IN THE INDUSTRIAL COURT OF APPEAL

JUDGMENT

Civil Appeal Case No. 4/2013

In the matter between

THE ATTORNEY GENERAL **APPELLANT**

And

SIPHO DLAMINI **1ST RESPONDENT**

THULANI MTSETFWA **2ND RESPONDENT**

Neutral citation: *The Attorney General vs Sipho Dlamini and Another (4/2013) [2013] SZICA 07 (19 September 2013)*

Coram: **M.M. RAMODIBEDI JP, E.A. OTA AJA, QM MABUZA AJA**

Heard **13 SEPTEMBER 2013**

Delivered: **19 SEPTEMBER 2013**

Summary: **Application was made to the Court a quo by the Respondents to review and set aside the decision of their employers suspending the 1st Respondent on the one hand and dismissing the 2nd Respondent on the other. The Respondents alleged procedural irregularities in the disciplinary proceedings and in their respective founding**

affidavits, placed reliance on the right to administrative justice preserved by Section 33 of the Constitution. The Appellant raised points in limine objecting to the jurisdiction of the Court *a quo* to entertain and determine a constitutional question on infringement of human rights, which jurisdiction is conferred on the High Court in terms of Sections 35(1) and 151(2) of the Constitution. The Appellant also decried the direct application to the Industrial Court without first lodging a dispute with CMAC in terms of Part VIII of the Act. The Court *a quo* held that it has the jurisdiction to entertain the constitutional question and that the issues raised by the Appellant, being merely questions of law, derogated the necessity of first lodging a dispute with CMAC, pursuant to Rule 14(6)(a) and (b) of the Industrial Court Rules. On appeal against the decision of the Court *a quo*, this Court held:- an employee alleging procedural irregularity and unfairness by his employer, may redress the wrong alleged either by invoking the common law review jurisdiction of the Industrial Court under the Act or the review jurisdiction of the Court pursuant to Section 33(1) of the Constitution (right to administrative justice). Appeal dismissed with costs.

THE COURT

JUDGMENT

BACKGROUND

[1] This appeal emanates from two cases, namely, Case No 148/2012 and Case No 128/2013 consolidated by the court *a quo.* For the sake of convenience we will refer to the parties as they are named in this appeal.

[2] The facts briefly stated are as follows:- The Applicant in Case No. 148/12 Sipho Dlamini, who is 1st Respondent *in casu*, is a teacher by profession. He was based at the Mbabane Central High School where he held the position of Deputy Principal. It appears that on 11th May 2011, the Teaching Service Commission on the apparent instructions of the Minister of Education wrote a letter to the 1st Respondent transferring him from Mbabane Central High School to Lobamba Lomdzala High School. 1st Respondent's protestations to this transfer, on the grounds that he had not made a formal application for same as required by the Teaching Service Regulations and that the Minister of Education had no role to play in the employment of teachers, fell on deaf ears. Rather, on 15th December 2011 the Teaching Service Commission preferred charges of insurbodination against the 1st Respondent 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 result of the disciplinary enquiry that ensued was that 1st Respondent was suspended for one year without pay.

[3] It was the aforegoing facts that elicited the proceedings in 148/12 which the 1st Respondent instituted against the Teaching Service Commission, Swaziland Government and The Attorney General, as 1st, 2nd and 3rd Respondents respectively, claiming *inter alia* the following reliefs:-

> **"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] His contention was that the Respondents *a quo* (Appellant) miscontrued the provisions of Regulation 15(1) (c) and (J) and 24 of the Teaching Service Regulations in the fact of his suspension. He argued, therefore, that the disciplinary proceedings were unfair and irregular and ought to be set aside because; his right to administrative justice in terms of Section 33 of the Constitution was infringed.

[5] Similarly, in Case No. 128/13, the 2nd Respondent Thulani Mtsetfwa who was employed as a fireman since March 2004 was slammed with disciplinary charges ranging from gross insurbordination, insolence, abuse of Government vehicle to absenteeism. The outcome of the disciplinary hearing was his dismissal.

[6] Aggrieved, the 2nd Respondent launched proceedings *a quo* against the Chairman Civil Service Commission, Swaziland Government and The Attorney General, as 1st, 2nd and 3rd Respondents respectively, claiming *inter alia* the following reliefs.

> **"1. Reviewing and setting aside the 1st Respondent's decision contained in a letter dated 13th March 2013.**
>
> **2. Re-instating 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".**

[7] The gravamen of the 2nd Respondent's application is that the disciplinary hearing was fraught with procedural irregularities; his constitutional right to legal representation in terms of Section 182 of the Constitution Act 2005, as well as, administrative justice as guaranteed and protected by Section 33 of the Constitution were thereby infringed upon. 2nd Respondent polarized all these issues on three allegations namely:

1. His request to be furnished with the occurrence book covering the period of the disciplinary charges was denied.

2. Inspite of the fact that he pleaded not guilty to the charges, one Mr Magwagwa Mdluli a member of the Commission informed him that he must exonerate himself even before evidence was led as the burden of proving his innocence rested upon him.

