IN THE INDUSTRIAL COURT OF SWAZILAND

FUTHI P. DLAMINI AND OTHERS

And

TEACHING SERVICE COMMISSION	1st Respondent
THE SCHOOL MANAGER	2nd Respondent
THE HEADTEACHER/NKILIJI SECONDARY SCHOOL	3 rd Respondent
THE ATTORNEY GENERAL	4th Respondent
REGISTRAR OF THE INDUSTRIAL COURT OF APPEAL	5th Respondent

Case No. 12/2002

Coram	MATSEBULA JA
	MAPHALALA JA
For the Appellants	MR. C.S. MAPHANGA

2

For the Respondents	MS S. MASEKO

JUDGMENT

(15/04/2004)

The Court

The matter appeared before us on the 19th November 2002, where Sapire JP presided in the three-judge panel of the Industrial Court of Appeal. After hearing arguments in the matter we reserved judgment. However, judgment was not delivered until the President as aforementioned retired from the judiciary, In view of this eventuality the remaining Judges could not form a quorum for purposes of issuing an effective judgment in this case. We then recommended that the matter commence de novo.

Counsel for the parties however, agreed that the two remaining Judges issue a judgment based on the arguments advanced on the 19th November 2002. That the parties would be bound by the judgment of the court as presently constituted. It is in this vein therefore that we issue the following judgment.

The issue for determination in casu was only raised in the Respondents' Heads of Argument, to wit, that the court a quo lacked jurisdiction to entertain the application giving rise to the appeal on hand.

The brief history of the matter is that the Appellants who were Applicants in the court below filed an application for, inter alia, that the disciplinary proceedings of 1st, 2nd, and 3 rd Respondents against Applicants be reviewed and set aside on grounds of irregularity. The Applicants were all schoolteachers who were subjected to disciplinary action by the Teaching Service Commission for various charges having preferred against them. There appears on the facts that mere was friction between the Appellants (teachers) and the headmaster of the school who is cited as the 3rd Respondent.

The matter appeared before Nkambule J who delivered his judgment on the 3rd May 2002, where the learned Judge ruled inter alia as follows at page 8 of the ruling:

3

"It is clear that before the decision to suspend was taken all procedural steps were followed. Consequently, it is my opinion and that held by the members of this court that the Respondents did not act above the Teaching Service Commission Act and Regulation in suspending the teachers".

The court a quo then issued the following order:

"1. Housing allowance

That the Applicants be refunded all monies deducted from their salaries as a result of
the head teacher's unlawful action. 2. That they are paid all their housing allowance from the date these deductions were effected".

Thereafter, the Appellants filed a Notice of Appeal to the Industrial Court of Appeal, being dissatisfied with a part of the judgment of the court a quo as cited above. The following grounds of appeal are advanced:

"1, That the court a quo erred in holding that:

1.1 All procedural steps were followed before the decision to suspect (sic) Appellants was taken.

2 The Respondents did not act ultra vires the Teaching Service Commission Act".

The Respondents in support of the objection raised submitted in arguments that the Judge a quo erred in law in entertaining the matter in the first place because in terms of Section 8 of the Industrial Relation Act of 2000 there is no mention of the power to review among the powers conferred to the Industrial Court. Review powers are reserved for the High Court at common law and that it is the only superior court of record with the power to review decisions of any inferior board including the Industrial Court itself. It is the Respondents' submission in this regard that in as much as it may have been an oversight on the part of the Respondents' representative in the court a quo not to advise the court that it was exceeding its jurisdiction, it was incumbent upon the court not to hear the matter mew motu as it is expected to know its jurisdiction.

A further contention by the Respondents is that this court should not infer a waiver on the part of the Respondents because it is not a matter in which the parties can submit to jurisdiction of the Industrial Court at all in the absence of statutory authority. There is no doubt from the record in the court a quo that the purpose of this application was for review of the exercise of disciplinary power by the Teaching Service Commission.

When motivating the point of law Mr. Msibi applied on behalf of the Respondents that this appeal be dismissed as a nullity since the court a quo did not have the necessary jurisdiction at all.

Per contra arguments were advanced on behalf of the Appellants against the objection. The first line of opposition is that this point of law being raised at this stage is an afterthought in that it was never raised in the court a quo, reliance on which has been perempted by the Respondents' acquiescence to the lower court's judgment; which acquiescence is not consistent with the contention the Respondents' seek to advance before this court. For this proposition the court was referred to the textbook by Herbstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa (4th ED) at page 887 where the learned author state the following:

"Under the common law a person who has acquiesced in a judgment cannot appeal it. Acquiescence can be inferred from any unequivocal act inconsistent with the intention of the appeal".

