INDUSTRIAL COURT OF APPEAL OF ESWATINI

DISSENTING JUDGEMENT

Case No. 02/2021

In the matter between

BHEKITHEMBA VILAKATI Appellant

And

ESWATINI ROYAL INSURANCE COPORATION Respondent

Neutral citation Bhekithemba Vilakati vs Eswatini Royal Insurance Corporation [02/2021] [2023] SZICA 10 (5th April 2023)

Coram: **MAZIBUKO JA, NKONYANE JA, VAN DER WALT JA**

Last Heard: 21st April 2022

Delivered: 5th April 2023

Summary:

1. *APPLICABILITY OF A DISCIPLINARY CODE*

   (i) *Where there is a disciplinary code operating at the workplace both the employer and employee are obligated to comply with the provisions therein. The employer has no authority to unilaterally deviate from the code and impose its own decision, if dissatisfied with the decision of the chairperson.*

   (ii) *In casu, an employer who is dissatisfied with the decision of the chairperson, at the disciplinary hearing, may challenge that decision before a tribunal constituted in accordance with the code.*

   (iii) *In principle, deviation from the code is permissible provided, it is done by consent with the employee, and there are exceptional and compelling circumstances in support of deviation.*

   (iv) *Where an employer, in the course of a disciplinary hearing, takes a decision, that is prejudicial to the employee, and does so without legal authority and/or in breach of any of the provisions in the code, the employee is entitled to apply to*

Court to set that decision aside, on the basis that it is invalid or null and void.

(v) *A decision that is taken by the employer without authority, to dismiss an employee from work, is a nullity, has no effect in law and is deemed invalid.*

2. *STARE DECISIS*

Where a legal principle has already been decided by Court and that principle is correctly decided, the Court is expected to follow precedent when that principle is raised in a subsequent matter, before Court. It is in the interest of justice, that the law should be applied consistently and be predictable.

3. *RULE 7*

Where an appeal matter is before this Court for hearing, this Court is not limited to the grounds of appeal that the appellant has filed. This Court is authorised by rule 7 to consider and determine any other relevant question of law that arose in the course of argument, and in respect of which the parties have made submissions.

MAZIBUKO JA

DISSENTING JUDGMENT

BACKGROUND

1. The matter before Court is an appeal from a judgment of the Industrial Court dated 7th April, 2021. A judgment on appeal has already been prepared by Justice Van der Walt. There are however aspects in the judgment of Justice Van der Walt in respect of which I have arrived at a different conclusion on the issues that are raised in the matter. It became necessary therefore to file a dissenting judgment. It is also necessary to sketch a background of the events that took place at the workplace which led to an application being filed at the Industrial Court.

   1.1 The Appellant is Mr Bhekithemba Vilakati and was Applicant before the Industrial Court. For the sake of convenience, the Appellant shall be referred to as employee, and this matter shall also be referred to as the BHEKITHEMBA VILAKATI case.

   1.2 The Respondent is Eswatini Royal Insurance Corporation, and was Respondent before the Industrial Court. For the sake of convenience the Respondent shall also be referred to as employer.

DISCIPLINARY PROCESS

2. On the 1st January 2014 the employee (Appellant) was employed by the Respondent as "*IT Systems Administrator*". On the 14th November 2019, the employee was summoned by the employer to attend a disciplinary hearing. The employee was charged with 3 (three) offences namely:

2.1 Insubordination which was combined with insolence, and

2.2. Gross dishonesty.

3. The employer appointed an external chairman and an external initiator for the disciplinary hearing. At all times material hereto the employee was assisted by a trade union.

4. The chairman found the employee not guilty on Gross Dishonesty. The chairman however found the employee guilty on the combined charge of insubordination and insolence. The chairman recommended a final written warning as an appropriate sanction.

5. The employer rejected the recommended sanction; of final written warning, and informed the employee regarding the decision it had taken. The employer called

upon the employee to show cause why; it should not substitute the recommended sanction – with its own decision. The employee challenged the employer's proposal on the basis that it was irregular and contrary to the disciplinary code.

6. Despite resistance from the employee, the employer went ahead with its proposal, as aforementioned. The employer dismissed the employee from work. The employee filed an internal appeal. The internal appeal was however not heard. The issue regarding the internal appeal is not among the legal questions that are before this Court for determination.

EMPLOYEE'S PRAYER BEFORE THE INDUSTRIAL COURT

7. The employee moved an urgent application before the Industrial Court (court a quo) in which he challenged the employer's decision which terminated his services.

7.1 An excerpt of prayer 1 reads thus:

"1. That an order be and is hereby issued ... correcting and/or setting aside the Respondent's decision of terminating the Applicant's services ..."

7.2 The employee, inter alia, had prayed the Industrial Court to set aside a particular decision of the employer viz; the one that terminated his services. The employee stated in his founding affidavit that his

application finds support in Sections 8 (1) and 8 (3) of the Industrial Relations Act no 1/2000 (as amended).

INDUSTRIAL RELATIONS ACT, SECTION 8 (1) AND 8 (3)

7.2.1 In Section 8 (1) of the Industrial Relations Act, the Industrial Court is authorised to apply, inter alia, the common law, in a matter that may arise between employer and employee.

7.2.2 In Section 8 (3), the Industrial Court is also authorised by the Industrial Relations Act to exercise the same powers as the High Court, in deciding a matter between employer and employee.

7.3 The employee stated as follows in paragraph 15 of his founding affidavit.

"*15. The decision to terminate my services by the Respondent against the finding and recommendation by the Chairman of the disciplinary hearing was grossly unreasonable, unlawful and improper in that:*

"15.4 The Superior Courts of Eswatini and other jurisdictions have firmly stated that a recommendation by a lawfully appointed Chairperson cannot be substituted with a different verdict and that, if the organization is unhappy with the recommendations, its only remedy is to re-convene another disciplinary hearing or to make an application for review in the Court with the appropriate jurisdiction to challenge and seek to set aside such recommendations."

"15.7 The Respondent's policies stipulate that for a first offence of insubordination, the appropriate sanction is that of a final written warning. Even if found guilty, which I deny was a correct decision, the appropriate sanction was legally supposed to be a final written warning since this was a first offence on my part. A copy (extract) of the Respondent's Disciplinary Code is attached hereto and marked as BV 9"

(Underlining added)

(At pages 10 – 11)

7.4 Clearly the employee was challenging the authority of the employer, particularly to set aside a recommendation of the chairman and to replace it with its own decision, viz: the decision to dismiss the employee from work.

7.5 The employee's argument is that: when an employer is dissatisfied with a verdict or recommended sanction that had been issued by the chairman, at a disciplinary hearing, that employer should apply to an upper, legally constituted forum, to set aside that decision. The employer has no authority to unilaterally substitute the verdict or recommended sanction of the chairman with its own decision.

7.6 According to the employee, the employer failed or refused to comply with the disciplinary code when it had a legal obligation to comply. Instead, the employer acted in blatant breach of the disciplinary code. The employee regarded the employer's conduct as arbitrary and unlawful and consequently prayed that it be set aside.

A DISCIPLINARY CODE IS BINDING ON THE PARTIES

8. It is common cause that the disciplinary code is binding on the parties. The employer confirmed this fact in paragraph 6 of its answering affidavit, as follows:

8.1 *"6 It should be noted that this disciplinary code is a product of a collective bargaining process evinced by signatures appended to the code, at the bottom."*

8.2 In a nutshell, the Respondent confirmed that the code is a written agreement that is binding on the parties thereto. In other words the disciplinary code is an agreement that contains reciprocal rights and obligations of the parties, it is not merely a guide but a contract.

8.3 If the intention of the parties, when signing the disciplinary code, was that-

8.3.1 the code is not binding on either of them, and

8.3.2 that the code is merely a guide which either party may deviate from when it is convenient to do so, then

8.3.3 that statement is a material term of that code and should have been incorporated in the code, and

8.3.4 the fact that the proposition that is stated in clauses 8.3.1 and 8.3.2 above was not incorporated in the code, means that it was not the intention of the parties to make it a term or condition in the code.

8.4 A disciplinary code, just like any other contract, should be interpreted in accordance with its terms and conditions. The code that is before Court is not a mere guide but a contract which has clearly spelt out the rights and obligations of each party. Neither party is empowered to unilaterally deviate from the code.

8.5 In this matter, the code itself does not state that it is merely a guide or that it is not binding. Instead the code has all the essentials of a binding contract. The code is therefore binding on the parties. Neither party is entitled to unilaterally deviate from the code. The employer's conduct, which was subsequent to its unilateral deviation from the code, is null and void and of no effect.