3. Both himself and the two legal representatives he attended the disciplinary hearing with were denied the right to cross-examine the 3 witnesses called by the Appellant.

[8] It is on record that the Appellant raised similar points of law *a quo* seeking to defeat the respective suits *in limine*.

[9] The *ipsissima verba* of these points of law which is the hub upon which this whole appeal resonates, is imperative. In case No 148/12, they state as follows:-

> **"1. This is an application for review and set aside (sic) the first respondents 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."

[10] Then there is Case No. 128/13 where the legal points sound in the following terms:-

"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 work place 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 work place is bound to follow the

dispute resolution procedure laid down in Part VIII of the Act and his failure is fatal to his case."

[11] The Court *a quo* per **Nkonyane J** with **G Ndzinisa and S. Mvubu** concurring, settled these points *in limine* in a judgment rendered on 15th August 2013, wherein after a careful compass of the issues arising and the law concomitant thereto, the Court dismissed the points *in limine* and made no order as to costs.

THE APPEAL

[12] It is the aforegoing decision of the Court *a quo* that the Attorney General (Appellant) decries in this appeal predicated upon one lone ground of appeal to wit:-

> **"1. The Court a quo erred and misdirected itself in dismissing appellant's points of law."**

[13] In paragraph 2 of Appellant's heads of argument, learned counsel for the Appellant Mr Vilakati, focused the appeal on two issues namely:-

> **"(a) the failure of the respondents to report a dispute to the Conciliation Mediation and Arbitration Commission (CMAC) as provided for in Part VIII of the Industrial Relations Act, 2000 (The Act) and**
>
> **(b) the jurisdiction of the Industrial Court to entertain disputes founded on an alleged infringement of provisions of the Constitution of Swaziland Act No. 001/2005 ('the Constitution') ".**

[14] Now, a careful consideration of the complaints raised by the Respondents *a quo*, shows that their contention is that the procedure adopted by the respective disciplinary commissions set up by their employers to deal with their respective

cases, was irregular and unfair and therefore a violation of their constitutional rights. These issues were in our respectful view correctly captured by the Court *a quo* in paragraph [18] of the assailed decision in the following words:-

"Case before the Court

> **The Applicant's case before the Court in Case No. 128/13 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. 418/12 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".**

[15] In dismissing the point *in limine,* the Court *a quo* held that the Respondents were entitled to invoke the review jurisdiction of the Industrial Court to redress the wrongs alleged without the necessity of reverting to the procedure prescribed by Part VIII of the Act, which requires that disputes should first be reported to CMAC. That court correctly held, in our view, that the Applicants were seeking orders for the review and that CMAC has no review power. The Court further held that the Industrial Court has the jurisdiction to deal with a constitutional question arising in proceedings before it.

[16] Now, there is no doubt that in raising these issues, the Respondents in their respective founding affidavits, placed reliance on their rights to administrative justice as entrenched in Section 33 of the Constitution Act as clearly identified by the Court *a quo*. It is by reason of this fact that Mr Vilakati contended, that the Court *a quo* misdirected itself in dismissing the points *in limine* because the Respondents were obliged to follow the dispute resolution procedure laid down

in Part VIII of the Act by first reporting the dispute to CMAC. Rather, they bypassed the Act and approached the Court *a quo* directly alleging an infringement of their right to administrative justice entrenched in Section 33 of the Constitution. This, Mr Vilakati says runs counter to the principle of law evolved by the South African Constitutional Court in the case of **South African National Defence Union v Minister of Defence and Others 2007 (8) BCLR 863 (CC) at para 51**, which is to the effect that

> **"where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional Standard."**

[17] Counsel contended that this principle has been applied by our Supreme Court in a long line of cases including **Jerry Nhlapo and 24 Others v Lucky Howe N.O (in his capacity as liquidator of VIF limited in liquidation) Civil Appeal No 37/2007; Daniel Didabantu Khumalo v Attorney General [2010] SZSC 6; Umbane Limited v Sofi Dlamini and 3 Others [2013] SZSC 25.**

[18] Counsel submitted that the Act, which is employment focused and purpose built for disputes between employer and employee in the work place, gives effect to several rights protected by Chapter 111 (ss 14-39) of the Constitution. These include the right not to be unfairly dismissed or subjected to an unfair labour practice as is envisaged by Section 32 of the Constitution. Counsel argued, therefore, that since the Respondents were not challenging the constitutionality of the Act on the ground that it inadequately protects them against unfair treatment or unfair dismissal, it was not open to them to skirt around the provisions of the Act and rely directly on the Constitution. They were obliged

to follow the dispute resolution procedure laid down in Part VIII of the Act, so he submitted.

[19] Counsel further contended that the question whether a disciplinary enquiry was irregular, which was the case for the Respondents *a quo*, is not a question of law but a question of fact. It is capable of proof including the subject of evidence addressed for that purpose. He argued, therefore, that the Court *a quo* was wrong to hold that it is a question of law derogating the necessity of the Respondents following the provisions laid down in Part VIII of the Act.

