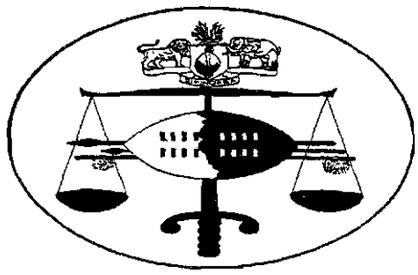

IN THE INDUSTRIAL COURT OF APPEAL OF SWAZILAND

(HELD AT MBABANE)

APPEAL CASE NO.: 04/2005

In the matter between

MATHEMBIDLAMTNI Appellant

and

SWAZILAND GOVERNMENT Respondent

CORAM:

J.P. ANN AND ALE JP
J.M. MATSEBULA JA
S. B. MAPHALALA JA

For Appellant: MR. P. DUNSEITH
OF P.R. DUNSEITH
ATTORNEYS

For Respondent: MS S. MASEKO
ATTORNEY
GENERAL'S
CHAMBERS

APPEAL JUDGMENT
27 February 2006

ANNANDALE JP:

[1] This is an appeal against a judgment of the Industrial Court and involves the Industrial Relations Act, 2000 (Act 1 of 2000) ("the Act").

[2] The appellant was employed by the Government as a teacher in about 1983

and was eventually promoted to the post of headmaster.

[3] From an audit of his school records an alleged shortage of E30 415,14 was found to have been unaccounted for. Disciplinary proceedings were instituted against the appellant by the Teaching Service Commission ("the Commission") and the appellant was found guilty and the respondent was informed through a letter written by one W.S.A. Shongwe, the then Executive Secretary of the Commission of the Government, that he was demoted to the position of deputy headmaster at another school with effect from the 1st January 1999. He was also surcharged for the amount of E30 415.14.

[4] The appellant appealed against the said decision and a second audit was conducted at the school. The second audit allegedly revealed that a lesser amount of E9 992,70 was missing. The reduction from the amount of E30 415,14 was apparently brought about as a result of further documentation becoming available.

[5] The appellant, per letter dated the 24th September 1999 addressed to the Commission, queried the findings of the second audit and indicated that he himself and the auditors had gone through the entire foliage of records and established that E4,328.55 was at that stage not accounted for and not E9,920.70 as was alleged in the second audit.

[6] The aforesaid letter apparently was not acted upon by the Commission and the Commission by letter dated the 24th January 2000 informed the appellant that he was now surcharged for the E9,920.70.

[7] The respondent did not respond to the said letter of the appellant dated the 24th September 1999 and as the time period in which the appellant could report the dispute had apparently lapsed, the appellant applied for an extension of the period in which to report the dispute and the Commissioner of Labour on the 10th November 2002, who extended the period until April 2003. The matter was reported and on the 16th June 2003 and a Certificate of Unresolved Dispute was issued by the CMAC Commissioner.

[8] The matter was then instituted in the court *a quo.*

[9] Paragraph 7 of the application by the appellant to the court *a quo* reads as follows:

> "7. *The Applicant was granted an extension of time to report the dispute to the Labour Commissioner. The CMAC conciliated but was unable to resolve the dispute."*

[10] Paragraph 5 of the respondent's reply to paragraphs 6 and 7 of the appellant's application to the court *a quo* reads as follows:

> *"Para 5. AD Paragraph 6 and 7: The contents herein (sic) are noted."*

[11] The matter then went to trial.

[12] The aspect of the extension of the time period was not canvassed during the hearing before the court *a quo* and was apparently also not raised during argument stage.

[13] Surprisingly, the court *a quo mero motu* in its judgment raised the question of extension of time and stated the following on page 123 of the record (unfortunately the court *a quo* did not number the paragraphs of the judgment):

> *"A point worth noting first is that, the demotion and transfer was done in December 1998 but the matter did not come before court until the 12th September 2003 approximately five (5) years from the date of the demotion.*
>
> *Indeed the dispute was not reported to the Commissioner until on or before April 2003.*
>
> *In terms of Section 76(4) of the Industrial Relations Act No. 1 of*

2000, a dispute way not be reported to the Commissioner of Labour if more than six months have elapsed since the issue giving rise to the dispute first arose, but the Commissioner may extend the time during which a dispute may be reported though in any event, he shall not have the power to extend the time in which a dispute may be reported where a period of thirty six months have elapsed since the dispute first arose.

