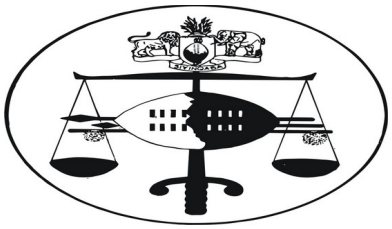

IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGEMENT

Case NO. 418/12

In the matter between:

SIPHO DLAMINI **Applicant**

And

THE TEACHING SERVICE COMMISSION **1st Respondent**

SWAZILAND GOVERNMENT **2nd Respondent**

THE ATTORNEY-GENERAL **3rd Respondent**

Consolidated with: **Case NO. 128/13**

THULANI MTSETFWA **Applicant**

And

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

SWAZILAND GOVERNMENT **2nd Respondent**

THE ATTORNEY-GENERAL **3rd Respondent**

Neutral citation: *Sipho Dlamini v The Teaching Service Commission & Two Others (418/2012 [2013]* SZIC 24 (August 15 2013**)**

Thulani Mtsetfwa v. Fire & Emergency Services & Two Others (138/2013) [2013] SZIC 25 (August 15 2013)

Coram: NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu Nominated Members of the Court)

Heard : **19 July 2013**

Judgment delivered: **15 August 2013**

Summary:
The Applicants claim that their rights to administrative justice were infringed by the 1st Respondents. They also claimed that their right to be properly represented before a service commission, a right that is entrenched in the Constitution, was also infringed.

Held—The specific mention of the rights of workers in Section 32 does not mean that an aggrieved employee cannot approach the Industrial Court to enforce a right that is found in other parts of the Constitution.

Held further—The Industrial Court has exclusive jurisdiction to deal with labour related disputes notwithstanding that the labour disputes involve Constitutional issues.

JUDEGMENT
15.08.13

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[1] Before the court are two applications under case numbers 128/2013 and 418/2012. The two applications were consolidated by an order of this court as the Applicants in both cases are seeking similar orders against the two Government Agencies namely, the Teaching Service Commission and the Civil Service Commission.

[2] The Applicant in case No. 128/13 is Thulani Mtsetfwa. He is seeking an order against the Civil Service Commission, the 1st Respondent, in the following terms;

"1. Reviewing and setting aside the 1st Respondent's decision contained in a letter dated 13th March 2013.

2. Reinstating the Applicant to his position as a Fireman forthwith and payment of his arrear salaries.

3. Costs of application.

4. Further and or alternative relief."

[3] The Applicant in case No. 418/12 is Sipho Dlamini, who is a Teacher and is seeking the following relief;

"1. Reviewing and or setting aside the 1st Respondent's decision contained in a letter dated 28th May 2012 and purporting to suspend the Applicant without pay for a period of one year.

2. Costs of Application.

3. Further and or alternative relief."

[4] The gravamen of Sipho Dlamini's application appears in paragraphs 33 to 41 of the Founding Affidavit. In the application by Thulani Mtsetfwa these appear in paragraphs 22 to 30. These paragraphs will be reproduced in full later in this judgement.

[5] In case No. 418/12 an Answering Affidavit deposed thereto by Mduduzi Nkambule was filed in opposition. A Replying affidavit was accordingly filed by the Applicant.

[6] In case No. 128/13 no Answering Affidavit was filed. The Respondents filed a Notice to oppose and also a Notice to raise points of law.

[7] The Respondents in case No. 128/13 raised the following points of law:

"1. The Applicant instituted an application for common law review seeking the setting aside of the decision of his dismissal from the Civil Service Commission on the ground that it was procedurally unfair.

2. The Applicant has failed to report a dispute to the Conciliation, Mediation, and Arbitration Commission (CMAC).

3. Protection against unfair treatment, including dismissal, in the workplace is guaranteed by ***Section 32 of the Constitution*** *and not by* ***Section 33.***

4. ***The Industrial Relations Act 2000 ("as amended")*** *is the legislation envisaged by* ***Section 32 (4) of the Constitution*** *to give effect to the protection against unfair dismissal, victimization and other unfair disadvantages in the employment sphere.*

5. The act provides one stop shop dispute resolution procedure.

6. An employee whether in the Private or Public Sector, alleging unfair treatment by his or her employer in the workplace is

bound to follow the dispute resolution procedure laid down in ***Part VIII*** *of the act and this failure is fatal to his case."*

[8] In case No. 418/12 the points of law raised by the Respondents appear as follows:-

"1. This is an application to review and set aside the First Respondent's decision of 28 May 2012.