8.6 In the matter of GUGU FAKUDZE VS THE SWAZILAND REVENUE AUTHORITY AND 3 OTHERS (8/2017) [2017] SZICA 01 (30th October

2017), the Honourable Court confirmed the authority of a disciplinary code as follows: *"It is not inconceivable to think that when parties agreed on the provisions of the code, they also intended to be bound by its contents."*

(At paragraph 31)

8.7 In the matter of SWAZILAND POSTS AND TELECOMMUNICATION [S] WORKERS UNION AND ANOTHER VS SWAZILAND POSTS AND TELECOMMUNICATION [S] CORPORATION 4/16 [2016] SZICA (09) (14 October 2016), (hereinafter referred to as the SPTC case). The Court restated the principle regarding the code as follows:

"Once put in place, a code becomes legally binding upon the employer and employee, irrespective of the manner in which it has come about – i.e. whether through the unilateral act of the employer or through a negotiated process."

(At paragraph 45.2)

9. At paragraph 18 in the answering affidavit the employer confirmed that the chairman had recommended *'... a sanction of a final written warning'*. In

order to justify its decision to reject the recommended sanction, the employer stated as follows at paragraph 8 and 10 in the answering affidavit.

"8 *Upon receipt and consideration of the recommendation of the independent chairperson, the respondent decided not to accept the recommendation in respect of the sanction. The respondent took the view that the recommended sanction was disproportionate to the nature and derivative import of the offence. The chairman ignored the nature of the offence. Consequently, the respondent caused a letter to be sent to the applicant, informing him that it was unable to accept the recommendation of the chairperson, and would wish to consider substituting the recommendation with its own sanction.*"

"10 *Having considered and reflected on the representations the respondent, in exercise of its powers, elected to substitute the decision of the chairperson with respect to sanction and terminated the applicant's employment.*"

(Underlining added)

9.1 The employer confirmed the fact that it formed an opinion that the recommended sanction was disproportionate to the nature of the offence in respect of which the employee had been found guilty. In other words the employer decided that, the outcome of the disciplinary hearing should be subject to its opinion and control, as opposed to the disciplinary hearing following due process, as per the dictates of the code.

9.2 What is notable in the employer's submission is the point that: the employer does not deny the fact that the sanction which the chairman had recommended, was consistent with the disciplinary code. In other words the chairman correctly exercised the authority that was conferred upon him by the code and appropriately applied the terms of the code regarding the sanction.

CLAUSES 8.1 TO 8.4 OF THE CODE

9.3 When the employer refused to implement the chairman's recommendation and took a decision to challenge that recommendation, the employer thereby placed itself under a legal obligation to refer that legal challenge to a tribunal that has jurisdiction to assess the chairman's recommendation, with authority to confirm or correct it. The employer's

conduct is regulated under clauses 8.1, 8.2, 8.3 and 8.4 of the code, which read thus:

9.3.1 *"8.1 Where the gravity of the matter justifies dismissal or the employee has a final written warning the Human Resources Manager shall set up a tribunal to take the matter to stage 4 of the disciplinary code."*

9.3.2 *"8.2 Should in the opinion of the officer presiding over a matter at stage three, the matter require a more severe disciplinary action, it shall automatically fall within stage four."*

9.3.3 *"8.3 The presiding officer hearing a matter at stage four will, upon conclusion, make his recommendations to the Human Resources Manager which may either be a dismissal or an acquittal."*

9.3.4 *"8.4 The Human Resources Manager will take a decision and communicate it in writing within five (5) working days of receipt of the presiding officer's recommendations."*

(Underlining added)

9.3.5 The disciplinary hearing that is under consideration in this appeal, and in which the chairman had issued a recommended sanction, is referred to as stage three in the disciplinary code.

MANDATORY REQUIREMENT IN THE CODE

9.4 In terms of the code-

9.4.1 it was mandatory that the employer's complaint (or challenge) against the chairman's recommended sanction be referred to stage four of the disciplinary code, for determination, and

9.4.2 at stage four of the disciplinary proceedings it was mandatory that a tribunal be established (as declared in clauses 8.1 to 8.4 of the code), and

9.4.3 the code made it mandatory that at stage four of the proceedings, a presiding officer should be appointed, in order to lead and manage the proceedings, and

9.4.4 furthermore, the code made it mandatory that at the conclusion of the stage four of the disciplinary proceedings, the presiding officer should communicate its recommendation to the Human Resources Manager (as employer representative).

9.4.5 The code has also made it mandatory that: upon receiving a recommendation from the presiding officer, the Human Resources Manager should communicate its decision (which is based on the code), to the employee. The presiding officer is expected to either correct or confirm the chairman's recommendation. Depending on the terms and conditions in the code, and the facts of the case, the recommendation from the presiding officer may include a dismissal or acquittal of the employee.

9.4.6 The presiding officer has an important role to play particularly at stage four of the disciplinary proceedings, since he is assessing the work that was done by the chairman at stage three of the disciplinary proceedings.

ABSENCE OF A TRIBUNAL AND PRESIDING OFFICER

9.5 In the absence of a tribunal and/or recommendation from a presiding officer, the employer has no authority to issue a decision either to dismiss or acquit the employee. A dismissal letter that has been issued by the employer in the absence of a recommendation from the presiding

officer (as the case was in the matter before Court), is invalid, null and void and should be set aside.

ERROR OF LAW

9.6 The interpretation of a disciplinary code is a question of law. The Industrial Court made an error of law when it failed to interpret and implement clauses 8.1 to 8.4 of the code. That error of law led to an erroneous decision.

9.7 A correct interpretation of clauses 8.1 to 8.4 of the code would have resulted in the Industrial Court setting aside the dismissal letter, on the basis that the employer had no authority to issue that letter, and that was the application that was before the Industrial Court.

9.8 The employer's submission confirms the following facts –

9.8.1 that a tribunal, mandated in paragraphs 8.1 to 8.4 of the code, to be established (in order to hear and determine the employer's complaint or challenge against the chairman's recommended sanction), was not established,

9.8.2 and that in the absence of a tribunal (as mandated by the code), a presiding officer could not be appointed at stage four of the disciplinary proceedings, and

9.8.3 that in the absence of a presiding officer there would be no recommendation (at stage four of the disciplinary proceedings), such as is mandated in clauses 8.3 and 8.4 of the code, and

9.8.4 that in the absence of a recommendation from the presiding officer, the employer's complaint or challenge (against the chairman's recommended sanction), could not be determined, and therefore the chairman's recommendation could neither be confirmed nor corrected, and consequently the sanction that the chairman had recommended (at stage three of the disciplinary code), remains unaltered and is applicable to date hereof, and

9.8.5 that the employer had no authority to issue a dismissal letter in the absence of a recommendation from a presiding officer, to that effect, and

9.8.2 and that in the absence of a tribunal (as mandated by the code), a presiding officer could not be appointed at stage four of the disciplinary proceedings, and

9.8.3 that in the absence of a presiding officer there would be no recommendation (at stage four of the disciplinary proceedings), such as is mandated in clauses 8.3 and 8.4 of the code, and

9.8.4 that in the absence of a recommendation from the presiding officer, the employer's complaint or challenge (against the chairman's recommended sanction), could not be determined, and therefore the chairman's recommendation could neither be confirmed nor corrected, and consequently the sanction that the chairman had recommended (at stage three of the disciplinary code), remains unaltered and is applicable to date hereof, and

9.8.5 that the employer had no authority to issue a dismissal letter in the absence of a recommendation from a presiding officer, to that effect, and

EMPLOYER ACTED ULTRA VIRES ITS AUTHORITY

9.9 that the conduct of the employer in issuing a dismissal letter (dated 28th April 2020), in the absence of a recommendation from a presiding officer was ultra vires its power and authority.

APPLICATION OF THE ULTRA VIRES DOCTRINE

9.10 The Courts have explained the doctrine of ultra vires conduct as follows:

9.10.1 *"ULTRA VIRES*

Beyond the power. This phrase is used of acts which purport to be done in virtue of a certain authority, but which are really in excess of such authority, or of acts which are unauthorized."

SOMERSET BELL W.H : SOUTH AFRICAN LEGAL DICTIONARY, 2nd edition, Juta, 1925 (ISBN not available) page 562.

9.10.2 *"The courts ... use the term 'ultra vires', ... to indicate that action is outside its lawful parameters, illegal and of no force or effect."*

(Underlining added)

HOEXTER C et al: ADMINISTRATIVE LAW IN SOUTH AFRICA, 3rd edition, Juta, 2021 (ISBN 978 1 48513 528 9) page 149.

9.10.3 "*An act or order which is ultra vires is a nullity, utterly without existence or effect in law.*"

WADE H.W.R. et al: ADMINISTRATIVE LAW, 11th edition, OXFORD, 2014 (ISBN 978 -0-19- 968370 3) page 247.