[20] Mr Vilakati advanced the view that reliance on Section 33 of the Constitution divested the Court *a quo* of its review jurisdiction because the right to interpret and enforce the Constitution is the province of the High Court pursuant to Sections 35(1) and 151(2) of the Constitution. He submitted that the Court *a quo* was wrong to hold that it derived the same jurisdiction from the provisions of Section 35 (3) of the Constitution.

[21] Counsel condemned the decision of the Industrial Court in **Melody Dlamini v The Secretary Teaching Service Commission and Others [2008] SZIC 39**, to the extent that it allows Government employees to skirt the provisions of the Act and rely directly on Section 33 of the Constitution. He contended that the decision was wrong and ought to be overruled.

[22] Counsel also posited that the Court *a quo* was wrong to place reliance on the Case of **Attorney General V Stanley Matsebula (2008) SZICA 99** in making

the finding that the Industrial Court has the jurisdiction to hear matters of a constitutional nature. He contended that in arriving at this conclusion the Court *a quo* did not have regard to the provisions of Sections 35(1) and 151 (2) of the Constitution which give the High Court jurisdiction to enforce the bill of rights and to hear and determine any matter of a constitutional nature.

[23] Learned Counsel for the 1st and 2nd Respondents, Messrs Dlamini and Mkhwanazi respectively, held a view *au contraire* to that of Mr Vilakati. We will make references to Counsel's submissions as the need arises in this decision.

[24] The question that has clearly arisen before us is whether the Industrial Court has jurisdiction to enforce the provisions of Section 33 of the Constitution?

[25] Since it is the review power of the Industrial Court that the Respondents seek to invoke to set aside the decision of the Appellant on grounds of procedural irregularities pursuant to Section 33 of the Constitution, a proper determination of the issues that have arisen will entail that we first interpolate at this juncture, to recount the review power of the Industrial Court in the employment context and the spirit behind it.

[26] In our view the expression judicial review in the context of this case refers to the means through which the courts control the exercise of administrative or public power exercised by public or statutory boards and bodies acting qua employer. Such statutory or public powers as the case may be, are usually

exercised through an officer of such public or statutory boards or bodies or by quasi-judicial tribunals set up by them.

[27] Speaking about the operational mode of such statutory or public bodies in the case of **John Kunene v The Teaching Service Commission and Others Civil Appeal Case No. 15/2006,** this Court stated as follows: at pps 7-8

> **"I refer to the Regulation [Teaching Service Regulation] and their statutory source in order to make it clear that the 1st and 3rd Respondents exercise public powers and that therefore they are bound to conduct their procedure in accordance with natural justice and the rules of public law" (emphasis added).**

[28] Thenceforward, it can be taken that Parliament only conferred the decision making power on such statutory or public bodies on the basis that it was to be exercised on the correct legal principles: i.e in accordance with the fundamental requirements of justice and fairness. A misdirection in law in making the decision therefore rendered it *ultra vires* and subject to judicial review. See **O'Reily v Mackman [1983] A.C. 237.**

[29] This is the sense in which the expression tends to be understood in the common law English jurisdiction from which the Roman Dutch common law applicable in the Kingdom is derived Our case law developed there tends to focus on this connotation of judicial review. We agree with the Court *a quo* that the common law judicial review is still applicable in this jurisdiction since it was subsumed under the Constitution upon its promulgation and adoption, in terms of Section 252 of the Constitution. The Court *a quo* made this observation in paragraph [21] of the assailed decision in the following terms:

[**"---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 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…".**

[30] The English common law concept identifies four principal objectives of judicial review in the sense of control of the exercise of administrative or public power, as follows:-

(1) that Acts of Parliament have been correctly interpreted;

(2) that discretion conferred by statute has been lawfully exercised;

(3) that the decision maker has acted fairly;

(4) that the exercise of power by a public body does not violate human rights.

[31] Postulating on the aforegoing principles in the locus classicus case of **Anisminic v Foreign Compensation Commission [1969] 2 A.C 147,** the House of Lords**,** per **Lord Reid**, said the following:

> **"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word *"jurisdiction"* has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. <u>It may have failed in the course of the inquiry to comply with the requirements of natural justice.</u> <u>It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it</u>. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provision setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly----."** (emphasis ours)

[32] It is important that we emphasise that the principle espoused in the **Anisminic Case** finds expression in a panoply of case law authority in other common law jurisdictions, including the neighbouring Republic of South Africa as well as in the Kingdom. Thus, in the case of **Johannesburg Consolidated Investment Company v Johannesburg Town Council 1903 TS at 115,** the Court stated as follows:-