The learned authors refer to two decided cases on the subject i.e. Gentiruco AG vs Firestone S.A. (Pty) Ltd 1972 (1) S.A. 589 (A) at 600 A - B and also Richaels vs Wells NO. 1967 (1) S.A. 46 (C) at 52 A- E).

In casu, so the argument goes, the Respondents have in part accepted and complied with the court a quo's judgment in so far as it relates to the court's ruling that the Respondents' be ordered to refund

the Appellants' all sums deducted from their salaries in respect of housing allowance. In the premise it is submitted that the Respondents should be precluded by the prior conduct, from pursuing the said point of law and as such the appeal should be allowed.

5

It is further contended for the Appellants that in the event the court finds there is merit in the said point of law that Section 8 of the Industrial Relations Act No. 2 of 2000 is couched in such broad terms as to confer a wide jurisdiction on the court a quo at parity with the High Court in so far as it relates to various disputes between employers and employees or as pertains any matter arising in the course of employment. For purposes presently, Appellants are not seeking to assert "exclusive" jurisdiction for the relief sought on the part of the court a quo save to contend that the court a quo was clothed with jurisdiction to consider and hear the application and to grant the injunction it did, partially awarding the relief sought.

In the instant case, it is common cause that the Respondents' have in part accepted and complied with the court a quo's judgment in so far as it relates to court's ruling that the Respondents' be ordered to refund the Appellants' all sums deducted from their salaries in respect of housing allowance. Therefore, the question which arises for consideration at this juncture is whether the acquiescence on the part of the Respondents precludes them from advancing their point of law on appeal.

According to Herbstein (supra) at page 88 7 under the common law a person who has acquiesced in a judgement cannot appeal against it. Acquiescence can be inferred from any unequivocal act inconsistent with the intention to appeal. It should be noted in this case that it is not the Respondents' who have filed an appeal before this court but the Appellants. It would appear to us that the principle relied upon by the Appellants does not apply. The appeal is pending before the court at the instance of the Appellants and in our view there is no reason why the Respondents cannot defend the matter on appeal. The Respondents in law are permitted to raise whatever defence they wish to advance on appeal. We find also in this regard that the cases cited by the Appellants (see Gentiruco AG vs Firestone (SA) (supra) & Hlatshwayo vs Mane & Deas 1912 A.D. 242) are clearly distinguishable on the facts from the case in casu.

In sum therefore, on this point it is our considered view that the Respondents are permitted to move the point of law that they have advanced. The next question then which presents itself is whether on the merits the point can be sustained. The point as earlier stated is that the Judge a quo erred in law in entertaining the matter in the first

6

place because in terms of Section 8 of the Industrial Relations Act, 2000 there is no mention of the power to review among the powers conferred to the Industrial Court. Review power is reserved for the High Court at common law and it is the only superior court of record with the power to review decisions of any inferior board including the Industrial Court itself.

It appears to us after considering the relevant statutory provisions and the case law on the subject that the position adopted by the Respondents is the correct one. In the High Court case of Musa Gwebu vs Manzini City Council, Civil Case No. 2802/2002 (unreported) Maphalala J who sits in the present Bench considered a similar point. In that case the Applicant sought an order reviewing and setting aside the proceedings and acts leading to his dismissal by the Respondent, Ancillary to the review proceedings was a prayer for reinstatement of the Applicant to his post as the Respondent's Building Inspector, payment of arrear salary was also sought

The Respondent in that case raised a preliminary point of law, namely that the Industrial Court had exclusive jurisdiction to hear, determine and grant appropriate relief in respect of an application which arises between an employer and employee.

The court held in its judgment delivered on the 13th March 2003 as follows:

These are the arguments for and against the point in limine raised by the Respondent in this matter.

The crisp point to be addressed is whether or not the review, correction and setting aside of the proceedings leading to the termination of the officer (Applicant) and the Respondent which is statutory body whose authority to discipline and terminate the services of any of its officer is created, defined and regulated by Urban Government Act, 1969 and its subsidiary legislation, is not the kind of " appropriate relief which Section 8 of the Industrial Relation Act, 2000 contemplates to be within the exclusive jurisdiction of the Industrial court.