9.11 The law declares that: action or conduct that is ultra vires is illegal and of no force or effect, is a nullity and utterly without existence in law. In this case, this principle applies to the conduct of the employer from the time after the employer had raised a complaint against the chairman's recommended sanction, to the point where the employer issued a dismissal letter.

9.11.1 The Industrial Court has the power to set aside any conduct of the employer that is: invalid, illegal or unauthorized, and thereby render its consequences a nullity or without effect. It makes no difference that the end result of the employer's conduct (which

the Court has declared ultra vires) was a dismissal letter. For the purposes of the ultra vires doctrine, it is not the end result of the employer's conduct that matters, but the absence of authority and/or the presence of illegality in the conduct of the employer which brought about the end result.

9.11.2 The dismissal letter is declared invalid, a nullity and without effect, as a consequence of this Court having declared the conduct of the employer ultra vires, viz: the conduct of the employer that resulted in the employer issuing a dismissal letter. For the sake of completeness, this Court hereby sets aside the dismissal letter.

ERROR OF LAW

9.12 The Industrial Court failed to apply the ultra vires doctrine when the matter came before it for determination. The Industrial Court made an error of law when it failed to apply the correct law in this matter, and that error resulted in an erroneous judgment.

9.13 An excerpt of paragraph 10 of the employer's answering affidavit is again reproduced for the sake of emphasis:

> *"10 Having considered and reflected on the representations the respondent, [employer] in the exercise of its powers, elected to substitute the decision of the chairperson with respect to sanction and terminated the applicant's [employee's] employment"*

9.14 The employer is confirming the fact that it raised a challenge or complaint against the sanction that the chairman had recommended at stage three of the disciplinary hearing. The employer was therefore complainant, at that stage of the disciplinary process.

9.15 The employer confirmed also that it decided to substitute the chairman's recommended sanction with its own decision and proceeded to terminate the employee from work.

9.16 As aforesaid, according to the code, the employer's complaint placed the matter at stage four of the disciplinary process. According to the code, at stage four of the disciplinary process it is mandatory that a

tribunal be appointed as well as a presiding officer. A tribunal as well as a presiding officer was not appointed in this case.

9.17 The employer as complainant, took a decision in a matter which involved its own complaint, and proceeded to decide that complaint in its favour, and also proceeded to grant itself power to dismiss the employee from work, and further proceeded to implement that power by dismissing the employee from work.

NEMO JUDEX RULE

9.18 The employer's conduct was in breach of a fundamental rule of natural justice viz: *Nemo Debet Esse Judex In Propria Sua*, (which for the sake of convenience will be referred to as the Nemo Judex rule). The Nemo Judex rule is explained as follows:

"*No one should be a judge in his own cause. No rule in connection with the administration of justice is more settled than that contained in the above maxim, which applies equally to the case where the judge [employer] has an interest in the cause as to where he is a direct party to it.*"

CLASSEN C.J.: DICTIONARY OF LEGAL WORDS AND PHRASES, volume 3, BUTTERWORTHS (SBN 409 01890 2) page 19.

9.19 When the employer "... *elected to substitute the decision of the chairperson with respect to sanction*", the employer was thereby dealing with its own complaint which it had raised against the recommended sanction that the chairperson had issued at stage three of the disciplinary process. The employer's conduct was in breach of the Nemo Judex rule.

9.20 When the employer '... *terminated the applicant's [employee's] employment,'* the employer thereby imposed its own decision in a matter in which it had an interest.

EMPLOYER WAS DISQUALIFIED FROM ISSUING THE DISMISSAL LETTER

9.21 The Nemo Judex rule condemns bias on a decision maker, such as the employer in this case. The employer's interest was to have the employee dismissed from work, hence the employer's complaint against the chairman's recommendation, viz: that the employee be

given a final written warning. The Nemo Judex rule as well clauses 8.2 and 8.3 of the code, disqualify the employer from sitting as a judge or decision maker in a matter in which the employer has an interest.

9.22 This principle is explained in more detail as follows:

"*Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others* *is disqualified if he has a bias which interferes with his impartiality*."

(Underlining added)

CLASSEN C.J.: (supra) volume 1 page 184.

EMPLOYER ALSO DISQUALIFIED BY BIAS

9.23 The employer had a bias which interfered with its impartiality especially when –

9.23.1 the employer substituted the chairman's recommendation with its own decision,

9.23.2 and also when the employer appropriated to itself power to dismiss the employee from work, at a time when the

employer had no authority to take a decision that would empower itself to issue a dismissal letter.

ERROR OF LAW

9.24 The employer was disqualified by the presence of bias in making the decisions referred to in paragraphs 8 to 10 of the answering affidavit, as shown above. The Industrial Court failed to apply the Nemo Judex rule in circumstances where that rule was applicable, and that omission was an error of law. As stated above, failure by the Court to apply the correct law, is an error of law, and that error resulted in an erroneous judgment.

9.25 In addition, there is no submission by the employer that it was authorised by the code to substitute the recommended sanction with its own decision, in the event, it was dissatisfied with that recommendation. The employer did not deny that its conduct was contrary to the provision in the code.

9.26 The code is binding on the parties hereto. In this case the employer has made a resolution that it would comply with the code only when

compliance is favourable to itself and would discard the code when compliance is not favourable. The employer's approach amounts to an abuse of the code. If the code is binding on the employee, it should be equally binding on the employer as well. The Court cannot ignore or condone an abuse of the disciplinary code by one party to the prejudice of the other.

RESPONDENT REFUSED TO ACCEPT RECOMMENDED SANCTION

10. The employer submitted as follows in paragraphs 18 and 19.1 of its answering affidavit respectively:

10.1 *"It is correct that the chairperson recommended a sanction of a final written warning. The respondent did not accept the recommendation of a sanction of a final written warning and having followed due process, in exercise of its residual powers, it substituted the recommendation with a sanction of dismissal."*

10.2 *"In addition, I wish to state that it is a trite principle that an employer may not be burdened with a sanction that does not accord with its discipline principles and is disproportionate with other sanctions in similar matters"*

10.3 According to the employer, it had '*residual powers*' to reject the recommended sanction and substitute it with its own decision. The employer did not however submit that the alleged '*residual powers*' is based on the disciplinary code or rule of natural justice or any law that is applicable at the workplace. The source of the alleged '*residual powers*' has not been disclosed.

10.4 It was argued that the employer has a duty to maintain order and discipline at the workplace. The employer cannot however exercise that power arbitrarily and in disregard of: the applicable legal provisions, the disciplinary code and the rights of the employee concerned. In other words the right to manage discipline at the workplace, does not place the employer above the law, and does not give the employer power to evade the provisions in the code, in order to achieve a result that is favourable to itself.

10.5 The Respondent further stated that its decision to reject the recommended sanction and further to impose its own decision, was based on its *'discipline principles'*. The employer did not present the

alleged '*discipline principles*' as evidence before Court. The Industrial Court was consequently denied a chance to deal with the alleged '*discipline principles*' in its judgment, (that is; if the said '*discipline principles*' existed). In any event the alleged '*discipline principles*' (whose existence has not been proven), could not override the provision in the code, the rules of natural justice and the law which governs relations between employer and employee.

10.6 The Respondent also added that the recommended sanction '*is disproportionate with the other sanctions in similar matters*'. The Respondent's submission does not impute failure on the part of the chairman to comply with the code or any irregular conduct on the chairman.

10.7 The Respondent failed to state the law or provision in the code in terms of which it was justified to reject the recommended sanction and to proceed to impose its own decision.

THE DISCIPLINARY HEARING WAS SUBJECT TO THE CODE

11. The Industrial Court made a finding that the disciplinary hearing was subject to the provisions in the code. In that case the conduct of the parties to the code should comply with the provisions therein. An extract of the judgment of the Industrial Court reads as follows:

"*The present disciplinary hearing was held within the provisions of the disciplinary code and therefore the powers of the chairman are circumscribed.*"

(At paragraph 10)

(Underlining added)

CLAUSE 7.2 OF THE CODE

12. The judgment of the Industrial Court indicates that the Honourable Court placed emphasis on clause 7.2 of the code, and that clause reads as follows:

"7.2 *The presiding officer shall make his recommendation to the Human Resources Manager who shall take a decision on the matter*"

(Underlining added)

12.1 In its analysis of clause 7.2 of the code, the Industrial Court expressed itself as follows in its judgment:

12.1.1 *"... the Human Resources Officer ... has a right to substitute the decision of the Chairperson as it is merely recommendation."*

(At paragraph 13)

12.1.2 *"The Respondent in terms of the disciplinary code was at liberty to consider the recommendation and substitute the decision of the chairperson'*

(At paragraph 16)

12.2 The Industrial Court interpreted clause 7.2 in the code to mean that: whenever the employer is dissatisfied with a decision of the chairman, at a disciplinary hearing, the employer is at liberty to unilaterally set that decision aside and substitute it with its own verdict and/or recommendation.

