsequential. All that it said, in effect, was that the majority decision is a binding decision of the court. This is surplasage because it is axiomatic that where many judges sit, it is the majority decision that takes effect. It appears to me that the law-maker perceived the futility of the 1996 provision and re-worded it in a manner that conveys more clearly that the decision of the majority **"shall be final".**

19.4 As far as the above goes, it appears to me to be beyond debate that the intention of Parliament, in changing the wording of the1996 clause to read as it does in the 2000 clause, was to decree unequivocally that labour disputes shall end at the Industrial Court of Appeal, literally.

[11] Collins English Dictionary.

19.5 In this position that I take I am fortified by the judgment of the full bench of the Supreme Court in SWAZI OBSERVER (PTY) LTD v HANSON NGWENYA AND 68 OTHERS[12], wherein the current Section 21(4) was under discussion. Although this judgment deals with the question whether an appeal lies from the Industrial Court of Appeal to the Supreme Court, the principle is in my view the same, especially within the context of the word **"final"**. Browde A.J.P's following remarks are informative:-.

> **"It should not be surprising, therefore, that although the Constitution was gazette in July 2005, the finality of the Industrial Appeal Court's decisions was left untouched when the Act was amended in certain aspects in September 2005. The esoteric nature of industrial problems led not only to the creation of the Special Industrial Court, but also to the Industrial Court of Appeal with its exclusive jurisdiction to hear and determine appeals from that special court,"[13]**

and the judgment concludes in the following manner:-

> **"…..I am of the view that this court does not have jurisdiction to hear an appeal from the Industrial Court of Appeal….."**

19.6 Now, if in respect of review the High Court is held to have authority over the Industrial Court of Appeal, the result is that the outcome of such review is appellable to the Supreme Court, and this provides indirect access to the Supreme Court where direct access is, for sound reasons, expressly denied.

[12] See note 8 above.
[13] At page 16-17.

[20] The other relevant provision is Section 152 of the Constitution. It provides as follows:-

> **"15.2. The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its review or supervisory powers."**

20.1 This provision is the jurisdictional pivot upon which the review application finds its way to the High Court. This can only make good sense if it is accepted that the Industrial Court of Appeal is either a subordinate Court, or a tribunal or some other lower adjudicating authority. If it is not one of these, then its decisions cannot be reviewable by the High Court.

20.2 This aspect was interrogated at length in the High Court case of Memory Matiwane[14]. I hasten to state that in that case the issue arose in the context of Rule 53 of the High Court, in terms of which that application for review was brought. I do not readily perceive a difference either in form or in substance between the power of review in terms of Rule 53 of the High Court and in terms of Section 152 of the Constitution. In other words, what was at common law achieved through Rule 53 can now be achieved through both Rule 53 and the Constitution. It is equally possible, too, to see Section 152 of the Constitution as creating a constitutional right, with Rule 53 providing the procedure through which that right may be exercised. This is why the

[14] See note 6 above.

Applicant's founding affidavit in this review application cites Rule 6 and Rule 53 of the High Court rules. At paragraph 9[15]deponent Dumisani Masilela makes the following averment:-

> **"This is a founding affidavit in an application under Rule 6 and 53 of the rules of the above Honourable Court, wherein the applicant is seeking to review and set aside a decision of the Industrial Court of Appeal……"**

20.3 The Second Respondent's Counsel had a bit of an issue with this approach, apparently on the understanding that a litigant must choose whether to proceed by way of Rule 53 or in terms of Section 152 of the constitution, and not both at the same time. It is just as well that this argument was not persisted with, and as I have already stated above, it appears to me that Section 152 gives a constitutional right which, ordinarily, is to be pursued through the procedure laid down in Rule 53. I say ordinarily because situations often arise where, due to circumstances of urgency, the slow procedure in Rule 53 may be abridged. For the avoidance of doubt, I make a passing reference to Rule 53(1) which provides: -

> **"Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion ……..".**

20.4 Of course, under Section 152 of the Constitution the powers are possibly somewhat wider because of the supervisory aspect,

[15] Page 8 of the Book.

otherwise there is significant common ground. The point being made here is that the constitutional provision has not brought such change as would create a watershed in judicial decision–making.