2. The Applicant has failed to report a dispute to the Conciliation Mediation and Arbitration Commission (CMAC).

3. ***The Industrial Relations Act, 2000 (as amended)*** *is the legislation envisaged by* ***Section 32 (4)*** *to give effect to the protection against unfair dismissal, victimization and other unfair disadvantage in the employment sphere. An employee, whether in private or Public Sector, alleging unfair treatment by his or her employer in the workplace is bound to follow the dispute resolution procedure laid down in* ***Part VIII*** *of the Act.*

*4. It is clear ex facie the papers that the Applicant has failed to invoke **Part VIII** of the Act by failing to attach a certificate of unresolved dispute, and this failure is fatal to his case."*

[9] **Factual Background: Case No. 418/12**

The Applicant is a Teacher and is currently holding the position of Deputy Principal and is based at Mbabane Central High School. In October 2009 he verbally expressed his wish to be transferred from Mbabane Central High school to St. Christopher's High School to the Executive Secretary of the Teaching Service Commission. He did not formally apply to the Regional Education Officer as required by the Teaching Service Regulations. In March 2010 however, The Executive Secretary of the Teaching Service Commission called the Applicant to tell him that the Teaching Service Commission has turned down his request for the transfer on the grounds that the Applicant was troublesome and would cause trouble for the Principal of St. Christopher's High school or any other school.

[10] The Applicant said he was taken aback by this as he never made a formal request for transfer to the Teaching Service Commission. In November 2010, the Mbabane West Member of Parliament visited Mbabane Central High School and bitterly complained about the poor performance of the school in both external and internal examinations and also about the tension

among the staff members. The Member of Parliament promised that he would challenge the Minister of Education and Training to resolve these issues.

[11] On 2nd February 2011, the Minister of Education indeed came to the school in the company of Inspectors and journalists. The Minister and his delegation first met the Headmaster in his office and thereafter the staff in the main staff room.

[12] On 3rd February 2011 the Teaching Service Commission wrote a letter to the Applicant inviting him to a meeting with the Executive Secretary to discuss a way forward in the matter that the Applicant considered as long closed, that is, his wish to be transferred to St. Christopher's High School. The Executive Secretary informed the Applicant that the Minister had issued an instruction that he be removed from Mbabane Central High School.

[13 The Applicant was taken by complete surprise by this turn of events. He explained to the Executive Secretary that the Teaching Service Commission could not revive this matter as it was long abandoned and that in any event, he had only informally talked about the matter and never formally made the request as required by **Regulation 24** of the Teaching Service Regulations.

On 11th May 2011, the Teaching Service Commission wrote a letter of transfer directed to the Applicant directing him to transfer to Lobamba Lomdzala High School instead of St. Christopher's High School.

[14] The Applicant objected to the transfer on the basis of the apparent political interference by the Minister who has no role to play in the employment of teachers. In the meantime the Headmaster at Mbabane Central High School on 17th and 24th May 2011 demanded the Applicant to surrender all school property and to vacate the school's premises. The Teaching Service Commission did not consider the objection by the Applicant but instead on 15th December 2011 preferred charges of insubordination against the Applicant in terms of **Regulation 15 (1) (C) and (J) of the Teaching Service Regulations** for his failure to report for duty at Lobamba Lomdzala High school. The Applicant was found guilty and was suspended for one year without pay. The Applicant accordingly instituted the present proceedings and is challenging the Teaching Service Commission's decision on the basis of the following grounds;

14.1 The 1st Respondent has refused and/or failed to furnish him reasons for the adverse decision it took against him.

14.2 The 1st Respondent has breached the provisions of ***Section 33 (2) of the Constitution of Swaziland*** *and the principles of natural justice.*

14.3 During the disciplinary proceedings he was refused an opportunity to call witnesses.

14.4 The decision to suspend without pay was ultra vires and against the provisions of ***Regulation 24 of the Teaching Service Regulations.***

14.5 The 1st Respondent misconstrued the provisions of ***Regulation 15(1) (C) (J)*** *and* ***Regulation 24 of the Teaching Service Regulations.***

14.6 The 1st Respondent was prejudiced and biased against me as I was advised by its legal advisor to write a letter of appeal and apology before the verdict was issued, creating the impression that the 1st respondent was acting in bad faith.