ERROR OF LAW

12.3 With respect, the Industrial Court misinterpreted clause 7.2 of the code, and that misinterpretation resulted in an erroneous decision. Clause 7.2 in the code does not say what the Honourable Court alleges

it says. In particular, clause 7.2 does not say that the employer is at liberty to set aside and substitute a decision of the chairman. The code does not give the employer the option that the Industrial Court has mentioned. The Industrial Court therefore made an error of law in the manner it interpreted the disciplinary code.

12.4 The Industrial Court also made an error of quoting clause 7.2 of the code in isolation. Clause 7.2 should be read with 7.1 in order to get a complete text. The code is part of the record that was presented before the Industrial Court by the parties.

CLAUSE 7.1 OF THE CODE

12.5 Clause 7.1 reads thus:

"Where an employee who is serving either a verbal or written warning commits another offence which should ordinarily attract a written warning, the Human Resources Manager shall appoint a tribunal to take the third step in the disciplinary procedure, which shall be a final written warning."

(Underlining added)

12.6 In terms of clause 7.1 of the code: when an employee is found guilty of an offence that is punishable with a warning, yet that employee was already serving a warning (be it written or oral) the tribunal (or chairman) is mandated to recommend a final written warning to the employer.

12.7 In the present case the chairman had no option but to recommend a final written warning. The code states clearly that: (in the present circumstances), the sanction "*shall be a final written warning.*" That clause means that the employee cannot be punished with a sanction that is severe than a '*final written warning.*' The recommended sanction was therefore consistent with the code.

12.8 The chairman is not the employer or representative of the employer. The chairman could not therefore impose a sanction on the concerned employee. It is legally and procedurally correct that the sanction should be delivered on the employee by the employer or someone authorised by the employer. In this case the employer was represented by the Human Resources Manager.

12.9 The code imposes an obligation on the chairman –

12.9.1 to preside over the disciplinary hearing and,

12.9.2 to issue a verdict, and

12.9.3 in the event of a verdict of guilty; to recommend a sanction that is consistent with the provision in the code.

12.10 When clause 7.2 states that: it is '*the Human Resources Manager who shall take a decision in the matter*', the code means that: (in a case such as the present), the chairman has an obligation to recommend an appropriate sanction (which is consistent with the code), but not to implement it. The code also means that the employer is obligated to implement the sanction as recommended by the chairman and nothing more.

12.11 In this case the chairman did carry out his obligation as required by the code.

12.12 The code does not authorise the employer –

12.12.1 to issue its own recommendation regarding the sanction, or

12.12.2 to implement a sanction which has not been recommended by the chairman.

12.13 When the employer implements the recommended sanction, that conduct amounts to a communication, by the employer to the employee, of a decision which the employer has taken '*in the matter*', and which is based on the recommended sanction. In other words, the chairman delivers a recommended sanction to the employer and that recommendation becomes an employer's decision when the employer conveys it to the employee.

12.14 When the employer implements a sanction on the employee that is contrary to the provision in the code, such conduct would be invalid, null and void and consequently unenforceable. In this case the employer implemented a sanction on the employee that is contrary to the provisions in the code, particularly clause 7.1 as read with 7.2 and also 8.3 as read with 8.4 of the code.

EMPLOYER ACTED WITHOUT AUTHORITY

12.15 In the matter before Court, the employer acted without authority and in breach of the code when it rejected the sanction that the chairman had recommended and proceeded to impose its own decision. It makes no difference; whether the employer issued its own recommendation regarding the sanction and proceeded to implement it or took a decision in the absence of a recommended sanction. The same principle applies, viz: that the employer had no authority to take the decision that it took, after it had received a recommended sanction. In law, a decision is null and void or invalid, if it is taken by a person who has no authority to take it and the aggrieved party may ask the Court to set that decision aside. The employee has asked the Court to set aside that invalid decision. The Industrial Court made an error of law when it failed to declare that the employer had no authority to act in the manner it did.

THE EMPLOYER IS OBLIGATED TO COMPLY WITH THE CODE

13. The purpose of a disciplinary code is to establish disciplinary rules and procedures at the workplace that are –

i) fair,

ii) predictable,

iii) applied with consistency, and

iv) not subject to manipulation or abuse by either party.

CENTRAL BANK CASE

13.1 In the matter of CENTRAL BANK OF SWAZILAND VS MANDLA LUSHABA AND OTHERS (990/2018) [2020] SZHC (6 April 2020), the High Court, (sittings as a review Court), declared the importance of a disciplinary code at the workplace, as follows:

> "*30 The Disciplinary Code is the cornerstone of any disciplinary proceedings instituted by the Applicant [employer] against its employees.*"
>
> (At paragraph 30)

13.2 This Court agrees with the aforementioned pronouncement. The emphasis is on the fact that when an employer institutes a disciplinary hearing against its employee that is based on the code, the employer is also obligated to comply with the provisions in that code. The employer is not permitted to manipulate the code in order

to influence the outcome of the disciplinary hearing and such conduct would be set aside, when it is brought to the attention of the Court. The same principle applies whether the disciplinary code is a product of collective bargaining (as is the case in this matter) or it was introduced at the workplace unilaterally, by the employer. The Industrial Court misinterpreted the code and that misinterpretation resulted in an erroneous decision.

14. An excerpt of the Notice of Appeal reads as follows on ground number 1:

"1. The Court a quo erred in law... that the employer had established exceptional circumstances to interfere with the recommendations of the chairperson."

14.1 Initially, the employee had applied before the Industrial Court, wherein he had challenged the legality of the decision to dismiss him from work. That application was dismissed. As aforementioned, the employee has appealed to this Court - the decision of the Industrial Court.

14.2 In ground number 1, in the Notice of Appeal, the employee is challenging the decision of the Industrial Court, which held that the employer was authorised to interfere with the recommendation of the chairman and substitute it with its own decision.

14.3 The employee's argument is that the employer had no authority to interfere with the chairman's recommendation or to deviate from the code, in the manner it carried out the dismissal. There were also no exceptional circumstances, in the matter, to warrant deviation from the code. The dismissal should be set aside since it had no legal basis.

14.4 At this point the Court has to emphasize the fact that in its analysis of the case that is subject of appeal, this Court is not limited to the grounds of appeal that the appellant (employee) has filed. This Court has power and a duty to analyse relevant legal aspects that arise in the course of argument and in respect of which the parties have had a chance to make submission on. This power and duty is contained in rule 7, which is reproduced below:

"The appellant shall not, without the leave of the Industrial Court of Appeal, urge [argue] or be heard in support of any ground of appeal not stated in his notice of appeal, but the Industrial Court of Appeal in deciding the appeal shall not be confined to the grounds so stated."

WHEN IS DEVIATION FROM THE CODE PERMISSIBLE

15. The question: whether or not the employer is authorised to deviate from the code when disciplining its employee, has been answered in various judgments of the Court.

15.1 In the matter of ESWATINI CIVIL AVIATION AUTHORITY VS SABELO DLAMINI [2021] (13/2021) SZICA 01 (9 February 2022), the employer was found guilty of misconduct by the chairman at a disciplinary hearing. The employer issued a letter of dismissal before the employee could make submission on mitigation. The employer refused to withdraw the letter of dismissal even after it had been made aware of that error. The employee applied (on urgency basis) for an order before the Industrial Court for relief inter alia, as follows:

"*21 That the letter of dismissal be set aside*"

(At paragraph 21)

15.2 The employee was successful before the Industrial Court as the letter of dismissal was set aside. The employer appealed the decision of the Industrial Court.

INVALID OR UNFAIR DISMISSAL

15.3 On appeal the Honourable Court recognized the distinction between an unfair dismissal and an invalid dismissal, and declared as follows:

15.3.1 *"Fair and unfair dismissal is statutorily defined in section 35 and 36 of the Employment Act, 1980. Invalid dismissal, on the other hand, is a common law concept."*

(Underlining added)

(At paragraph 13)

15.3.2 *"During the course of consideration of its judgment, it became evident to the Court that the concept of 'invalid dismissal' lies at the centre of the controversy ..."*

(Underlining added)

(At paragraph 17)

15.3.3 "*The common law concept of invalid dismissal forms part of our law and is justiciable by the Industrial Court.*"

(Underlining added)

(At paragraph 26.1)

15.3.4 *"It then follows that the concept of invalid dismissals forms part of our law and justiciable by the Industrial Court."*

(Underlining added)

(At paragraph 19)

15.4 In the SABELO DLAMINI case, the Honourable Court emphasized the difference between an unfair dismissal and an invalid dismissal. This Court agrees with the manner the Honourable Court has clarified the distinction between these 2 (two) concepts, and the fact that the Industrial Court has jurisdiction to hear a claim based on an invalid dismissal. When dealing with a claim for dismissal, the Courts should be wary not to confuse an invalid dismissal with an unfair dismissal.