The issue was not canvassed at all during the hearing of this matter nor is there any indication from the papers filed of record that extension of time was sought and granted by the Commissioner of Labour.

It would appear to the court that at the time the report was made, the Applicant was barred from reporting the dispute unless the same was done in terms of section 41 of the Employment Act which provided no time bar. The documentation before court and in particular the certificate of Unresolved Dispute indicates that the matter was reported in terms of the Industrial Relations Act 2000. On that score alone, the application should fail."

[14] As I have indicated in paragraph 9 *supra* the extension was duly pleaded by the appellant and the "CERTIFICATE FOR THE EXTENSION OF TIME", annexure "MD2", itself appears on page 101 of the appeal record. The court *a quo* clearly and unfortunately overlooked this and misdirected itself and erred in this regard.

[15] The aspect of the extension of time was also referred to in paragraphs 1, 1.1,1.2 and 1.3 of the grounds of appeal set out in the notice of appeal.

[16] The aspect of the extension of time was also pertinently raised in paragraphs 1,2, 3,4, 5, 6 and 7 of the appellant's heads of argument.

[17] The respondent did not, in it's heads of argument, respond at all to the appellant's arguments with regard to the extension of time aspect in their heads as it clearly was common cause that extension of time was granted.

[18] With regard to the merits of the matter the court *a quo* in its judgment stated that: *"the charges of misconduct and negligence were established against the Applicant on a balance of probabilities."* How and on what basis this finding was made is not set out in the judgment. To be able to make such a finding there must at minimum be acceptable evidence in that regard.

[19] The evidence of the witnesses before the court *a quo* must now be examined to ascertain whether the charges of misconduct and negligence were established. It was the appellant's evidence that there was no disciplinary hearing by the Commission. There was no evidence to the contrary. It must be pointed out that the record of the disciplinary proceedings before the employer was not put before the court *a quo.* The excuse that the Commission's file went missing is not sufficient enough. There must at least be somebody who took part in the disciplinary proceedings, if ever there were such proceedings, who would have been able to testify to that respect. Yet no witness was called by the respondent in respect of those proceedings, adducing any admissible evidence.

[20] The appellant testified in the court *a quo.* He did not call any other witnesses to support his case.

[21] The appellant testified that he was summoned to the Commission to come and answer allegations by an auditor that there were funds missing from the school. He proceeded to the Commission where he was presented with a letter from the auditor to the effect that E30,415.15 was missing from the school's funds. He disputed this and asked for time to consider the report of the auditor and was given a week to do so. He was thereafter to report again at the Commission.

[22] He testified that during that week he tried to reconcile the figures. He stated that he discovered some discrepancies in the banking statements and that bank deposit slips were apparently forged by students who added figures thereon to

reflect amounts allegedly deposited in excess of the amounts actually deposited and that the forged receipts were given by the students to the school secretary who entered the falsified amounts in the school's records. Some students brought copies of their respective deposit slips to the school secretary who entered it into the school's records and later the students brought further copies of the same slips to the secretary who entered it again into the school's records as further payments. Some of the monies which was paid in 1994 was only receipted in 1995 which satisfactorily explained the query regarding underbanking of funds.

[23] He explained that initially he tried to reconcile the amounts all by himself and that he was later joined in this by a lady auditor, one Ms Nomcebo Mdziniso, and that they went through the records together. He also explained that it was found that some of the payments into the bank went into wrong accounts as the numbers were incorrectly filled in on the slips.

[24] He stated that the lady auditor was eventually satisfied and that they found that only about E1,000.00 was unaccounted for but that they did not have sufficient time to check the records further and that Ms. Mdziniso then stated to him that "no they will kill me bo Thoko if they find out this is what is missing" and that she stated that she must report a shortage of at least E 10,000.00 and that they, apparently meaning the Commission, would accept that amount.

[25] In response to questions from the court *a quo* he stated that in fact all the amounts were accounted for but despite that he was demoted and transferred.