[15] **Factual Background: case 128/13**

The Applicant was employed by the 1st Respondent as a Fireman in March 2004. In October 2012 he was served with disciplinary charges. One of the charges was that he refused to attend a grassfire on two occasions. In

another charge he was accused of absenteeism. The Applicant requested to be furnished with certain documents including the Occurrence Book in order to prepare for his defence. The 1st Respondent failed to make the Occurrence Book available to the Applicant.

[16] The hearing was held on 06th March 2013. The Applicant attended with his legal representative. A member of the panel by the name of Magwagwa Mdluli told the Applicant that it was not enough to plead not guilty, but he should exonerate himself as the burden to prove his innocence rested on him. Three witnesses were led by the 1st Respondent. The Applicant's legal representative was however denied the opportunity to cross examine the witnesses as the members told the Applicant that the 1st Respondent employed the Applicant and not his attorney.

[17] The Applicant was in effect denied legal representation. In his papers the Applicant accordingly challenged this conduct of the 1st Respondent by stating as follows:-

17.1 My legally guaranteed and protected right to legal representation in terms of ***Section 182 of the Constitution*** *was infringed by the 1st Respondent.*

17.2 The hearing was unfair and irregular as the Applicant or his legal representative was denied the opportunity to cross examine the 1st Respondent's witnesses.

17.3 The disciplinary hearing was fraught with procedural irregularities and ought to be reviewed and set aside.

17.4 My right to administrative justice as guaranteed and protected in ***Section 33 of the Constitution of Swaziland*** *was violated and this is the sole question of law that the court is called upon to determine.*

[18] **Case before the court**

The Applicant's case before the court in case no128/13 is that the disciplinary hearing by the 1st Respondent was so irregularly conducted as to amount to a violation of his rights to administrative justice. He therefore wants the court to review and set aside that decision. The Applicant's case in case No.418/13 is that the decision to transfer him was irregular and in violation of the Teaching Service Regulations and the Constitution and that as the result of this his suspension without pay for one year was unlawful and ought to be reviewed and set aside.

[19] The court will now address the points of law raised on behalf of the Respondents.

Review Proceedings

Mr. Vilakati argued on behalf of the Respondents that the present review proceedings are not competent. He argued that a dismissal or any unfair labour practice can no longer be challenged by way of common law review. He argued that there is now a new phenomenon whereby the right to administrative justice has been codified in the Constitution. The second aspect of his argument was that the infringements complained about were not administrative, and further that our Constitution draws a clear distinction between administrative action (section 33), and unfair labour practices (section 32). He argued that a dismissal is similar in its effect whether it is by a Public Sector employer or a Private Sector employer. He said it followed therefore that the matters should have been reported to the Conciliation, Mediation and Arbitration Commission (hereinafter referred to as CMAC) and the applications come to court in terms of **Part VIII** of the **Industrial Relations Act, 2000 (as amended).**

[20] **Administrative Justice**

Indeed, in terms of the **Constitution of the Kingdom of Swaziland** under **Section 33,** the right to administrative justice is provided and guaranteed.

In the **Constitution of Namibia** it is provided in **Article 18.** In the **Constitution of the Republic of South Africa** it is found in **Section 33** and it is referred to as **"Just administrative action."** In the **Constitution of Zimbabwe** the provision is similarly worded as the local constitution as "**Right to administrative justice."**

[21] In our Constitution however, there is no definition of administrative justice. In the Republic of South Africa, they have since enacted a law to give effect to this Section of the law called **Promotion of Administrative Justice Act (PAJA).** No similar legislation exists in Swaziland. I therefore respectfully differ with Mr. Vilakati when he says the common law review proceedings are no longer applicable. In this regard I align myself with the views of **Chaskalson J** (as he then was) in the case of **Pharmaceutical Manufacturers of SA; in re: Ex Parte Application of President of South Africa 2000 (3) BCLR 241 (CC) at 257** where he was reacting to the view that judicial review under the Constitution and under the common law were different concepts;

"I take a different view. The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law

constitutional principles. Since the adoption of the interim constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been <u>subsumed</u> under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are <u>intertwined</u> and do not constitute separate concepts …" (my underlining for emphasis***)***