FAILURE TO COMPLY WITH THE CODE

15.5 In the SABELO DLAMINI case, the Honourable Court went on to analyse the legal consequence of an incident where an employer refuses or fails to comply with the disciplinary code.

15.5.1 *"... the Disciplinary Code, which forms part of the terms and conditions of employment, requires certain steps to be followed; the starting point of most cases involving dismissal is the prevailing Code. The failure by the employer to comply with the dictates of the Code prior to a dismissal may constitute a procedurally unfair dismissal but a dismissal may be both procedurally unfair and invalid, in which case it is for the aggrieved party to elect which cause of action and consequent remedy to pursue."*

(Underlining added)

(At paragraph 20)

15.5.2 *"In casu, the Employee elected to rely on invalid dismissal, and there being no dispute that the Employer jumped the gun in dismissing without prior submission on sanction, contrary to the Code, the Employee was entitled to rely on*

invalid dismissal as his cause of action in the Court a quo, and to seek appropriate relief in the form of the letter of dismissal being set aside (as opposed to unfair dismissal and reinstatement) the dismissal itself being a nullity in the circumstances."

(Underlining added)

(At paragraph 21)

15.5.3 In the SABELO DLAMINI case (supra) the Industrial Court did set aside the letter of dismissal on the basis that the conduct of the employer, particularly in issuing the letter of dismissal, was contrary to the provision in the code. On appeal, the Court confirmed the decision of the Industrial Court. The upper Court emphasized the fact that the dismissal letter was invalid because it was issued by the employer under circumstances where the employer had no authority to issue it.

15.5.4 This Court agrees with the *ratio decidendi* in the SABELO DLAMINI case.

16. The legal principles that are pronounced in the SABELO DLAMINI judgment (supra) are applicable in the matter before Court.

EMPLOYER SHOULD COMPLY WITH THE CODE

16.1 According to authority: when an employer concludes a disciplinary code with the union, or introduces a disciplinary code at the workplace, that employer is bound by the provisions in that code. Since the employer herein relied on the code, as its source of authority to charge the employee with misconduct (as shown above), the employer could only exercise such authority as conferred upon itself by the code, concerning that misconduct. The employer's authority to dismiss the employee from work, is circumscribed in the code. The employer agreed in the code that its power to discipline or dismiss its employee should be restrained and regulated by the provisions therein.

16.2 The code does not give the employer authority to evade or circumvent the provisions therein, especially regarding the obligation on the employer to implement the sanction which has been recommended by the chairman.

16.3 The Court reiterates that the code does not give the employer an option to either issue its own recommendation regarding the sanction or to issue a dismissal letter that is either inconsistent with or not based on, the recommended sanction.

16.4 In this case, when the employer issued the dismissal letter it thereby purported to exercise authority it did not have. The law declares such conduct – a nullity. In law, conduct that is a nullity is described as: void, invalid and has no legal effect, as shown below:

16.4.1 NULLITY

"[is] in law, a void act or an act having no legal force or validity-invalid-null"

GIFIS SH: LAW DICTIONARY, 3rd edition, BARRONS, (ISBN 0 -8120 – 4628 -5) page 327.

16.4.2 *"The truth is that the Court will invalidate an order [or decision] if the right remedy is sought by the right person in the right proceedings and circumstances. The order, may be 'a nullity' and 'void' but those terms have no absolute sense: their meaning is relative, depending*

upon the Court's willingness to grant relief in any particular situation."

WADE H W R et al: (supra) page 251.

16.5 The employee is not challenging the dismissal for being substantively and/or procedurally unfair. The application before the Industrial Court was not concerned with the question: whether or not the employer had provided sufficient proof, at the disciplinary hearing, that the employee had committed the misconduct which he had been charged with.

EMPLOYER HAD NO AUTHORITY TO DISMISS EMPLOYEE

16.6 The employee has challenged the circumstances under which the employer issued the dismissal letter. This Court confirms the fact that the employer acted without legal authority when it issued the dismissal letter. The Industrial Court as well as this Court has the power to set aside: either an illegitimate exercise of power by the employer or conduct by the employer which lacks authority, yet prejudicial to the employee. This principle is also supported in the SABELO DLAMINI case.

16.7 Authority is defined as:

"The legitimate and formal right or power inherent in specific position or function that allows an incumbent to perform assigned duties and assume assigned responsibilities."

BARKER F et al: SOUTH AFRICAN LABOUR GLOSSARY, Juta 1996 (ISBN 0 7021 3631 x) page 10.

16.8 There is a difference between –

16.8.1 an employer who has dismissed an employee whether fairly or unfairly, exercising his/its authority to dismiss, and

16.8.2 an employer who has issued a dismissal letter under circumstances where he had no authority to do so, either at all or at the time of the dismissal.

16.9 In the former case the employee may challenge the unfair dismissal in Court and invoke the provisions in the Industrial Relations Act (supra) as well as the Employment Act no 5/1980 (as amended), in order to prove that the dismissal was unfair and unreasonable.

16.10 In the latter case the employee may challenge the invalid dismissal in Court and invoke common law principles in order to prove that the employer had no authority to dismiss him at the material time, or that the person who issued the dismissal letter had no authority to do so.

DEVIATION MAY BE PERMISSIBLE IN CERTAIN CIRCUMSTANCES

17. The general rule is that where there is a disciplinary code that operates at the workplace, the parties are obligated to comply with that code. However, circumstances may arise where strict application of the code could be impracticable or may result in an injustice or unfairness to the employee concerned. In such a case the parties may agree to deviate from the code in order to avoid an injustice or unfairness being visited upon the employee. This approach provides an exception to the rule and is supported by authority, as shown below:

17.1 In the SPTC case (supra) the Honourable Court restated the legal principle regarding deviation from the code as follows:

17.1.1 "*It is settled law that a code may be deviated from by the employer in exceptional circumstances.*"

(At paragraph 39)

17.1.2 *"The position, therefore, is that deviation is not allowed if it occasions or has the potential to occasion prejudice upon the employee or employees."*

(At paragraph 40)

17.1.3 *"A code cannot be exhaustive in its coverage of relevant issues. Where unforeseen circumstances arise, and in exceptional circumstances, a code may be deviated from in a quest to do justice on a given case. Deviation can also be justified where it is to the benefit of the employee."*

(At paragraph 45.3)

GUGU FAKUDZE CASE

17.1.4 In the matter of GUGU FAKUDZE VS SWAZILAND REVENUE AUTHORITY AND 3 OTHERS (supra) the Honourable Court, inter alia, dealt with the question of deviation from the code by the employer. An excerpt from that case reads thus:

"The conclusion is that deviation from the code is not permissible if it causes or has the potential to cause prejudice upon the employee."

(At paragraph 26)

17.2 This Court agrees with the pronouncements made by the Honourable Court in the GUGU FAKUDZE and the SPTC cases regarding circumstances when deviation from the code may and may not be permitted.

DEVIATION BY EMPLOYER SHOULD NOT PREJUDICE THE EMPLOYEE

17.3 Based on the authority of the GUGU FAKUDZE and the SPTC cases, one of the requirements that is relevant in the case before Court is that: deviation will not be permitted if it is prejudicial to the employee.

17.4 As aforementioned, the code did not authorise the employer to dismiss the employee from work. Instead, the employer devised a ploy in the form of a unilateral deviation, to justify its decision to dismiss the employee. The employer's conduct aforesaid, was prejudicial to the employee in that it resulted in an invalid dismissal of the employee from work. The employer's conduct (of dismissing the employee), is liable to be set aside since it was based on a deviation (from the code), that was invalid and prejudicial to the employee and therefore legally impermissible.

UNILATERAL VARIATION OF THE CODE IS NOT PERMISSIBLE

18. Once there is a code in operation at the workplace, neither party is permitted to unilaterally vary the provisions therein. In this case, the employer unilaterally varied a provision in the code when it appropriated to itself power it did not have, and further exercised that power to dismiss the employee from work. That unilateral variation amounted to a manipulation of the code by the employer, to the prejudice of the employee, and such conduct is condemned by the Court.

18.1 In the CENTRAL BANK case (supra) the Court stated the rule concerning a unilateral variation of the code as follows:

"It appears that, the conduct of the Applicant [employer] amounted to a unilateral variation of the Disciplinary Code and Procedures. The Code is a component of the Collective Agreement duly signed by the Applicant [employer] and the Union; <u>any deviation from code including the extent of such deviation must be through mutual consent of the Applicant [employer] and the Union</u>."

