



IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 161/2014

In the matter between:

LEWIS VELAPHI DLAMINI

APPLICANT

and

THE CHAIRMAN OF THE CIVIL

SERVICE COMMISSION

1ST RESPONDENT

MINISTRY OF AGRICULTURE

2ND RESPONDENT

ATTORNEYGENERAL

3RD RESPONDENT

Neutral Citation : *Lewis Velaphi Dlamini v The Chairman of the Civil Service Commission & 2 Others [2017] SZIC 41 (09 JUNE 2017)*

CORAM : **M. SIBANDZE ACTING JUDGE**
(Sitting with Ms. P. Thwala & Mr. P.S. Mamba Alternate Members of the Court)

DATE HEARD : **16TH MAY 2017**

DATE HANDED DOWN : **09TH JUNE 2017**

Summary

Civil Litigation - Powers of the Industrial Court of Swaziland to review dismissals of Public sector employees. Findings - in the current matter the Industrial Court of Swaziland does not have the requisite jurisdiction to review the termination of the Applicant's services.

JUDGMENT

1. The Applicant in an Application filed on or about the 08th April 2014 sought an order;
 - 1.1 Reviewing correcting and setting aside the decision of the Civil Service Commission dismissing the Applicant from his employment and directing that the conduct of the disciplinary hearing proceedings against the Applicant contravenes the provision of the Constitution relating to the discipline of Public Officers and is set aside.

2. Ordering and directing the Respondent's to re-instate the Applicant to his post as an Accountant forthwith.

3. The Applicant alleged that the termination of his services were unfair and irregular on various grounds including that the disciplinary hearing do not conform to the rules of natural justice, the Civil Service regulations, the Industrial Relations Act and the Constitution in various respects which for the purposes of this judgment we need not traverse.

4. Indeed prior to the setting down of this matter for hearing, the High Court Judgment of *Alfred Maia V The Chairman of the Civil Service Commission & 2 Others, Case No. 1070/2015* was handed down, significantly altering the legal landscape in respect of what had been taken to be settled law with regards to this court's jurisdiction to entertain the review of decisions to dismiss employees in the Public Sector.

5. At the roll call of this matter prior to the date of hearing the court, *meru motu* invited both Counsel to file Supplementary Heads of Argument and address the court on the question of whether this court, has review powers over decisions to dismiss employees in the Public sector in light of the Maia Judgment .

6. Both Attorneys filed their Heads of Argument which were helpful and for which this court is grateful.

7. The Maia judgment to which we have alluded found emphatically as follows;

“ 1. The Industrial Court has no jurisdiction to entertain review proceedings brought on the basis of Common law for the alleged contravention of the employee’s rights to administrative justice as covered by 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 as all other disputes in the said Act”.

8. In reaching its conclusion in the Maia judgment, the High Court of Swaziland considered inter alia the scope and meaning of Section 8 (1) of the Industrial Relations Acts which bestows The Industrial Court with its jurisdiction and came to the conclusion that whilst

the Industrial Relations Act bestows this court with all the powers of the High Court; in the exercise of its mandate under the Act, the review of an employer's decision to dismiss is not a matter arising at Common Law between employer and employee as envisaged by Section 8 (1) of the Industrial Relations Act and accordingly, that any employee in the public and clearly from the reading of His Lordship Hlophe J's judgment, in the private sector who is disaffected by dismissal must follow the laid down procedure for the reporting of disputes in the Industrial Relations Act and thereafter file an application in the same manner as all other litigants .

9. Counsel for the Applicant Mr. X. Mthethwa referring to a judgment of ***Firestone South Africa (Pty) Ltd V Gentriciolag 1977 Vol.4 SA 298 pg.304;*** on the interpretation of statutes submitted on the established principle that in the absence of express provisions to the contrary, statutes should be considered as affecting future matters only and more especially that they should be if possible so construed as to not take away any rights vested at the time of the promulgation.

10. Mr. Mthethwa further relied on the well-established principle that in the absence of an express provision to the contrary, no statute is presumed to operate retrospectively as one recognized by the case provident as indeed, it is recognized in our law.

11. Counsel for the Applicant invited the Honourable Court to extend this principle of law to pronouncements by the courts, the suggestion being that on the basis of judgments prior to that of Maia which had found that the Industrial Court had the jurisdiction, or had made orders based on the understanding that the Industrial Court had the jurisdiction, to entertain reviews of this nature had acquired rights which were effectively affected by the Maia judgment which was handed down after they had initiated the legal proceedings.

12. Mr. Mthethwa submitted that for the court to hold that the Maia judgment affects matters instituted prior to it would visit grave injustice upon the Applicant, who, at the basis of the law as it was understood at the time, elected to resort to a review application as a manner of challenging his dismissal.

13. Mr. Mthethwa's argument loses sight of the fact that the Industrial Relations Act come into force on the 25th August 2000 and the Constitution of Swaziland in 1995.

14. The fact that a pronouncement on the meaning of these Sections was made by the High Court of Swaziland in the Maia judgment in February 2016 does not mean that litigants had obtained vested rights contrary to the actual meaning of Section 8 (1) of the Industrial Relations Act and Section 33 (1) of the Constitution of Swaziland based upon judicial misinterpretation and that those vested rights had then be taken away by the Maia judgment.

15. We are fortified in this view by the 1st Respondent's cited authority in the case of Ferrara V Levino N.O 1996 (1) SA 1984 CC , a judgment of the Constitutional Court of South Africa, in which that court stated as follows;

“The court does not invalidate the law, it merely declares it to be invalid... pre- existing law which was inconsistent with the provisions of the constitution became invalid the moment the relevant provisions of the constitution came to effect. The

inception of the validity of the existing law occurs when the relevant provisions of the constitution came into operation”.

16. This would mean, this principle would not apply to current facts would mean that the Act that, the meaning at the respective Sections of the Constitution and the Industrial Relations Act, as analyzed in the Maia judgment comes in to effect upon the actual inception of the relevant provisions of the Industrial relations Act and the Constitution retrospectively and not upon the date of the pronouncement.

17. Counsel for 1st Respondent also cited the case of *Attorney General V Mary Joyce Doo Aphane Civil Appeal Case 12/2010* in support of the submission that an order pronouncing upon constitutionality is by virtue of the Supreme Law retrospective in effect.

18. In the premises as attractive as the argument by Mr. Mthethwa maybe, it stands to fail and we find that this being an Application for review of a dismissal in the Public Sector, this court has no jurisdiction to entertain an Application of this nature and the Application is accordingly dismissed with no order as to costs.

The Members agree.

MUSA M. SIBANDZE
ACTING JUDGE - INDUSTRIAL COURT

For the Applicant: Attorney Mr. X. Mthethwa (Bhembe Attorneys)

For the Respondent: Attorney Ms. T. Dlamini (Attorney General's Chambers)