"**Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularily or clear illegality in the performance of the duty this Court may be asked to review the proceedings complained of and set aside or correct them ---. Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behest of the statute and the tenets of natural justice (see NATIONAL TRANSPORT COMMISSION AND ANOTHER V CHETTY'S MOTOR TRANSPORT (PTY) LTD 1972 (3) SA 726 (A) AT 735 F-G, JOHANNESBURG LOCAL ROAD TRANSPORTATION BOARD AND OTHERS V DAVID MORTON TRANSPORT (PTY) LTD 1976 (1) SA 887 (A) AT 895 B-C; THERON EN ANDERE V RING VAN WELLINGTON VAN DIE NG SENDINGKERK IN SUID AFRICA EN ANDERE 1976 (2) SA 1 (A) AT 14F-G). Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated (see cases cited above; and NORTHWEST TOWNSHIPS (PTY) LTD V THE ADMINISTRATOR, TRANSVAAL, AND ANOTHER 1975 (4) SA 1 (T) at 80-G; GOLDBERG AND OTHERS V MINISTER OF PRISONS AND OTHERS (supra at 480 D-H). SULIMAN AND OTHRS V VA MINISTER OF COMMUNITY DEVELOPMENT 1981 (1) SA 1108 (A) at 1123A) some of these grounds tend to overlap."**

[33] Then, bringing this issue home to our doorsteps in the Kingdom is the case of **Futhi P. Dlamini and Others v The Teaching Service Commission and Others, Appeal Case No 12/2002 para [18],** where the Court said the following:-

"The principle that should guide the Superior Courts in exercising their powers of review under the common law were set out by Bristone J in the leading case of African Reality Trust Ltd vs Johannesburg Municipality 1906 T.H 179 at 182 as follows:-

> **'If a public body exceeds its powers, the Court will exercise a restraining influence. And if, whilst ostensibly confining itself within the scope of its powers, it nevertheless acts mala fide or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable except on the assumption of mala fides or ulterior motives, then again the Court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the decretion of the body or person who has decided it, then the Court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not the one at which it would have itself arrived.' "**

[34] The take home message from the totality of the aforegoing, is that, where a statutory or public body commits an error of law in making a decision, judicial review is then available to a person aggrieved by such a decision to remedy that error of law.

[35] Judicial review in this sense is currently exercised in Swaziland by the High Court, pursuant to Section 152 of the Constitution read with Sections 2(1) & 4(1) of the Courts Act 1954. Section 152 of the Constitution provides as follows:-

> **"152. The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority, and may, in exercise of that jurisdiction, issue orders and directions**

for the purpose of enforcing or securing the enforcement of its review or supervisory powers."

[36] Section 2(1) of the Courts Act reads as follows:-

"The High Court shall be a superior Court of record and in addition to any other jurisdiction conferred by the Constitution, this or any other Law, the High Court shall within the limits of and subject to this or any other law possess and exercise all the jurisdiction, power and authority vested in the Supreme Court of South Africa."

[37] Section 4(1) of the Courts Act in turn reads as follows:-

"The High Court shall have full power, jurisdiction and authority to review the proceedings of all surbordinate Courts of justice within Swaziland, and if necessary to set aside or correct the same."

[38] Reference above to the Supreme Court of South Africa is to be understood as reference to the present day High Court of South Africa. These powers and authority of the High Court of South Africa of course include the power of judicial review. These powers of the High Court are further confirmed by Section 152 of the Constitution of Swaziland as fully reproduced above.

[39] It is therefore indisputable that the High Court has inherent supervisory jurisdiction over the proceedings and decisions of inferior Courts and tribunals and also acts of governmental bodies. This jurisdiction is exercised by judicial review of such proceedings, decisions and acts by the Court. In its judicial review the High Court is concerned with the legality and not with the merits of

the proceedings, decisions or acts of the affected inferior Court, tribunal or governmental body.

[40] It is important for us to state at this juncture, that the unlimited original jurisdiction in all civil and criminal causes in the land, which Section 151(1) of the Constitution, confers on the High Court is excluded by Section 151 (3) (a) of the Constitution, which postulates that the High Court has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction.

[41] The reason for this is not far-fetched. This is because Section 8 (1) of the Industrial Relations Act 2000, (The Act), clothes the Industrial Court with exclusive jurisdiction in all labour disputes in the following language:-

> **"The Court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, 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 employees' association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation or a member thereof." (our emphasis)**

[42] Section 19 (5) of the Act however retains in the High Court review jurisdiction over the decisions of the Industrial Court or arbitrator.

[43] The intention of the law giver is thus clear, which is to create in the Industrial Court a specialist Court to the exclusion of the ordinary Courts, in the employment context. This proposition finds jurisprudential backing in the case of **Swaziland Breweries Ltd and Another v Constantine Ginindza, Civil Appeal No. 33/33/2006, para (12),** where **Ramodibedi JA** (as he then was) adumbrating on this exclusivity of the Industrial Court, made the following apposite declaration:-

> **"It is important to recognize that the purpose of the legislature in establishing the Industrial Court was clearly to create a specialist tribunal which enjoys expertise in industrial matters. In this regard I am respectfully attracted by the following remarks of Botha JA in PAPER, PRINTING WOOD AND ALLIED WORKERS' UNION v PIENAAR NO AND OTHERS 1993 (4) SA 621 (A) at 637 A-B**
>
> > **'The existence of specialist courts points to a legislative policy which recognizes and gives effect to the desirability, in the interest of the administration of justice, of creating such structures to the exclusion of the ordinary courts.' "**

[44] It appears to us that it was in a bid to ensure the realization of this exclusivity that Section 8 (3) of the Act prescribes **"In the discharge of its functions under this Act, the Court shall have all the powers of the High Court, including the power to grant injunctive relief"** and Section 8 (5) states **"Any decision or order by the Court shall have the same force and effect as a judgment of the High Court and a certificate signed by the Registrar shall be conclusive evidence of the existence of such decision or order"**

[45] It is beyond controversy from the above that Parliament very meticulously clothed the Industrial Court with all the powers exercised by the High Court in the employment context. These powers include judicial review.