(Underlining added)

(At paragraph 52)

18.2 *"[There] are exceptional and appropriate circumstances which may justify a deviation from the code by the employer. <u>However, it cannot be through the employer's unilateral conduct, the employee must be brought on board</u> in all these deliberations in the interest of transparency and fairness"*

(Underlining added)

(At paragraph 59)

18.3 The CENTRAL BANK case is authority for the principle that a unilateral variation of the code is invalid. However, deviation by consent is permissible as an exception to the rule.

18.4 In the CENTRAL BANK case this Court did set aside a decision which the employer had taken after it had unilaterally varied the code. The Honourable Court made a finding as follows"

"... a unilateral variation of the Code ... [is] <u>arbitrary, unlawful and not in accordance with the rules of natural justice</u>."

(Underlining added)

(At paragraph 54)

18.5 In the SPTC case the Honourable Court elaborated on the rule against unilateral deviation as follows:

"*Where deviation becomes necessary or desirable, both sides must engage in order to find a mutually acceptable way forward.*"

(Underlining added)

(At paragraph 45.5)

18.6 In the matter of NEDBANK SWAZILAND LIMITED VS SWAZILAND UNION OF FINANCIAL INSTITUTIONS AND ALLIED WORKERS [SUFIAWU] AND ANOTHER (10/12) [2013] SZICA 4 (20TH March 2013), the Court confirmed the principle, that a unilateral deviation from the code is not permissible. A party seeking deviation from the code can only do so after obtaining consent of the other party. An excerpt from the NEDBANK case reads as follows:

"*... even where the said exceptional and appropriate circumstances exist, the party wishing to deviate from the code, should engage the other.*"

(Underlining added)

(At paragraph 27)

18.7 In the NEDBANK case, the employer unilaterally deviated from the code in the manner it appointed the chairman of a disciplinary hearing. The Industrial Court set aside the conduct of the employer on the basis that the employer had no authority to appoint a chairman - in the manner it did. The principle on which the Industrial Court had based its decision to set aside the conduct of the employer was approved on appeal.

18.8 The authorities that have been cited above for instance; the SPTC, GUGU FAKUDZE, NEDBANK AND CENTRAL BANK cases unanimously emphasize the mandatory requirement that: the employer should obtain consent from the employee or union before deviating from the code, failing which the employer's conduct shall be declared invalid, by the Court. This is another reason the conduct of the employer, (viz; of issuing a dismissal letter), is declared null and void or invalid.

18.9. It is the law that declares the aforesaid conduct of the employer: null and void or invalid. It is the duty of this Court to look into the entire case before it, including the arguments, in order to determine whether

or not there is an error of law that was committed by the Industrial Court, in its judgment. This Court has been empowered to make that decision by the authorities cited above, the submissions presented by both employer and employee and the provision of rule 7.

STARE DECISIS

18.10 The principle that applies in the case that is before Court, is the same principle that applied in the cases that are cited above and (for the sake of emphasis), the principle may be summarized as follows –

18.10.1 where there is a disciplinary code at the workplace, the employer has no authority to unilaterally deviate from that code, and

18.10.2 that if deviation from the code becomes necessary, due to the existence of exceptional and compelling circumstances, it must be done with the consent of the employee or the employee's representative, and

18.10.3 that deviation is not permissible if it causes or has the potential to cause prejudice to the employee.

18.11 The aforementioned cases have established a rule (which is subject to exceptions), and that rule unequivocally prohibits the employer from unilaterally deviating from the code. The said cases have also laid down clear guidelines as to when and how the exception to the rule should be applied. The rule as stated in the aforementioned cases serves as a precedent, which is legally sound and which this Court agrees with, and consequently is bound to follow.

18.12 The principle of '*Stare Decisis*' is applicable in our law and provides as follows:

"To stand or abide by cases already decided. I think it is a sound rule to adhere to, that where once the Court has laid down certain principles, if they are not to be in direct opposition to the provisions of the law, for the Court to abide by them".

SOMERSET BELL W.H.(supra) page 526.

18.13 The cases that are cited above, for instance, SPTC, GUGU FAKUDZE, NEDBANK, CENTRAL BANK and SABELO DLAMINI, are leading cases in the principles that are subject of discussion. It must be emphasized that the aforementioned cases have

stated the principle which should apply in every case where the employer has unilaterally deviated from the code, as the case was in the matter before this Court. It is in the interest of justice that similar cases be given equal treatment, before the Courts.

18.14 When the Court declares that the conduct of the employer is invalid, it means the effect of that conduct is unenforceable and of no force or effect. This principle is supported by authorities including the following cases; SABELO DLAMINI, SPTC, GUGU FAKUDZE, NEDBANK AND CENTRAL BANK.

ADDITIONAL CASE LAW

19. During argument the parties referred to various judgments of the Courts which in turn, require analysis from this Court. The said judgments were presented before Court in order to answer the relevant questions that this Court is dealing with, as listed hereunder –

19.1 whether or not an employer, by itself, has authority to review a decision which the chairman has issued, at a disciplinary hearing, and which decision is in compliance with the code, and

19.2 whether or not an employer has authority to impose its own decision and to replace that which the chairman has issued, at a disciplinary hearing,

19.3 whether an invalid dismissal is justiciable before the Industrial Court.

20. In the Industrial Court judgment, that is subject of this appeal, the Honourable Court made the following determination.

"The decision that an employer is entitled to substitute a decision of a chairperson at a disciplinary hearing, have [has] since been upheld in a number of decisions of this Court, including SITHEMBISO NYAWO VS MANANGA SUGAR PACKERS Industrial Court case no. 317/2019"

(At paragraph 18)

20.1 In this case, the Industrial Court arrived at a determination that: an employer is entitled to replace a decision of the chairman (at a disciplinary hearing), with its own. The Industrial Court relied on the SITHEMBISO NYAWO judgment as its authority for the determination it had made. The Industrial Court did not consider the provision of clauses 8.1 to 8.4 of the code, and that omission resulted in an erroneous judgment.

SITHEMBISO NYAWO CASE

20.2 In the matter of SITHEMBISO NYAWO VS MANANGA SUGAR PACKERS (317/2019) [2020] SZIC 03 [03 February 2020] the Industrial Court made a determination as follows:

"It is settled law in our jurisdiction that in appropriate circumstances where principles of fairness dictate, an employer may, in the interests of Justice and fairness, intervene in disciplinary hearings and substitute an egregious decision by chairpersons. This was espoused ... in the case of MBONGISENI DLAMINI AND 4 others VS SWAZILAND ELECTRICITY COMPANY – Industrial Court case no. 138/2017."

(At paragraph 8.2)

20.3 The Industrial Court interpreted the SITHEMBISO NYAWO judgment to mean –

20.3.1 that the employer is entitled, in a disciplinary hearing, to unilaterally deviate from the code and substitute the decision of the chairman with its own, provided the employer is justified by the presence of '*exceptional circumstances*', to do so, and

20.3.2 that the employer is entitled to unilaterally decide that: there exists in a disciplinary hearing, '*exceptional circumstances*' that would justify its unilateral decision to deviate from the code, and

20.3.3 that where the employer has made a unilateral determination that the decision of the chairman is egregious, the employer would thereby be justified to treat that decision as an '*exceptional circumstance*' and proceed to unilaterally interfere with the decision of the chairman.

20.4 The aforementioned was the *ratio decidendi* in the judgment that is subject of appeal. The employee was justified therefore, in his Notice of Appeal, to challenge the decision of the Industrial Court in its interpretation of; the concept of '*exceptional circumstances*' in the context of a disciplinary code.

20.5 Based on the code and the leading authorities aforementioned, the employer is not justified in making a unilateral decision to deviate from the code. The question whether or not: '*exceptional*

circumstances' exist in a particular disciplinary hearing that would justify deviation from the code, would necessarily be a joint decision by the employer and employee.

ERROR OF LAW

20.6 The Industrial Court made an error of law when it applied a wrong principle of law, in the matter before it. The judgments in the matters of: NEDBANK, CENTRAL BANK, SPTC AND GUGU FAKUDZE, had already stated the correct legal position, at the time the Industrial Court decided the case before this Court.

20.7 This Court has a duty therefore to determine, inter alia, whether or not the SITHEMBISO NYAWO case was correctly decided. Based on the leading authorities aforementioned, this Court declares that the SITHEMBISO NYAWO case was wrongly decided and it is hereby set aside.

20.8 In the SITHEMBISO NYAWO case, the Honourable Court relied, as its authority, on the case of: MBONGISENI DLAMINI and others VS

SWAZILAND ELECTRICITY COMPANY (138/2017) SZIC 33

(May 17, 2017)

MBONGISENI DLAMINI CASE

21. At paragraph 11 of the MBONGISENI DLAMINI case the Industrial Court correctly identified the question before it as follows:

"The first question for determination herein is whether or not the employer has a right to substitute the decision of a chairperson."