20.5 In the High Court judgment in Memory Matiwane, the issue was exactly like the present one – whether the High Court has powers of review over decisions of the Industrial Court of Appeal. At page 4 of the judgment His Lordship Masuku J. made the following observations:-

> **"From a proper reading of the provisions of Rule 53, to which the Applicant confined itself, it is abundantly clear that the High Court will review proceedings of bodies or persons who are circumscribed. These include inferior courts, tribunals, boards or officers performing judicial, quasi-judicial or administrative functions……..**
>
> **The question to be decided is whether it can be stated that the Industrial Court of Appeal falls within the category of any of the bodies set out in Rule 53. In my view, the Industrial Court of Appeal is not an inferior court, tribunal or board. It is a court of law which exercises appellate powers only and is not a court of record, it being confined to the record of proceedings of the Industrial Court".**

20.6 The Learned Judge went on to state that the fact that judges of the Industrial Court of Appeal are required to have the same qualifications as judges of the Court of Appeal (Now the Supreme Court), per Section 17(2) of the Industrial Relations Act 1996, demonstrates clearly that the legislature rated the High Court

lower than the Industrial Court of Appeal, and it cannot be that review would be competent under those circumstances. I mentioned earlier that the memory Matiwane judgment was confirmed on appeal to the Court of Appeal. The same reasoning was adopted by the Supreme Court in 2006, in the case of The Swazi Observer[16], which, as I have observed, was dealing with an appeal from the Industrial Court of Appeal to the Supreme Court, the focus being exactly on the finality of judgments of the Industrial Court of Appeal per Section 21 (4) of the Industrial Relations Act 2000. At paragraph 10 the unanimous judgment of five Justices of appeal, per Browde AJP, quotes Masuku J.[17] with approval, in the following terms:-

> **"What is abundantly clear therefore is that the legislature gave jurisdiction to the High Court to review decisions of the Industrial Court only. Had Parliament intended to extend that power to reviewing the proceedings, decisions or orders of the Industrial Court of Appeal, it would have expressed its intention in clear language. What transpires therefore is that Parliament intended the Industrial Court of Appeal to be the last port of call in all industrial matters and with its decisions final".**

THE WATERSHED

[21] The constitution of this country was promulgated in the year 2005. On both sides of 2005 – before and soon thereafter, the position of the law on this subject pointed in one direction – that judgments of the Industrial Court of Appeal are final, per Section 21(4) of the creating

[16] See note 8 above.
[17] In Memory Matiwane, Civil Case 2378/98.

statute, and therefore neither reviewable nor appellable. I have already made reference to the judgments that spelt out this position.

[22] Available judgments show that the turning point came in 2016, through a judgment of this court, in the case of EZULWINI MUNICIPALITY AND OTHERS v PRESIDING JUDGES OF THE INDUSTRIAL COURT OF APPEAL AND OTHERS[18], a judgment of the full bench. The upshot of this judgment is that the constitution brought with it changes in the law, whose effect is that Section 21(4) of the Industrial Relations Act is inconsistent with Section 139 and 140 of the Constitution, read together, and that because the Constitution prevails over any other law that is inconsistent with it, to the extent of the inconsistency, Section 21(4) is of no consequence. The effect of this was that Section 21 (4) of the Industrial Relations Act 2000 was implicitly struck down. The question that arises is whether or not this court was entitled, on the case as presented, to go that route and that far?

[23] About two years later, in the case of AVENG INFRASET SWAZI (PTY) LTD v CLEOPAS DLAMINI[19], this court followed the path laid out in Ezulwini Municipality, and held that decisions of the Industrial Court of Appeal are reviewable by the High Court.

[24] *Amicus* has submitted that on the two cases just referred to above, as presented, the court was not entitled to come to the conclusion that it did come to. The basis of this argument is that the proper procedure, where subordinate legislation is inconsistent with a provision of the constitution, is to move an application for that provision to be struck

[18] (661/16) [2016]SZHC 214, October 2016.
[19] (772/17 [2017] SZHC 116.

down. It cannot just be emasculated, fortuitously as it were, or by implication, and be allowed to remain in the statute books. This argument, of course, bears no emphasis, because it is not a minor matter to declare a piece of Parliamentary legislation invalid. There must be a direct challenge, and the court must, having applied its mind fully and directly on the issue, make an appropriate decision, in keeping with the magnitude of the task.