[46] This foreshadows the following commentary by Mr Mkhwanazi in paragraph [2.10] of 1st Respondent's heads of argument that:

> **"One of the powers exercised by the High Court is the power to exercise judicial review and this power is given to the High Court by the High Court Act, 1954. The Industrial Court therefore exercises all the powers vested in the High Court in the employment context. These powers include the power to entertain review application".**

[47] We cannot agree more. This is also the position in the neighbouring Republic of South Africa whose case law authority is of high persuasion in the Kingdom.

[48] Commenting on the status of the South African labour Court, the learned authors, in the **Law of South (LAWSA) first issue vol. 13 part I at 431 para 890** declared as follows:-

> **"Court of law and equity (having) the same authority and inherent powers and standing as a High Court in relation to matters that fall under its jurisdiction."**

[49] We can therefore safely extrapolate that the Industrial Court has the same inherent supervisory powers of the High Court over the proceedings, acts and decisions of statutory boards and public bodies exercising public power in the employment context. This is to enable it to acquit itself properly and effectively as a court of law. As aptly stated by this Court per **Annandale JP** (as he then was) in **Moses Dlamini v The Teaching Service Commission and Another Appeal Case No. 17/2005 para [35]**, with reference to **Connelly v Director of Public Prosecution (1964) 2ALL ER 401 (HL).**

> **"There can be no doubt that a Court which is endowed with a particular jurisdiction has powers which are necessary to enable it act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A Court must enjoy such powers in order to enforce its rules of practice and to suppress any abuse of its process and to defeat any attempted thwarting of its process."**

[50] Section 4(2) of the Act enjoins the Industrial Court in applying and interpreting any of the provisions of the Act, to take into account and give meaning and effect to the purposes and objectives of the Act referred to in Section 4(1) (a) and (b) thereof, which is to promote harmonious Industrial relations, fairness and equity in labour disputes. This envisages the constitutional right of protection of employees from victimization and unfair dismissal or treatment by their employers, which is entrenched in Section 32(4)(d) of the Constitution.

[51] In its day to day endeavours the Industrial Court is confronted with allegations of unfair dismissal or treatment by employers. The essence of the fundamental right against unfair dismissal and treatment by employers, is to protect an employee against arbitrary dismissal that is, dismissal without substantive ground in a procedurally unfair manner. See **Moses Dlamini v The Teaching Service Commission supra para [22].** A resolution of these issues is usually steeped, *inter alia,* in the enquiry as to whether the statutory or public body conducted its procedure in fairness, and in accordance with the rules of natural justice and public law.

[52] The issue of denial of natural justice or, as it is increasingly (and more modernly referred to these days), absence of procedural fairness, requires

adherence to the principles encapsulated in the well known latin maxims of: *nemo iudex causae suae and audi alteram partem*. These legal principles are embodied in the right of administrative justice which Section 33 of the Constitution preserves in the following terms:-

> **"(1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements of fundamental justice or fairness and has a right to apply to a Court of law in respect of any decision taken against that person with which that person is aggrieved.**
>
> **(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority".**
>
> **(underlining ours)**

[53] Any semblance of violation of these legal rights by a statutory or public body exercising administrative or public power in labour relations , is a veritable ground for the invocation of the review jurisdiction of the Industrial Court.

[54] RELIANCE ON SECTION 33 OF THE CONSTITUTION

Having carefully canvassed the review jurisdiction of the Industrial Court derived from its specialist nature in terms of the Act and Constitution, the question here is: whether the Respondents were bound to place reliance on the Act or were they at liberty to invoke the remedy of review provided by Section 33(1) of the Constitution, which as we have abundantly demonstrated above, encompasses the doctrines of natural justice and equity which the Industrial Court is charged to uphold.?

[55] The Court *a quo* held that the Respondents were at liberty to rely on the provisions of Section 33 and that the Industrial Court had the jurisdiction to entertain and determine their complaint in that respect. We agree with the Court *a quo*.