[22] Mr. Vilakati argued further that if the Applicants' claim is that their rights under **Chapter III of the Constitution** have been infringed, their remedy lies with the High Court. I again respectfully disagree with learned Counsel because of the following reasons;

*22.1 Section 35 (3)of the Constitution provides that if any question arises as to the contravention of **Chapter III** in proceedings in any court, that court may stay the proceedings and refer the question to the High Court, and <u>shall</u> do so when requested by one of the parties. In the present matter none of the parties requested a referral of the questions to the High Court.*

22.2 The Industrial Court being a court of law is enjoined to enforce the laws of this country. The Constitution of the Kingdom of Swaziland is part of the laws of Swaziland and it being the supreme law of the land, cannot be excluded from enforcement by the Industrial Court. The Industrial Court of Appeal has already decided positively this question whether the Industrial Court has jurisdiction to deal with a Constitutional question arising in legal proceedings before it in the case of ***The Attorney General v Stanley Matsebula, case No.4/2007, (ICA).*** *The Industrial Court of Appeal found support in its decision from the dicta by Froneman J in the case of* ***Qozeleni v. Minister of Law and Order 1994 (3) S.A. 625 at 637*** *where he stated as follows in paragraphs E-G:-*

"In my view it seems inconceivable that those provisions of Chapter 3 of the constitution which are meant to safeguard the fundamental rights of citizens should not be applied in courts where the majority of people would have their initial and perhaps only contact with the provisions of the Constitution, viz the lower courts. Such an interpretation of the Constitution would frustrate its very purpose of constituting a bridge to a better future. It would negate the principles of accountability or justification in those

courts where most of the day to day administration of justice takes place."

The Constitutional question in the Stanley Matsebula case involved Section 194 (4) of the Constitution and the court a quo was faced with the question of whether the continued suspension of the Respondent was consistent with Section 194 (4).

22.3 Industrial Court therefore has exclusive jurisdiction in terms of section 8 (1) of the Industrial Relations Act of 2000 as amended. Further, in terms of Section 8 (3) of this Act, the Industrial Court in the discharge of its functions under this Act "shall have all the powers of the High Court". Furthermore, the applications could not properly be brought before the High Court because the High Court ***"has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction"*** (See: Section 150 (3) of the Constitution.

Failure to Follow the Provisions of Part V111

[23] It was also argued on behalf of the Respondents that the applications were not properly before the court because the Applicants have failed to follow the dispute resolution procedure as it was not first reported to CMAC as envisaged by **Part VIII of the Act.** The applications have not come to court as urgent applications. Even in an urgent application the litigant must state the reasons why the provisions of **Part VIII of the Act** should be waived. It was only the subsequent application to stop the transfer of Sipho Dlamini (case No.418/12) from Mbabane Central High School to Jericho High School that was brought under a certificate of urgency. A rule nisi was issued by the court on 18th July 2013 staying the transfer pending the determination of the main application.

[24] The court is inclined to agree with the argument on behalf of the Applicants that there was no need to follow the provisions of Part V111 of the Act as the applications were solely for the determination of questions of law only, namely, whether the 1st Respondents' conduct violated the rights of the Applicants to administrative justice entrenched in Chapter 111 of the Constitution of the Kingdom of Swaziland, the right to legal representation before a service commission under Section 182 and the Teaching Service Regulations. An application that is brought solely for the determination of a

question of law is an exception to the requirement to follow Part V111 of the Act. This is clear from the reading of **Sub-rule (6)(a) & (b) of Rule 14** which provides that;

"(6) The Applicant shall attach to the affidavit –

(a) all material and relevant documents on which the Applicant relies; and

(b) in the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission, unless the application is solely for the determination of a question of law."

[26] It seems to the court therefore that this point of law ought to be dismissed. As regards the application by Sipho Dlamini, (case No. 418/12), there is *prima facie* evidence that the transfer was irregular and that it was in violation of the Teaching Service Regulations. **Regulation 24** which deals with transfers, states categorically clear that a request for transfer shall be in writing. The evidence before the court showed that no such written request was ever made by the Applicant, Sipho Dlamini.

[27] Similarly, in the case of Thulani Mtsetfwa, (case No. 128/23) there is *prima facie* evidence before the court that the disciplinary proceedings were irregularly conducted by the members of the Civil Service Commission to the serious prejudice of the Applicant.