[26] He testified that he was to report at the Commission on a particular date. He did so but was late as he himself had to wait for somebody else who turned up late. He was asked by a Mrs. Nkambule of the Commission to write an apology for being late which he did. He was instructed to come back the following week. He did so and waited from 10:00 until 12:00. Mrs. Nkambule eventually came out of an office and she told him that he was not billed for that day as there was a long case involving a teacher which would last well into the afternoon and that he could leave and she told him that they would invite him by letter when he was to report again.

[27] He stated that he waited in vain but that no notice in that regard arrived at all. About three weeks later he got the letter informing him that he was demoted and transferred.

[28] He denied having misappropriated any funds. He reiterated that by the time he and Ms. Mdziniso went through the school's records the decision had already been taken that he be demoted. He stated that Ms. Mdziniso concocted her report to indicate an inflated shortage to protect her job and that he neither agreed to nor accepted her concocted figure. He stated that he at some stage agreed that a certain stage during their investigations he agreed that an amount of E4,328.55 was by then still unaccounted for. His evidence must be read as a whole. He also testified that when he and Ms. Mdziniso had to terminate their investigation receipts of only two amounts were still outstanding and that he was to get them from the store which banked the cheques. The respective amounts of the two cheques were E518.88 and E262,38, totalling E781.26.

[29] At this stage of the proceedings the presiding judge in the court *a quo* who earlier in the proceedings intervened quite often, unfortunately seemed to enter into the dust of the arena and he took over the questioning of the appellant. It appears, for instance, from page 20 to 30 of the record that the appellant's counsel asked 12 questions and the presiding judge 40 questions. It is clear that these questions of the presiding judge and the manner in which they were put unfairly upset the appellant.

[30] The appellant then testified again that in the end only the receipts relating to two cheques in the amounts of E518.88 and E262.38 respectively remained outstanding. He stated that Ms. Mdziniso instructed him to get copies of the receipts but that she still falsely concocted her report to show a shortage of E9,920.70.

[31] He stated that he raised this conduct of Ms. Mdziniso with the Commission and that they stated that Ms. Mdziniso would be called upon to come and answer his allegations. On three occasions she did not turn up and the Commission then

stated that they could not wait for her as that she could not be found. They finalised the matter resulting in his demotion and transfer without Ms. Mdziniso either answering his allegations or placing it in perspective, nor refuting it. Most surprisingly Me. Mdziniso did not testify in the court *a quo* and no acceptable explanation was given for this on behalf of the respondent. The evidence of the appellant in this regard was thus not rebutted by the respondent.

[32] The appellant stated that after he received the letter demoting him he reported the dispute to the Labour Commissioner.

[33] On page 42 of the record it appears that, despite the clear evidence of the appellant as to what happened on the various occasions when he attended at the Commission, the presiding Judge misdirected himself with regard to this evidence by stating that the Commission in fact gave the appellant appeal hearings.

[34] On page 45 of the record it appears that it was put to the appellant by the respondent's counsel that the appeal was dismissed by the Commission because some of the documents the appellant submitted were forged in order to decrease the amount unaccounted for cash. The appellant disputed this. It must be noted that no witness was called by the respondent to verify this most serious accusation against the appellant. See in this regard for instance *President of the Republic of South Africa and Others v South African Rugby Football Union and* Others (2000(1)SA 1(CC)) where it was ruled:

> *"(a) as a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still being in the witness-box, of giving any explanation open to the witness and of defending his or her character".*

After the questions were put it is the duty of the cross examiner to lead evidence to prove the contents of the allegations against the witness. As I have stated it was not done in this case and it is unacceptable. Before a cross examiner can put to a witness that he forged documents the examiner must make sure that he is able to lead evidence in support of the allegations. The respondent will be censured for

this as will appear from the order for costs in the court *a quo.*

It was put to the appellant that as accounting officer it was his duty to stop the students from falsifying documents. He acknowledged this and stated that it was a new system that was put into operation and that they were not aware of all the tricks the students could play with the system. His evidence in this regard was not rebutted and his answer seems to be a reasonable and acceptable explanation under the circumstances. He further stated that in fact they caught out some students which have falsified documents.