[25] This submission by *amicus* is, in my view, quite momentous. The effect of the two judgments just mentioned above is to render Section 21 (4) ineffective, and this in circumstances where there is no direct challenge to have it struck down. But there is more to the issue than that. Below I take a look at how the judgments in Ezulwini Municipality and Aveng came to the conclusion that they did. In Aveng, M. Dlamini J. declined to **"re-invent the wheel"** and embraced, as it were, the reasoning in Ezulwini Municipality, in respect of Section 139(1) and its effect upon Section 21(4) of the Industrial Relations Act 2000. For that reason I will not delve much on Her Lordship's judgment in that case.

EZULWINI MUNICIPALITY AND OTHERS v PRESIDING JUDGES OF THE INDUSTRIAL COURT OF APPEAL AND OTHERS.

[26] The conclusion that the court arrived at is, in my understanding, the result of deductive reasoning. An incisively appropriate portion of the summary in that judgment is as follows:

> **"Contrary to the pre-constitutional era, the Industrial Court of Appeal is not a superior court in terms of Section 139 (1) as read with Section 152 of the Constitution but is**

a specialized Tribunal or a Specialised Court…….therefore subject to review by the High Court."

[27] One question that arises is this: how can a specialist court or specialist tribunal be reviewed by a non-specialist court? It is like letting a general medical practitioner review the work of a specialist surgeon, or letting a builder review the work of an architect. Logically, it is incongruous.

[28] At the centre of the court's analysis in the Ezulwini Municipality case there is Section 139 (1) of the Constitution, read together with Section 152. Section 139 (1) is in the following terms:-

"139 (1) The Judiciary consists of:-

a) the Superior Court of Judicature comprising:-
   i) The Supreme Court, and
   ii) The High Court
b) Such specialised, subordinate and Swazi Courts or tribunals exercising a judicial function as Parliament may by law establish."

It has since been held by the Supreme Court that the Industrial Court of Appeal is a specialist tribunal[20].

[29] The reasoning in the judgment is that since the Industrial Court of Appeal is not categorised as a Superior Court of Judicature, and having been judicially characterized as a specialist tribunal – i.e. answering to Section 139 (1) (b), then it is an inferior court or tribunal and its

[20] Abel Sibandze v Stanlib Swaziland & Others Civil Appeal No. 57/2009.

decisions are reviewable by the High Court, in exercise of its powers in terms of Section 152 of the Constitution. The latter section provides as follows:-

> **"152. The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority…..".**

[30] There is absolute agreement that prior to the advent of the constitution of this country, decisions of the Industrial Court of Appeal were not reviewable by the High Court, per Memory Matiwane judgment. The full bench in Ezulwini Municipality has taken the view that the position has changed since the advent of the constitution. The words of Hlophe J., who wrote for the full bench, say it all:-

> **"To what extent this position has changed since the advent of the constitution shall be dealt with later on in this judgment. It suffices that this position has since changed given that the constitution has ranked courts, with the Industrial Court of Appeal not being ranked as a superior court, but as either a specialized court or <u>superior court</u> or specialized Tribunal".**

The underlining of **"superior court"** is mine, the reason being that I believe it does not belong there, it kind of sneaked in, probably as a typing error. As I understand the passage, the Learned Judge is making the point that the Industrial Court of Appeal, being not a superior court of judicature in terms of Section 139 (1) (a), is either a specialized court or specialized tribunal in terms of Section 139 (1) (b), and therefore reviewable by the High Court. See, also, paragraph 45 of the same judgment.

[31] I respectfully think that this reasoning elevates classification to a point where it counts for everything, and substance counts for nothing. I will come back to this aspect later on in the judgment.