21.1 Clearly the question that the Court had asked in the MBONGISENI DLAMINI case was central in determining the issue that was before it. An excerpt of the judgment reads thus.

"The Court aligns itself with the views of the author. If the employee is entitled to the right to appeal the decision of the disciplinary hearing chairperson we do not see why the employer should not have a recourse by way of reviewing the decision where exceptional circumstances exist."

(Underlining added

(At paragraph 18)

21.2 There are 2 (two) issues in the aforesaid excerpt that stand out and deserve the Court's attention.

21.2.1 In the MBONGISENI DLAMINI case, the Industrial Court expressed its opinion in relation to a situation, in the course of a disciplinary hearing, where '*exceptional circumstances*' exist. In other words, before deviation from the code can be considered, there must be a determination that '*exceptional circumstances*' exist in a disciplinary hearing.

21.2.2 In the MBONGISENI DLAMINI case the Honourable Court did not state who has authority to determine whether or not '*exceptional circumstances*' exist to warrant deviation from the code. Furthermore, should such '*exceptional circumstances*' be found to exist in a disciplinary hearing, should the extent of the deviation from the code be determined unilaterally or bilaterally?

21.2.3 The question regarding the circumstances under which deviation from the code is permissible, has already been decided by the upper Court in the cases aforementioned, namely SPTC, CENTRAL BANK, NEDBANK AND GUGU FAKUDZE. The aforementioned cases have determined that deviation from the code, and the extent of such deviation, should be done by consent. In other words unilateral deviation by the employer, is not permissible.

21.2.4 In the disciplinary code that is featured in the present appeal, there is no provision for unilateral deviation from the code. The employer cannot appropriate to itself power it does not have. The Court has authority to set aside that improper use of power, and that is what the employee applied for before the Industrial Court. That is also what the present appeal is about.

21.3 A second issue that stands out in the excerpt from the MBONGISENI DLAMINI case concerns the Court's statement that:

"The Court aligns itself with the views of the author."

21.3.1 When the Honourable Court mentioned that is '*aligned itself with the views of the author* ...', it meant a dissertation that had been submitted by an academic scholar who was pursuing a Masters of Laws degree at a university in South Africa. The Honourable Court was not referring to a *ratio decidendi* in a judgment that had been issued by a Court.

21.3.2 Academic scholars may differ in the views that they express in each dissertation or thesis that is presented for assessment. However, their views are not equal to a *ratio decidendi* in a Court judgment. A Court judgment has the force of law as opposed to an opinion.

21.3.3 The Industrial Court also mentioned at paragraph 16 of its judgment in the MBONGISENI DLAMINI case that:

'A survey of South African decisions seems to suggest that the position of law is not settled."

On the contrary, in Eswatini the position is now settled as shown in the cases aforementioned, for instance; the SPTC,

GUGU FAKUDZE, CENTRAL BANK and the NEDBANK.

21.3.4 As shown above, the judgment of the Industrial Court which this Court is currently dealing with, (viz the BHEKITHEMBA VILAKATI case) and also the preceding cases namely, the SITHEMBISO NYAWO and the MBONGISENI DLAMINI, are based on an opinion of a legal scholar who is not authority on the subject. That academic opinion as well as judgments that rely on it, is not binding on this Court. In this case, the disciplinary code is binding on the parties and its provisions are dispositive of the matter before Court, as shown above.

21.3.5 The MBONGISENI DLAMINI case was eventually decided on a different principle and not on the question that had been considered by the Industrial Court, for determination. The Industrial Court decided that the employer had delayed in exercising its review powers and

accordingly was out of time. The Industrial Court decided the matter in favour of the employee.

21.3.6 The employer applied for a review of the Industrial Court judgment. On review the High Court overturned the Industrial Court judgment. The Industrial Court was found to have erred on procedure. The MBONGISENI DLAMINI case is not a precedent on the questions that this Court has asked in paragraphs 19.1 to 19.3 above, since it was decided on a different legal principle.

21.3.7 The SITHEMBISO NYAWO case was wrongly decided. It is based on a principle that is contrary to the *ratio decidendi* in the leading cases aforementioned. The Industrial Court's decision (that is subject of appeal) followed a wrong judgment. Consequently, the Industrial Court judgment, is wrong and is hereby set aside. Ground 1 of the Notice of Appeal is upheld for this reason as well.

LYNETTE GROENING CASE

22. The Court was also referred to the case of GROENING VS STANDARD BANK OF SWAZILAND LTD, (1/2011) [2011] SZICA 7 (23 March 2011).

22.1 The employee was found guilty of misconduct at a disciplinary hearing. The employee was dismissed following a recommendation of dismissal from the chairman.

22.2 The employee filed an internal appeal against the verdict and the dismissal. The appeal chairman decided in favour of the employee and declared that employee had been: '*wrongly found guilty and her appeal therefor succeeded*' [sic]

(At paragraph 8)

22.3 The appeal chairman directed that the employee be reinstated. The chairman also advised that the parties are at liberty to negotiate a separation agreement, if they so wish. However the parties failed to reach agreement regarding a separation.

22.4 Thereafter the employer notified the employee (in writing) –

22.4.1 that the employer did not accept the decision of the appeal chairman and therefore was not bound by it, and

22.4.2 that the employer had decided to uphold the decision to terminate the employee's services, based on the findings of the chairman at the disciplinary hearing.

22.5 The Industrial Court had expressed its view that the employee had been dismissed without a hearing, and accordingly that dismissal, *prima facie,* was unfair. The Industrial Court did not however grant the employee an order for reinstatement on the basis that; the employee's prayer for reinstatement had not been supported by oral evidence, as the matter had been brought to Court by way of motion proceedings, as opposed to trial.

22.6 The employee appealed the decision of the Industrial Court. The upper Court focused its attention on what it considered to be the main issue. The upper Court stated as follows at paragraph 20 of its judgment:

"The question is whether the Court a quo was correct in its decision to deal with the matter as it did, in terms of Rule 14 (6) (b) of its Rules, as one raising only a question of law"

22.7 The upper Court took the view that the employee had filed its claim at the Industrial Court by way of rule 14 (6) (b), yet the matter was fraught with material disputes of fact which required to be dealt with in a trial. The upper Court concluded that the Industrial Court did not have jurisdiction to hear the matter and proceeded to set aside the decision of the Industrial Court.

22.8 The *ratio decidendi* of the Industrial Court as well as that of the Industrial Court of Appeal did not address the issues that are listed in paragraphs 19.1 and 19.3 above. The LYNETTE GROENING case does not therefore support the employer's argument since it was decided on a different legal principle. In the LYNETTE GROENING case the Court did not uphold the view that the employer had authority to interfere with the chairman's finding and replace it with its own decision.

HLOPHE LWAZI CASE

23. In the judgment that is under consideration, the Industrial Court, inter alia, referred to the case of HLOPHE LWAZI VS SWAZILAND TELEVISION AUTHORITY SZICA case no. 9/2002, (unreported) as authority in support of its decision.

23.1 In the HLOPHE LWAZI case, a group of employees were found guilty of misconduct at the disciplinary hearing. Thereafter, the chairman, (who was also referred to as the tribunal), issued (in respect of certain employees), a sanction of; first written warning while to the others, he issued a final warning. The employer was dissatisfied with the sanction that the chairman (tribunal) had issued. The employer proceeded to dismiss the employees.

23.2 The employees challenged the dismissal at the Industrial Court and prayed, inter alia, that the dismissal be set aside for being:

'*...invalid and null and, void ab initio ....*'

(At page 2)

23.3 The employees argued that the sanction that was issued by the chairman: '... *was final and precluded any more serious steps being taken against ... [themselves] following the findings of guilty.*'

(At page 3)

23.4 The employer argued that the mandate that was given the chairman (tribunal) was "... *to investigate the facts and to recommend what action should be taken in the event of the tribunal finding the Respondents [employees] guilty of some or all the charges against them.*"

(At page 3)

23.5 There were 2 (two) conflicting versions before the Industrial Court regarding the mandate that the chairman (tribunal) had been given, as he presided over the disciplinary hearing. The Industrial Court decided that the version of the employees was more probable than that of the employer. The Industrial Court concluded that the chairman (tribunal) had been given a mandate to issue a verdict and sanction at the disciplinary hearing, and that the chairman had correctly exercised

his mandate when he issued the aforementioned sanction to the employees.

23.6 The employer appealed the Industrial Court judgment. When reading the judgment from the upper Court it became clear that the upper Court had decided the matter on a different legal principle, compared to that which the Industrial Court had relied on. Excerpts from the judgment of the upper Court have clarified the position and they read as shown below.

23.6.1 The upper Court stated as follows:

"The claim so formulated presents a number of difficulties. As the dismissal complained of is not described as 'unfair' within the meaning of Section 35 of The Employment Act ... ."