[56] We interpolate here and observe that the prayers sought before the Court *a quo* by the Respondents were to review and set aside the decisions in question. These prayers were premised on the alleged violation of the Respondents' rights to a fair hearing, encapsulated in the right to administrative justice as protected by Section 33 of the Constitution. The Respondents did not seek any relief in terms of the Constitution. For instance, they did not ask for an order declaring the disciplinary proceedings *ultra vires* for violating the provisions of Section 33 of the Constitution. They only placed reliance on the Constitution in contending that their rights to a fair hearing had been infringed, which they were entitled to do. Afterall, allegations of procedural irregularities are usually steeped in violation of human rights. All that the Court *a quo* was required to do in these circumstances was to ascertain whether Section 33 of the Constitution was applied in the respective disciplinary hearing. It was not being called upon to interpret that constitutional provision in the absence of any prayer to that effect. We conclude, therefore, that the Respondents cannot be said, *strictu sensu*, to have taken the matter to Court pursuant to Section 33, in the absence of any prayer alleging an infringement of same.

[57] In any case, even if we were to agree with the Appellant that the matter was taken to Court pursuant to Section 33 of the Constitution, our views will remain the same. We say this because the phrase "Court of law" appearing in Section 33(1) of the Constitution, which we recited in para [52] above, must be read to

include the Industrial Court. There is nothing in Section 33(1) restricting an aggrieved litigant to take the matter to the High Court only. "Court of law" is a wide term that is encompassing of all courts and cannot be read restrictively to mean the High Court only. To read it otherwise will mean amending Section 33(1) which amounts to legislation. A Court lacks the *vires* to legislate. It can only declare the law.

[58] It is thus our considered view that the Industrial Court was correct in holding that it has jurisdiction to entertain the matters brought before it pursuant to Section 33 of the Constitution, to review administrative decisions on grounds of lack of a fair hearing.

[59] In coming to this conclusion, we must say that we agree with Mr Vilakati's views that applications to enforce fundamental rights should go to the High Court in terms of Section 35(1) of the Constitution which states as follows:-

> **"Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress".**

[60] This legislation is amplified by Section 151(2) of the Constitution in the following language:

> **"(2) Without derogating from the generality of subsection (1) the High Court has jurisdiction-**

(a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution; and

(b) to hear and determine any matter of a constitutional nature".

[61] It cannot therefore be gainsaid, as rightly contended by Mr Vilakati, that the combined effect of Sections 35(1) and 151(2) of the Constitution prescribes the jurisdiction of the High Court to entertain matters concerning the violation of fundamental rights generally.

[62] However, Section 33(1) of the Constitution is a special provision prescribing jurisdiction to entertain applications to review administrative decisions on grounds of violation of the right of a fair hearing. It confers this jurisdiction on courts generally. This provision enables other courts, in particular the Industrial Court in the face of its specialist nature and exclusive jurisdiction in employment matters, to share with the High Court the jurisdiction given to it by Sections 35(1) and 151(2) of the Constitution to enforce fundamental rights generally, in this isolated category of cases dealing with violation of the right to a fair hearing in administrative decisions in employment cases.

[63] This special provision in Section 33(1), in line with the legal doctrine that special provisions override general provisions on a matter (*generalia specialibus non derogant*), will override the general provisions in Sections 35(1) and 151(2) respectively in applications to review administrative decisions on grounds of lack of a fair hearing. See **Black's Law Dictionary (8th ed at page 705).** It is therefore wrong to argue that only the High Court can exercise

jurisdiction to entertain applications in respective of infringement of fundamental rights pursuant to Section 33.

[64] The nature of the matter which is employment based lies within the exclusive province of the Industrial Court as we have already abundantly enunciated in this judgment. The fact that the issues arising therein acquired constitutional hegemony in Section 33 of the Constitution cannot change its flavor or remove it from the jurisdiction of the Industrial Court.

[65] To hold a contrary view will make a mockery of the effort and intent of Parliament in creating in the Industrial Court a specialist Court in the employment context, whilst giving to the High Court review jurisdiction over the decisions of the Industrial Court or arbitrator.

[66] Similarly, the argument that since this is a matter provided for in the Act, the Appellants cannot skirt the provisions of the Act and rely on Section 33 of the Constitution in bringing the application, is not tenable.

[67] The learning is that where a remedy is provided for by two laws, a party is at liberty to choose to pursue his remedy under any of those laws. If a matter is covered by the Constitution and an Act, even if there is no conflict, the Constitution will still prevail, but this is without prejudice to the right of the party to choose to pursue his remedy either under the Act or the Constitution. Except where the Constitution itself allows its derogation by an Act, it cannot be subservient to an Act. It will therefore be absurd to suggest in anyway, that

where the Constitution and an Act have covered the same field, the provisions of the Constitution must remain in abeyance and that only the Act shall remain operational. Such a proposition amounts to an assault on the supremacy of the Constitution. It cannot fit into the jurisprudence of constitutionalism. It violates the fundamental doctrine of covering the field. If a party chooses to pursue his remedy under the Constitution he cannot be precluded from doing so and asked to go and exhaust the mechanisms provided in the Act first, although it is generally more desirable that the provisions of the Act should be exhausted before recourse is had to the Constitution. That is the gravamen of the dictum of the constitutional Court of South Africa in **South African National Defence Union v Minister of Defence and Others at (supra) para 51**.