The Industrial court was created by the Industrial Relations Act No. 4 of 1980. The Act was succeeded by the Industrial Relations Act No. 1 of 1996 which repealed the 1980 Act. The 1996 was succeeded by the present Industrial Relations Act No. 1 of 2000. For purposes of this judgment it is also helpful to have regard to the relevant Section of the 1996 Act.
Section 5 (1) of the 1996 Act read as follows:

"The court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of any matter properly brought before it including an application, claim or complaint or infringement of any of the provisions of this Act, an Employment Act, a Workmen's Compensation Act, or any other legislation which extends jurisdiction to the court in respect of any matter which arise at common law between an employer and employee in the course of employment or between an employer's association, an industry union, an industry staff association, a federation and a member thereof", (my emphasis).

The Court of Appeal in the case of Sibongile Nxumalo and three others vs Attorney general and two others Case No. 25/96 (including case nos. 30/96, 28/96 and 9/96 (unreported) in the judgement by Tebbutt JA held that Section 5 (1) of the 1996 confined the Industrial court's jurisdiction solely to those matters set out in the Act, those disputes which had run the gauntlet of the dispute procedure, and those issues arising from the other legislation specifically set out in Section 5 (1). The learned Judge of Appeal said the following:

"Having regard to the principle that in order to oust the jurisdiction of the ordinary courts, it must be clear that the legislation intended to do so and that any enactment which seeks to do so must be given a strict and restricted construction, it is in my view, clear that save for specific provisions mentioned, Section 5 (1) does not disturb the common law of master and servant".

The wording of similar Section conferring jurisdiction on the Industrial court in the 2000 Act is worded slightly different in Section 8 (1).

The Section reads as follows:

"The court shall subject to Section 17 and 65, have exclusive jurisdiction to hear, determine and grant 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 may arise at common law between an employer and employee in the course of employment or between an employer or employers 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.

Mr, Flynn contended that the exclusion of the words "of any matter properly before it ..." in the 2000 Act has widened the scope of the Industrial court to encompass the power to review decisions from other statutory bodies. In this regard, I tend to agree with Mr. Shabangu that the deletion of the

words "any matter properly before it" does not change the matter very much. This is in respect of an application/claim before it. This matter has to be before the Industrial Court. The existence of an application before the Industrial Court is condition precedence for the exclusive jurisdiction before the Industrial Court. Once the Industrial Court is seized with the matter it has exclusive jurisdiction. It is my considered view that the Industrial court has no power to review decisions of other statutory bodies as it also a creature of statute. The power is vested in the High Court by virtue of Section 104

Chapter IX Part 1 of the saved provisions of the 1968 Constitution which states that:

"The High Court shall be a superior court of record and shall have (a) unlimited original jurisdiction in all civil and criminal matters ...".

The High Court has, in addition to reviewing the conduct of statutory or public bodies, always asserted and has inherent power to review the conduct of non-statutory quasi - judicial bodies and domestic disciplinary tribunals. Clearly the Respondent is a public body. Furthermore, the employment of the Applicant was determined inter alia by statutory provisions in that only the council was empowered by the Act to appoint and discharge members of staff.

The decision of the Respondent, to terminate the employment of the Applicant, and the recommendations of the disciplinary inquiry to that effect were unquestionably proceedings of a disciplinary nature, which may be reviewed by this court.

Had the 2000 act intended to oust the jurisdiction of the High Court in this respect it would have done so in more clearer language (see page 8 of the Court of Appeal judgment in Sibongile Nxumalo (supra).

On the second point raised by Mr. Flynn that the Applicant's case relates to procedural unfairness and thus constitutes issues of employment. 1 am inclined to agree with Mr. Shabangu that the Applicant's complaint is about irregularities by a statutory body. The cause of action is premised under the Urban Government Act, the matter under dispute arises within a statutory framework not under the common law.

For the above-mentioned reasons I hold that the points of law in limine raised ought to fail and that the matter proceeds on the merits."

In the present case therefore, we will adopt the above cited ratio decidendi and hold that there is nothing in Section 8 which purports to give the Industrial Court this parental authority over other lower boards or employing institutions. There is further nothing at all, from the reading of the Act which suggests that the legislature intended

to oust the common law power of the High Court in so far as review of labour related decisions are concerned.

We respectfully hold therefore following what has been stated above that the court a quo exceeded its jurisdiction.

In the result, this appeal has to be dismissed as a nullity since the court a quo did not have the necessary jurisdiction to hear the matter, and it is so ordered.

We, make no order as to costs. MATSEBULA JA

MAPHALALA JA

Delivered on the.....15th..... .April 2004.