[36] The appellant also explained that in cases of emergency, for instance repairs to the school's electricity system, in the absence of the school board's chairman and in view of the vast distance from a bank, he would ask a local store to advance the school some cash against school cheques so that he could pay these amounts awaiting the return of the chairman to authorise the expenditure. In this regard the appellant clearly relied on the *maxim* that necessity knows no law. How that could be regarded as grounds for the demotion and transfer of a headmaster mystifies this court. There was no evidence led by the respondent to the effect that the appellant was ever warned against this and the chairman of the school board was not called by the respondent to rebut the evidence of the appellant.

[37] It must be reiterated that the respondent did not call any witnesses to rebut the appellant's evidence.

[3 8] The appellant's case was then closed.

[39] The respondent called as a witness one Moses Vusumuzi Zungu whose evidence is to be found on p. 68 *et seq.* of the record. He testified that he was employed as Executive Secretary of the Commission from the 6th February 2004. He testified that the applicant was demoted by a letter dated the 14th December 1998 with effect from the 1st January 1999. He stated that the applicant appeared before the Commission in August 1998 charged with the misappropriation of school funds in the amount of E30,415.14. He testified further that the original file relating to the matter went missing and he conceded that he was not present at the alleged proceedings before the Commission and that he was not the secretary of the Commission at the time. At this point in time the presiding judge in the court *a quo,* quite correctly, pointed out that the witness was giving hearsay evidence as he was not present at the alleged disciplinary proceedings and actually could not testify about the facts of the matter. After the court *a quo* pointed out that the evidence of the witness was of no value counsel of the respondent asked leave to

call another witness.

[40] The next witness for the respondent was one Thoko Zwane. She testified that she worked in the Department of Education as Financial Controller and that she had been in the post for two weeks and before that she was Principal Accountant. She testified that when she was Principal Accountant a team of auditors went to audit the school books at appellant's school and that upon their return they wrote a report. She testified that the procedure is that thereafter a copy of the report is furnished to the person having been audited and that person's response is awaited. The matter is then handled further by the Schools Managing Officer. She stated that she also testified at the disciplinary hearing of the appellant but that she could not remember when she testified. She stated that she explained *"a few things about the audit."* It is clear from her evidence that she received reports and obviously was also giving hearsay evidence about the matter. On page 78 of the appeal record her evidence is recorded as follows:

"RC: So yourself you inspected the school books?

RW2:1 inspected the report and I read from the report that he was not banking the money before using it, the regulations say you bank the money before you can use it.

RC:After that you make(sic) a report of your findings?

RW2:1wrote a minute to the TSC.

RC:Doyou have the minute?

RW2;YesIdo.

RCDo you hand that in as part of your testimony?

RW2:In don't know which things I should hand in and which things.... I

don't know I've never been to court I don't know which things I hand in and what not to hand in.

RC: Did you conduct an audit yourself?

RW2:1 didn't conduct any audit I just wrote a minute.

RC:About what? RW2:About

the findings. RC: Findings by

yourself or.... RW2:By the

auditors.

RC: What else did you do yourself in relation to this matter?

RW2.-Nothing except to go and be a witness at the hearing."

[41] She also testified that none of her officers (clearly the auditors) testified during the disciplinary proceedings.

[42] She was cross examined and as she herself was not involved in the matter she could not help the court *a quo* in any meaningful way. The evidence of this witness was absolutely unreliable. This court needs to refer to only one example of the worthlessness of her evidence. After stating, and after some prompting and in reply to a leading question, that the shortage was about E30,000.00, she changed her evidence and conceded that she doesn't know how it came about that the amount was reduced from E30,415,14 to E9,920.70. She also stated that she doesn't know whether there were further audits.

[43] It is clear that there could be no finding against the appellant which is

based on her evidence. The respondent's case was then closed.