[68] This is also implicit from the sentence "**a litigant may not bypass that legislation and rely directly on the Constitution"** appearing in the dictum. The phrase **"may not"** shows a discretion. It is optional. It is not a mandatory command. That pronouncement in our respectful view, does not preclude a litigant from invoking any of the statutes. It only advocates a more desirable course.

[69] In the **South African National Defence Union** case the South African Court did not decline jurisdiction or dismiss the application based on the fact that the parties in their application had relied on both the regulation and the Constitution. The Court still proceeded to determine the application on the merits after making the following remarks:-

> "**53. In this case, legislation does exist in the form of Chapter XX of the regulations. There is no constitutional challenge to the regulations in this regard. On the contrary, SANDU has always sought to rely on Chapter XX of the regulations as well as on Section 23 of the Constitution.**

Indeed, the primary relief sought in SANDU I is an order declaring that the refusal of the SANDF to negotiate with SANDU unless SANDU meets certain pre-condition is an infringement of regulation 36 of Chapter XX, and/or regulation 63 of chapter XX, and/or Section 23 of the Constitution. Similarly in SANDU 11 and SANDU 111, although the notices of motion did not specify the legal basis for the claims, the founding affidavits relied both upon the provisions of chapter XX of the regulation and the Constitution of the MBC as well as Section 23 of the Constitution.

54. Once it is accepted that disputes that arise from collective bargaining in the SANDF should be considered first in the light of the provisions of Chapter XX of the regulations rather than Section 23(5) of the Constitution, the focus of a Courts attention will be different to the focus of both the High Court and the Supreme Court of Appeal in these three matters. A Court will start with a consideration of the regulations rather than the constitutional provision. The regulations, of course must be considered in the context of the Constitution as a whole.

56. <u>As I have held, however, it is not necessary to determine the proper interpretation of Section 23(5) in this case and we accordingly refrain from doing so</u>. Accordingly, we neither endorse nor reject the approach to Section 23(5) of the Constitution adopted by the Supreme Court of Appeal. <u>As the proper interpretation of that Section need not be decided in this case, it would be inappropriate to consider the question further".</u>

(emphasis added)

[70] It is the principle espoused in the aforegoing pronouncement that our Supreme Court applied in **Daniel Didabantu Khumalo v Attorney General (supra).**

[71] In that case, one of the three grounds upon which the High Court dismissed a point taken *in limine* before it was that it had no jurisdiction in the matter in

terms of Section 151(8) of the Constitution, inasmuch as the point at issue concerned land which is administered in terms of Swazi Law and Custom. On appeal against the decision of the High Court, the same constitutional issue was raised before the Supreme Court, which declined to determine it in the following words of **Ramodibedi CJ,** speaking the mind of the Court:-

> **"[3] It is strictly not necessary for this Court to reach a concluded view on whether or not the learned judge a quo was correct in relying on lack of jurisdiction in terms of Section 151(8) of the Constitution. It shall suffice merely to stress a fundamental principle of litigation that a Court will not determine a constitutional issue where a matter may properly be determined on another basis. See, for example, Jerry Nhlapo and 24 Others v Lucky Howe N.O (in his capacity as liquidator of VIP Limited in Liquidation) Civil Case No. 37/07. This is undoubtedly such a case. The judgment in this matter, therefore, only focuses on two of the issues upon which the Court *a quo* relied for dismissing the appellant's application, namely, (1) failure to establish a clear right for an interdict and (2) dispute of facts."**

See **Umbane Limited v Sofi Dlamini and 3 others (supra.**

[72] The take home message is that where a Court is faced with a matter raising a constitutional question *vis a vis* other grounds upon which the matter could validly be decided, the Court should not answer the constitutional question. In these premises, the Respondents were quite entitled to launch proceedings either in terms of the Act or pursuant to Section 33(1) of the Constitution.

[73] It appears to us therefore, in light of the aforegoing analogy, that Mr Vilakati's umbrage at the case of **Melody Dlamini v The Teaching Service Commission and Others (supra)**, is clearly misconceived. In that case the Industrial Court

held that a Government employee dissatisfied with a disciplinary punishment made against him or her has two alternative routes to seek redress:-

> **"(1) She may follow the route prescribed by part VIII of the Industrial Relations Act (as amended) by reporting a dispute to CMAC. If the dispute cannot be resolved by conciliation, it may be referred to the industrial Court of arbitration for determination. This is the protection provided to workers by Section 32(4)(d) of the Chapter 3 of the Constitution. Where the matter comes before the Industrial Court by this route, the Court is not limited to merely reviewing the disciplinary decision of the Commission. It hears the matter de novo and arrives at its own decision.**
>
> **(2) alternatively, the employee has a right to apply to a Court of law for review of the disciplinary proceedings and/or ruling on the grounds that she has not been treated justly and fairly by an administrative authority in accordance with the requirements imposed by law. This is the protection of the right of administrative justice provided by Section 33(1) of the Chapter 3 of the Constitution".**

[74] We are of the considered view that the aforegoing pronouncement of the Industrial Court is well founded. We approve that decision as legally sound and in line with the established authority on the point.