[32] The later judgment in Aveng Infraset Swazi (Pty) Ltd is based on the premise set by Ezulwini Municipality. It is to be noted that these two judgments go against the Supreme Court judgment in SWAZI OBSERVER (PTY) LTD v HANSON NGWENYA AND 68 OTHERS[21]. For the sake of certainty, that judgment came after the promulgation of the constitution and in fact makes reference to some provisions of the 2005 Constitution. The full bench of the Supreme Court fully embraced the judgment of Masuku J. in Memory Matiwane, to the extent of generously quoting the judge with approval. It follows, then, that the position adopted by Hlophe J. in Ezulwini Municipality, that the position of the law changed after the promulgation of the constitution, must be seen in the light of the observations of a higher court, to the contrary, that the law has not changed. Part of what was quoted with approval from the judgment of Masuku J. is this:-

> **"Had Parliament intended to extend that power to reviewing the proceedings, decisions or orders of the Industrial Court of Appeal, it would have expressed its intention in clear language. What transpires therefore is that Parliament intended the Industrial Court of Appeal to be the last port of call in all industrial matters and with its decisions final"[22].**

[21] See note 8 above.
[22] At para 10.

[33] I pointed out earlier in this judgment that in my view **“final”** means just that. Industrial Court of Appeal judgments cannot be final for purposes of appeal and not final for purposes of review, and certainly not for review by a court that for all practical intents and purposes is inferior to it , but for a classification that possibly did not at all reflect upon the substantive status of the Industrial Court of Appeal.

CLASSIFICATION VERSUS SUBSTANCE

[34] In the Ezulwini Municipality case Hlophe J, writing for the full bench, highlights the perceived importance of classification. At paragraph 33 of the judgment His Lordship emphatically observes as follows:-

> **“In my view this constitution did two things which were not done by the saved sections of the 1968 constitution. Firstly, it defined what comprises the Judiciary in Swaziland, including classifying the courts’ structure as well as classifying who could or could not exercise judicial power in Swaziland. It did this in terms of Section 139 (1) and 140 ….This in my view is meant to say that all functionaries or institutions which exercised Judicial Power had to fall into the classification as set out in Section 139 (1)”.**

[35] In both High Court matters – that is, Ezulwini Municipality and Aveng, the court was alive to the relative, if not absolute, equivalence between the Industrial Court of Appeal and the Supreme Court. This is in respect of the qualifications of the judges, the manner of their

appointment and their tenure of office[23], per Section 20 of the Industrial Relation Act 2000. See also M. Dlamini J.'s judgment in Aveng, at paragraph 41, where Her Lordship remarks as follows:-

> **"In other words the Honourable Justice was also influenced by the composition of the ICA in holding that it was not a subordinate court. He did so by piercing what he termed as the "judicial veil", having borrowed same from company law."**

[36] The composition of the Industrial Court of Appeal also received the undivided attention of Masuku J. in Memory Matiwane, where His Lordship observed: –

> **"The judges who sit in that court according to Section 17 shall have the same qualifications and be appointed in the same manner as Judges of the Court of Appeal. Furthermore, their tenure shall be similar to that of Judges of the court of appeal. It is therefore abundantly clear that they intended to create a court which is on a similar standing with the court of appeal in so far as matters of Industrial Relations are concerned"[24].**

[37] The point being made above is that on all three judgments of the High Court as discussed above, one before and two after the promulgation of the Constitution, the equivalence of the Industrial Court of Appeal to the Supreme Court is acknowledged in many words. Is it reasonable to conclude that notwithstanding this practical scenario, the Industrial Court of Appeal becomes an **"inferior"** court, and therefore

[23] At para 25 of the Judgment of Hlophe J.
[24] Masuku J. in the Memory Matiwane Case.

reviewable by the High Court, simply and solely on the basis of the classification per Section 139 (1) of the Constitution? On what basis should classification count for more than substance – that which, according to Masuku J., is actually inside the judicial veil? I am mindful of the fact that the classification is not through an ordinary piece of legislation – it is in terms of the Constitution, but in my respectful view that is not where the answer lies. But even if that is where the answer lies, the courts have repeatedly stated that the Industrial Court of Appeal is not an inferior Court, it is not a court of record, it exercises appellate jurisdiction with finality, on matters of law only. And it is the duty of the courts to interpret the Constitution.