[44] The court *a quo,* however, on page 124 of the appeal record, with regard to the merits of the matter, simply stated the following:

> *"The Court however will go further to state that the Applicant has failed to establish that the demotion was unlawful, substantively and procedurally.*
>
> *We are satisfied that the charges of misconduct and negligence were established against the Applicant on a balance of probabilities."*

[45] Unfortunately the court *a quo* did not in its judgment deal with the evidence and it is not clear on what basis and on which evidence the court *a quo* reached its decision. It is clear to us that the appellant should have been successful on the merits in the court *a quo.*

[46] There is one more matter to deal with. The respondent, most surprisingly, raised a point of law in its heads of argument to the effect that "The Industrial Court does not have jurisdiction to review a decision of an employer".

[47] The respondent apparently lost sight of the enabling provisions of sections 6(1), 8(1) and 8(3) of the Act.

[48] Thus, in discharging its functions under the Act, the Industrial Court may exercise the power to review decisions of statutory boards and bodies acting *qua* employer, provided, in terms of section 8(1) of the Act, that the decision relates to an infringement of labour legislation or *"any matter which may arise at common law between an employer and employee in the course of employment".*

[49] The decision of the Industrial Court in the case of *Moses Dlamini* v. *TSC And Another* (Case no. 402/2004) seems to be clearly wrong.

[50] What this court is dealing with in this matter is an appeal to this Court by the

appellant. Appeals to this court are regulated by section 19(1) of the Act which reads as follows:

> *"There shall be a right of appeal against the decision of the Court on a question of law to the Industrial Court of Appeal."*

[51] Appeals against pure factual finding are thus not permitted under the legislation as it stands.

[52] It is clearly a question of law when the decision of the Industrial Court is based, as it is in this matter, on hearsay, irrelevant and insufficient evidence. When a factual finding is incorrectly applied by the Industrial Court it is a legal issue which can be appealed against. See in this regard *National Union of Mineworkers* v *East Rand Gold and Uranium Co. Ltd.* 1992 (1) SA 700(A) at 723E-F (also known as the *"Ergo"* case) where it was decided:

> *"It would appear that we are required to determine whether, on the facts found by the Labour Appeal Court, it made the correct decision and order. That is a question of law. If it did then the appeal must fail. If it did not, then this Court may amend or set aside that decision or order or make any other decision or order according to the requirements of the law and fairness."*

This case was cited with approval in *Media Workers Association of SA* v *Press Corporation of SA Ltd.* 1992 (4) SA 791 (A) at 802C by E.M. Grosskopf JA. See also the judgment of Ebersohn AJA in the matter of *VIP Protection Services* v *Simon Nhlabatsi,* case no. 10/2004 in this court. This Court is in respectful agreement with those judgments.

[53] The respondent thus errs where it regards that which is now before this Court which should have been brought before the High Court as a review.

[54] It is clear that the appeal should succeed.

[55] There is no reason why the appellant should not be awarded costs and in any

case the respondent is to be censured for its accusal of the appellant of forging documents without any supporting evidence.

[56] The refund of the surcharge by the respondent to the applicant, in the event of the applicant being successful, was not an issue in this appeal and can be dealt with in another forum if the appellant elects to do so.

[57] This court notes and shares the concern expressed by the court *a quo* with regard to the delay in the fmalization of the matter.

I accordingly make the following order:

1. The appeal succeeds with costs.

2. The order of the court *a quo* is set aside and is replaced with the following order:

1. The application succeeds with costs, including the costs in the Court *a quo.*

2. The demotion of the applicant by the respondent is set aside.

3. The respondent is ordered to forthwith reappoint the applicant in his post as headmaster or to appoint him in a post of similar seniority.

4. The respondent is ordered to pay to the applicant, within 30 days of this order, the balance, with interest *a tempore morae* at the rate of 9% *per annum,* between what he was paid and what he should have been paid had he not been demoted.

5. The respondent is ordered to afford to the applicant all other benefits and privileges with regard to pension contributions and all other benefits to which he would have been entitled to if he was not

demoted by the respondent.

J.P. ANNANDALE
JUDGE PRESIDENT OF THE INDUSTRIAL
COURT OF APPEAL OF SWAZILAND

I AGREE

J.M. MATSEBULA
JUDGE OF THE INDUSTRIAL
COURT OF APPEAL OF SWAZILAND

I AGREE

S.B. MAPHALALA
UDGE OF THE INDUSTRIAL
COURT OF APPEAL OF SWAZILAND