[28] Ordinarily, the Industrial Court does not deal with applications that have not first been reported to CMAC. The primary duty of CMAC is conciliation of labour disputes. In the present applications however, the Applicants are seeking orders for the review of the 1st Respondents decisions, which orders CMAC has no power to grant.

Discrimination between Public Sector and Private Sector Employees

[29] It was argued by Mr. Vilakati that the protection against unfair treatment including dismissal, at the workplace is guaranteed by **Section 32 of the Constitution** for both public sector and private sector employees. It was argued that to allow public sector employers to enjoy a short-cut of seeking redress in terms of review proceedings was discriminatory against private sector employees who have to approach the court by the long route of application for determination of an unresolved dispute in terms of **Rule 7.** Mr. Vilakati further argued that the decision to dismiss was not

administrative but a managerial prerogative and cannot therefore be challenged as a violation of Section 33 of the Constitution. He argued that the rights of employees against unfair dismissals or unfair treatment are protected under Section 32 (4) of the Constitution. For this argument he relied on the decision of the Constitutional Court of South Africa in the case of **Chirwa v Transnet LTD And Others 2008 (4) SA (CC).**

[30] **Miss Chirwa's case:**

Miss Chirwa was employed by Transnet Limited in the capacity of Human Resources Executive Manager in May 1999. She was dismissed on 22 November 2002 on grounds of inadequate performance, incompetence and poor employee relations. She first reported the matter to the Commission for Conciliation, Mediation and Arbitration on the basis that it was procedurally unfair. Conciliation failed. She did not pursue the labour relations mechanism further but approached the High Court claiming that the dismissal violated her constitutional right to just administrative action as given effect to by PAJA. The High Court applied the principles of natural justice and found that the dismissal was unfair and granted an order for her re-instatement.

[31] Transnet appealed to the Supreme Court of Appeal. The appeal was upheld on the basis that her dismissal did not fall to be reviewed under the

provisions of PAJA. Miss Chirwa then approached the Constitutional Court. She argued that since Transnet is an organ of state, the dismissal of its employee necessarily amounts to an exercise of public power, which is reviewable under **Sections 3 and 6 of PAJA.**

[32] The Constitutional Court dismissed the appeal and pointed out that as she was dismissed for alleged poor work performance, she should have followed to the end the procedures and remedies under the Labour relations Act (LRA) which specifically regulate this type of labour dispute. The Constitutional Court also found that the High Court did not have concurrent jurisdiction with the Labour Court.

[33] Dealing with the present question before the court whether the 1st Respondents conduct amounted to administrative actions, **Ngcobo J** and the **Chief Justice** held that it did not, both because there was no legislative source for the decision and because the dismissal was not the exercise of a public power or performance of a public function.

[34] The present applications are therefore clearly distinguishable from Chirwa's case; firstly, in the present applications there was a legislative source for the decisions taken by the 1st Respondents, being the Civil Service Board (General) Regulations and the Teaching Service Regulations.

Secondly, the 1st Respondents are specifically empowered by the Constitution to carry out the duties that they do. **Section 176 (1)** dealing with the functions and powers of service commissions, states categorically clear that the functions of the service commissions shall include appointments (including promotions and transfers) and selection of candidates for appointment, confirmation of appointments, termination of appointments, disciplinary control and removal of officers within the public service or any other sector of the public service.

[35] The court agrees with Mr. Vilakati that there is a specific provision under Section 32 relating to rights of workers. The court does not however agree that that means an employee is therefore precluded from enforcing a right that is found in other parts of the Constitution. For example, numerous applications have been brought before this court by public sector employees claiming that they have been put on indefinite suspension contrary to the provisions of Section 194 (4) of the Constitution.

[36] The points of law are therefore accordingly dismissed with no order as to costs.

[37] The parties are to agree in court on the next step to be taken in these applications.

[38] The members agree.

N. NKONYANE
JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANTS: **MR. M. MKHWANAZI**
(MKHWANAZI ATTORNEYS)

MR. B.S. DLAMINI
(B.S. DLAMINI AND ASSOCIATES)

FOR RESPONDENTS: **MR. M. VILAKATI**
(ATTORNEY-GENERAL'S CHAMBERS)