[38] In my respectful view the two recent judgments discussed above are pedantic and their conclusion defies the reality of the role of the Industrial Court of Appeal on the ground. The position of the law as espoused in Ezulwini Municipality and Aveng has the effect, with respect, of lowering the Industrial Court of Appeal down to a level that is implicitly lower than the High Court, to the extent that three justices of appeal may be reviewed by a single justice of the High Court. This is not only undesirable but it is also unsustainable on a pragmatic analysis of the law.

EQUITABLE JUSTICE

[39] There is one other aspect that is easy to overlook and which has, in fact, been overlooked in all the discourses dealing with this vexed subject. Equity is a cornerstone in the resolution of work-place disputes. Labour courts are courts of law and equity[25] and in terms of the legislation the Industrial Court and the Industrial Court of Appeal

[25] See Van Jaarsveld and Van Eck, Principles of Labour Law, 2nd Ed (Butterworths) at p443.

are not bound by the strict rules of evidence and procedure,[26] from which they may depart so long as this does not result in miscarriage of justice. To move labour matters away from the domain of specialist structures, at any stage whatsoever, has the effect of throwing labour litigants to the inflexible rigours of the common law courts. Surely, this must have adverse consequences, particularly on a litigant that does not have legal representation and cannot afford it.

SECTION 21(4) OF THE I.R.A HAS NOT BEEN STRUCK DOWN

[40] Even if one were to agree with the interpretation of Section 139 (1) of the constitution, as ascribed to it by this court in the two judgments under discussion, with the result that Section 21(4) of the Industrial Relations Act 2000 is inconsistent with the constitution, at this point in time it has not been struck down, and unless and until it is struck down, the word **"final"** must mean just that. There is no reason in law and in logic why finality must apply to appeals and not apply to review. In the context the distinction is artificial and not in keeping with the true intention of Parliament.

[41] A comparison of the equivalent provision in the 1996 Act and in the 2000 Act clearly shows that the 1996 provision was ineffective on the important aspect of finality, and the 2000 clause was intended to put the issue beyond doubt and in my respectful view it has achieved certainty.

[26] Per Browde AJP in Swazi Observer (Pty) Ltd v Hanson Ngwenya & 68 Others – see Note 8 above at p16 of the judgment.

[42] There is one other noteworthy aspect that arises from some remarks and observations of Honourable Hlophe J. in Ezulwini Municipality. At paragraph 40 of the judgment His Lordship says the following:-

> **"It suffices for me to observe it may not have been erroneous on the part of the Drafters of the Constitution to insist on the Industrial Court of Appeal having its decisions reviewed if one considers the fact that even the highest court in the land, the Supreme Court, had its decisions subject to review where appropriate, even though by the same court."**

[43] There is the maxim of interpretation *"expressio unius est exclusio alterius"* – the express mention of one thing excludes the other or others. I am not absolutely certain that the maxim does apply in this particular scenario, given that we are dealing with two different sets of circumstances, the Supreme Court and the Industrial Court of Appeal. But if it does apply, it leads to a conclusion that is the opposite of what the Learned Judge has advocated above. In other words, the express mention of review in respect of the Supreme Court must have the effect of excluding review in respect of any other forum where it is not specifically provided for. At the risk of repeating myself, I observe that even if there was an intention to have decisions of the Industrial Court of Appeal reviewable, it would certainly not have been intended that this would be done by a court that is, for all practical intents and purposes, inferior to it.

CONCLUSION

[44] This judgment may well be appealed against to the Supreme Court. I am unable to be persuaded that the intention of the law-maker was that labour disputes are to go this laborious, circuitous, financially and emotionally exhausting route. The toll, especially on an employee, is not difficult to imagine.

[45] For the above reasons this court has come to the conclusion that it does not have the power to review decisions of the Industrial Court of Appeal, and the Second Respondent's point of law on lack of jurisdiction is upheld. There is no order for costs.

[46] We are immensely grateful to all three Counsel for their respective contributions, especially *amicus* Counsel Mr. Vilakati for his intervention on a subject as important as this one.

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MLANGENI J.

I agree: _____

MASEKO J.

I agree: _____

MAPHANGA J.

For the Applicants: **Z.D. Jele**

For The 2nd Respondent: **K. Magagula**

Amicus: **M.Vilakati**