IN THE INDUSTRIAL COURT OF APPEAL

HELD AT MBABANE Appeal Case No. 4/2007

In the matter between

THE ATTORNEY GENERAL **Appellant**

And

STANLEY MATSEBULA **Respondent**

Coram: R. BANDA - JP
MAPHALALA - JA
MABUZA-JA

For the Applicant: MR. M. VILAKATI

For the Respondent: MR. Z. MAGAGULA

JUDGMENT

Maphalala JA:

[1] Before court is an appeal against the judgment of the Industrial Court of 1st June 2006, in which the court held that it had jurisdiction to entertain matters of a constitutional nature.

[2] The court *a quo* at paragraph [43] of its judgment held *inter alia* that the court was simply asked to apply Section 194 (4) of the Constitution. No interpretation is required, save to determine whether the Section applies to the suspension in question. The suspension of an employee is a matter falling squarely within the exclusive jurisdiction of the Industrial Court, and no reason has been shown why the court should decline jurisdiction to apply and enforce the unambiguous provisions of a law simply because the law in question is the supreme law. To hold otherwise, in our view, would give to the anomalous result that the High Court is required to determine a labour dispute over which the Industrial Court has exclusive jurisdiction.

[3] The Appellant who is the Government of Swaziland being represented by the Attorney General has filed before this court a Notice of Appeal from final decision of the Industrial Court in its original jurisdiction on the ground that the court *a quo* erred and misdirected itself in holding that it had jurisdiction to test law and/or conduct against the Constitution of Swaziland Act No. 001/2005.

[4] The factual history of this matter is set out in the judgment of the court below dated 27th April 2007 which dealt with certain preliminary points of law. In that judgment, the court found that the suspension of the

Respondent from his employment as Headmaster of Woodlands Secondary School commenced running from 19 January 2006.

[5] In arguments before us Counsel for the Appellant filed very comprehensive Heads of Arguments, as he usually does before this court and stated, *inter alia* that the Constitution makes only one explicit reference to the Industrial Court in Section 151 (3) (a) thereof. The Constitution does not empower the Industrial Court to hear and determine constitutional matters that fall outside Chapter III of the Constitution. The Industrial Court does have an attenuated jurisdiction to

enforce the fundamental rights and freedoms guaranteed by the Constitution. Section 35 (3) of the Constitution provides that:

> **"If in any proceedings in any court subordinate to the High Court any question arises as the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgment of that person, which shall be final, the raising of the question is merely frivolous or vexatious.**

[6] It is contended for the Appellant that the use of the word "may" to describe the powers of the presiding officer in a subordinate court confers a discretion. Thus the Industrial Court is competent to deal with alleged violations of the Bill of Rights unless either of the parties requests a referral to the High Court. It is for this reason that the Industrial Court's jurisdiction to entertain Bill of Rights litigation is attenuated. It is submitted in this regard that if the framers of our Constitution intended to confer the Industrial Court with competence over constitutional matters falling outside the Bill of Rights, Chapter VIII of the Constitution would contain a provision similar to Section 35 (2). In this regard Counsel for the Appellant took the court through a comparable examination of cases in other jurisdictions, i.e. Botswana and Lesotho.

[7] The gravamen of the Botswana Court of Appeal case in *Botswana Railways Organisation vs J Setsogo and 198 Others [1996] B.L.R 112(CA) per* Amissah JP (Tebutt and Steyn JJA concurring) is that the Industrial Court was a subordinate court in terms of Section 105 (1) of the Constitution. The court relied on the same Section and held that:

> **"The Industrial Court is therefore competent to deal with constitutional issues arising in proceedings before it, provided the court is of the opinion that the issue raised is not a substantial question of law which it ought to refer the High Court. Even where the question of law is of a substantial nature the Industrial Court may still choose to deal with it if the court feels capable of doing so, because the Constitution, in its use of the word "may" to describe the court's powers, confers a discretion. But in any event, if either of the parties before the Industrial Court requests that the constitutional issue should be referred to the High Court, however insubstantial the issue is in the opinion of the Industrial Court, and whether or not the court feels capable, however substantial the issue is, to deal with the issue itself, the court's competence over the issue is ousted and it must refer the issue to the High Court for determination".**