[75] It is imperative for us to observe, that this same principle was applied by this Court in **Attorney General V Stanley Matsebula Appeal Case No. 4/2007**. The issue in that case was whether the continued suspension of the Respondent (Applicant *a quo*) was consistent with Section 194(4) of the Constitution. The objection of the Attorney General was tailored along the same lines as in this case, which is that the Industrial Court lacks the competence to entertain and

determine the constitutional question. In affirming the decision of the Court *a quo* that the Industrial Court has such jurisdiction, this Court per **SB Maphalala JA** with whom **R. Banda J.P and Mabuza JA** concurred, remarked as follows:-

> **"[2]---- 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.**
>
> **[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 interprete the Constitution. "**

[76] We will not condescend in any detail to Mr Vilakati's grouse against the decision of the South African Court in the case of **Qozeleni v Minister of Law and Order 1994 (3) SA 625 E at 637 E-G,** which was cited in the case of **Attorney General v Stanley Matsebula (supra),** wherein **Froneman J** said the following:-

> **"In my view it seems inconceivable that those provisions of Chapter 3 of the Constitution which are meant to safeguard the fundamental rights of the citizens should not be applied in Courts where a 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."

[77] Mr Vilakati deprecated the reliance placed by the Court *a quo* on the aforegoing dictum of **Froneman J** in arriving at its decision. Counsel's position is that **Qozeleni** was wrongly decided and was overturned by a full bench of the Eastern Cape Provincial Division in **Port Elizabeth Municipality v Prut NO and Another 1996 (4) SA 318 (4) at 328 D-G** where **Melunsky J (Nepgen and Leach JJ** concurring) held that

"----the Constitutional Court is the only Court which has jurisdiction concerning the interpretation, protection and enforcement of, inter alia, an alleged violation or threatened violation of any fundamental right entrenched in Chap 3 ---."

[78] The South African Court may well be right in the aforegoing pronouncement. This however finds no application in the Swaziland situation. It must be borne in mind that there is no Constitutional Court in Swaziland which is tailored along the same lines as that of South Africa, and enjoys exclusive jurisdiction over constitutional questions arising from violations of human rights. The High Court has no such exclusive jurisdiction as we have abundantly demonstrated in this judgment. Mr Vilakati's contention in this regard finds no favour or grace in these circumstances.

RECOURSE TO CMAC IN TERMS OF PART VIII OF THE ACT

[79] It appears to us in light of the totality of the aforegoing, that the Court *a quo* was correct to hold that it has jurisdiction over the complaints of the Respondents, which complaints are legal issues and are contemplated by the Court's review jurisdiction, without the necessity of first reporting a dispute to CMAC in terms of Part VIII of the Act.

[80] The fact that the Respondents chose to pursue the remedy under the Constitution means they were then not bound to comply with the provision of Part VIII of the Act, which is that they first lodge a dispute with CMAC before coming to Court. That is not the route they have taken. The provisions of the Constitution do not require that an applicant for review of an administrative decision should first go to CMAC before coming to Court.

[81] It seems to us that the scenario *in casu* is also exactly what is contemplated by Rule 14(6) (a) and (b) of the Rules of the Industrial Court, which prescribes that where no dispute of facts is reasonably forseeable, in the sense that the application is solely for the determination of a question of law, the procedure laid down in Part VIII of the Act can be dispensed with.

[82] Speaking on this point in paragraph [24] of the impugned decision, the Court *a quo* declared as follows:-

> **"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 VIII of the Act as the applications were solely for the determination of questions of law namely, whether the 1st Respondent's conduct violated the rights of the Applicants to**

administrative justice entrenched in Chapter III 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 VIII 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."

[83] We respectfully align ourselves with the aforegoing exposition of the Court *a quo.* We have no reason to depart from it. The legislation ante is axiomatic and puts it beyond any peradventure, that the legal issues raised by the Respondents before the Court *a quo* required no prior reference to CMAC in terms of Part VIII of the Act, since there was no dispute of facts reasonably foreseable which would have necessitated such a course. The Appellant filed no opposing affidavit a quo, which state of affairs rendered the factual issues raised by the Respondents in their founding affidavits uncontroverted and unchallenged and thus established.

[84] In the same vein, the Court *a quo* correctly in our view, held that, the review of proceedings is not steeped in the atmosphere of the conciliation jurisdiction of

CMAC pursuant to Section 64 (b) of the Act, to require such a course. This was succinctly stated by the Court *a quo* in paragraph [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".**

CONCLUSION

[85] On the whole, we see no misdirection by the Court *a quo* which will necessitate this Court's interference with it's decision. This Appeal is clearly unmeritorious. It fails.

[86] In the result, it is ordered as follows:-

> **"Appeal Case No. 4/2013 be and is hereby dismissed with costs."**

M.M. RAMODIBEDI

JUDGE PRESIDENT

E.A. OTA

ACTING JUDGE OF THE INDUSTRIAL COURT OF APPEAL

Q.M. MABUZA

ACTING JUDGE OF THE INDUSTRIAL COURT OF APPEAL

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