[8] Section 22 (3) and 128 (1) of the 1993 Constitution of Lesotho are in *pari materia* with Sections 18 (3) and 105 (1) of the Botswana Constitution. Consequently, the Industrial Court of Botswana and Lesotho, subject to the qualifications mentioned by the learned Judge President in *Botswana Railways,* are competent to deal with constitutional issues arising in proceedings before it. The Appellant *in casu* contends that it is significant that our Section 35 (3) is similar to Section 18 (3) and 22 (3) of the

Botswana and Lesotho Constitutions respectively. However, we have no provision equivalent to Sections 105 (1) and 128 (1) of these countries' constitutions. The reason is plain enough the framers of our constitution did not intend to give subordinate courts, including the Industrial Court, power to deal with constitutional matters that fall outside of Chapter III of the Constitution.

[9] Further, it is contended for the Appellant that the reliance on two judgments in South Africa that of *Mcosini vs Mancotywa and Another (1998) 19ILJ1413 (TK)* and that of *Nelson and Others vs MEC Responsible for Education in the Eastern Cape and Another (2202) 23 ILJ 1005 (E)* are inapplicable to the instant case. The principle enunciated in these cases is that where the essence of the case is a labour matter falling within the exclusive jurisdiction of the labour court, a party cannot sidestep the labour court by classifying the issue in dispute as a constitutional matter. The substantive issue in *Mcosini* was whether an alleged suspension amounted to residual unfair labour practice. In *Nelson* case *(supra)* the essence of the dispute was the interpretation of a collective agreement. Constitutional issues in both cases were not the quintessence of the dispute. The court was not being asked to test the suspension and the application of the collective agreement against the constitution. The overriding issue in the case at hand is constitutional, that is whether the continued suspension of the Respondent (Applicant is the court below) was consistent with Section 194 (4) of the Constitution.

[10] On the other hand Counsel for the Respondent also filed very comprehensive Heads of Arguments for which this court is grateful.

Counsel for the Respondent contended therein that the fundamental question before us in this appeal is whether the Industrial court in dealing with matters which fall within its exclusive jurisdiction, has the jurisdiction and power to interpret and to deal with constitutional issues which are part and parcel of those

labour dispute. The Respondent contends that the Industrial court cannot wring its hands and disenfranchise itself if in the course of hearing a labour dispute the facts reveal that there may possibly be a violation of the constitution at the same time. The matter before the court *a quo* was a purely labour or industrial in nature, that is the suspension of the employee by his employer. The fact that there is a constitutional provision that also applies does not deprive the matter of its nature. The Industrial court, being a court of law is enjoined to enforce the laws of Swaziland and the Constitution being the supreme law of the land cannot be excluded from enforcement by the court. The Industrial Court is expected to apply the supreme law as it is a court of law. To support this argument the court was referred to a *dicta* by Froneman J in *Qozeleni vs Minister of Law and Order 1994 (3) S.A. 625* at *637 E* and *G* where he stated as follows:

> **"In my view, it seems inconceivable that those provisions of Chap 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".**

[11] It would appear to us after considering the force of the arguments by the parties that the position adopted by the Respondent is correct in the circumstances of this case. It is abundantly clear that the Industrial Court by virtue of its accessibility and nature of its function is perhaps the only forum where ordinary citizens come into contact with the operations of the law. In this regard we are in total agreement with the Respondent's contention that it would therefore be absurd to argue that such a court serving the greater portion of society would be deprived of the right to interpret the constitution.

[12] In the result, for the afore-going reasons the appeal is dismissed and we make no order as to costs.

MAPHALALA - JA

I agree

R. BANDA – JP

I agree

Q.M. MABUZA-JA

Handed down on 27th February 2008 at Mbabane.