(Underlining added)

(At page 3)

23.6.2 *"The purpose of the hearing in the Court a quo, notwithstanding the wording in which the claim was*

couched was to determine whether or not the [employees] had been unfairly dismissed. In order to do this the court had to take into consideration the provisions of Sections 35, 36, 41 and 42. This the Court a quo has not done."

(Underlining added)

(At page 4)

23.6.3 *"The court should have addressed the question of whether the dismissal was in all the circumstances fair."*

(At page 5)

23.6.4 *"The case will be remitted to the court a quo to determine whether in each case the dismissal was fair or unfair in terms of the Employment Act."*

(At page 5)

(Underlining added)

23.7 The upper Court approached the matter as if the employees were challenging an unfair dismissal. On the contrary the employees were challenging an invalid dismissal. The employees had prayed that their purported dismissal from employment be set

aside on the basis that the dismissal was: *'... invalid and null and void ab initio ...'*, as aforementioned.

23.8 With respect, the upper Court failed to distinguish between a claim for unfair dismissal and a claim for invalid dismissal yet these 2 (two) are separate causes of action. Consequently, the Honourable Court decided a matter that was not before it and failed to decide a matter that was before it. In particular, the Honourable Court decided a claim for unfair dismissal instead of invalid dismissal.

23.8.1 A claim for unfair dismissal will invariably be determined in accordance with the provisions in the Employment Act as well as the Industrial Relations Act. The test is whether or not the dismissal was fair and reasonable within the meaning of section 36 as read with 42(2), (a) and (b) of the Employment Act.

23.8.2 In a claim for invalid dismissal the test is whether the employer had the authority to dismiss the employee from

work either at the material time or at all. The provisions in the Employment Act and the Industrial Relations Act are not relevant in a claim for invalid dismissal. Common law principles apply in a claim for invalid dismissal.

23.9 The *ratio decidendi* in the HLOPHE LWAZI case does not address the legal issues that are raised in paragraphs 19.1 to 19.3 above. The upper Court did not determine the question; whether or not a case of invalid dismissal is justiciable before the Industrial Court. Consequently, the HLOPHE LWAZI case was decided on a different legal principle.

KENNETH MASHABA CASE

24. The case of KENNETH MASHABA VS CENTRAL BANK OF SWAZILAND, CASE NO (164/2016) SZIC 01 (2017) was also cited by the employer in order to bolster its argument.

24.1 The employee filed an urgent application before the Industrial Court in which he challenged his dismissal as being invalid and therefore a nullity. Before the Industrial Court could determine the question;

whether the dismissal was invalid or not, the Court had to determine a preliminary question; whether or not to enroll the matter as urgent. The employer had challenged the application both on the question of urgency and on the merits.

24.2 In the KENNETH MASHABA case the employee's argument: that his dismissal should be declared invalid, was not determined by the Industrial Court because the employee failed to enroll his matter in accordance with the rules of Court, that regulate urgent applications. The case was decided on a different principle of law, as shown hereunder.

24.3 In particular the employee, in the KENNETH MASHABA case, failed to satisfy the peremptory requirements of the Industrial Court rule 15 (2) (a), (b) and (c), yet the matter had been filed before Court, as an urgent application. The Court accordingly refused to enroll the matter as urgent. That order meant that the Court had no jurisdiction, at that point, to hear the merits of a claim for an invalid dismissal, until that claim was properly enrolled before the Court. The point that the Court was making was that a matter that is based on an invalid dismissal

claim, is not automatically urgent. The employee has an obligation to satisfy the requirements of urgency in order for the matter to be enrolled as such. That was the *ratio decidendi* in the KENNETH MASHABA judgment.

24.4 As shown above, the *ratio decidendi* in the KENNETH MASHABA case does not support the argument that the employer has presented, in the present matter, before Court. The said case does not address the questions that this Court has asked in paragraphs 19.1 to 19.3 above.

KENNETH MASHABA CASE ON REVIEW

24.5 In the matter of MASHABA VS CENTRAL BANK OF SWAZILAND (2110/2016) [2017] SZHC 54 (28th March 2017), the employee approached the High Court for a review of the Industrial Court decision. The High Court confirmed the decision of the Industrial Court. In particular, the High Court confirmed the finding that the employee had failed to satisfy the requirements of urgency and consequently his matter could not be enrolled as such. An excerpt of the High Court judgment reads thus:

24.5.1 *"The Court will further determine if the Industrial Court dealt with the merits of the matter before deciding the issue of urgency."*

(At paragraph 11)

24.5.2 *"I must finally point out that the issue of urgency was never a side issue on the part of 1st Respondent [employer]. It was first raised in the Human Resources Manager's Answering Affidavit. It was further raised in the Affidavit by the Governor. The [Industrial] Court needed to make a determination on it before dealing with the merits."*

(Underlining added)

(At paragraph 16)

24.6 The review application was dismissed. The KENNETH MASHABA case did not decide the question whether or not a claim for an invalid dismissal is justiciable before the Industrial Court. The KENNETH MASHABA case does not support the employer's argument and consequently does not serve as a precedent in the matter before Court.

24.7 With the aforegoing this Court finds that the employee has successfully challenged the conduct of the employer, which led to the employer issuing a dismissal letter. The dismissal letter was issued without authority, yet it is prejudicial to the employee. The law declares that such conduct is null and void or invalid. It is the duty of the Court to set aside such conduct. When the Court sets aside the dismissal letter, its consequences automatically fall away. The employee is entitled to all the employment benefits he would have received, but for the dismissal letter.

24.8 This principle is explained as follows in the SABELO DLAMINI judgment:

> *"An invalid dismissal is a nullity; in the eyes of the law an employee whose dismissal is invalid has never been dismissed and remain in his or her position in the employ of the employer. It is an employee whose dismissal is unfair, who requires an order of reinstatement.*
>
> (At paragraph 26.3)
>
> (Underlining Added)

PART VIII OF THE INDUSTRIAL RELATIONS ACT

25. There is another aspect of this case that deserves the Court's attention, namely part VIII of the Industrial Relations Act.

25.1 The Industrial Court, inter alia, noted a point that:

"20. *In the present matter the Respondent raised the point in limine that the Applicant did not follow the peremptory requirement of Part VIII of the Industrial Relations Act"*

...

Part VIII of the act further imposes another requirement in that a litigant seeking to invoke the assistance of the Industrial Court, must first exhaust the dispute resolution procedures as provided for by the Conciliation Mediation and Arbitration Commission in particular that the dispute ought to be conciliated. Where there has been a dismissal an applicant cannot simply by pass the provisions of Part VIII and seek to have his matter heard outside of this provision, in the form of a review."

(Paragraph 20)

25.2 The Industrial Court upheld the point in limine that the employer had raised.

25.3 As paragraph 10 of its written submission the Respondent stated as follows regarding part VIII of the Act.

"It is submitted that the appellant [employee] having been dismissed cannot bypass the provisions of part VIII and seek to challenge any other action that comes thereafter, he ought to first comply. This principle was affirmed in the matter of DUMSILE R. SHONGWE V SWAZILAND NATIONAL PROVIDENT FUND Industrial Court case no: 172/2017, where Acting Judge Bongani S. Dlamini dealt with the principle succinctly concluding that the Industrial Court is bound by the decision of the full bench in the Maia case."

26. In this case the employer does not distinguish between a claim for unfair dismissal from a prayer to set aside conduct of the employer which is unauthorized, null and void or invalid. This Court has already dealt with this distinction in the proceeding paragraphs, and with the support of legal authority.

27. According to the rules of Court, there are cases that can be referred direct to the Industrial Court for adjudication. There are cases also that are required,

by the rules, to be referred to part VIII of the Act, before they can be referred to the Industrial Court for adjudication. Rule 14 (6) provides as follows:

"(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."

(Underlining added)

28. According to rule 14 (6), there are two avenues by which an aggrieved person may apply to the Industrial Court for relief. In this case the aggrieved person is the employee.

28.1 If the cause of action involves a dispute of fact, the employee is mandated by rule 14 (6) (b) to file his dispute under part VIII of the Act. If the dispute that has been referred to the Commission in terms of part VIII of the Industrial Relations Act has not been resolved, then the employee is authorised, by the said rule, to

proceed to file his dispute before the Industrial Court for adjudication.

28.2 In a claim that is brought to Court is *solely for determination of a question of law,* the employee has no need to deal with part VIII of the Industrial Relations Act. The Court is called upon to interpret the law based on facts that are common cause. In that case, rule 14 (6) (b) allows a litigant to file his claim direct with the Court and bypass part VIII of the Industrial Relations Act.

28.3 In the matter before Court, there is no dispute of fact especially regarding the role that was played by the chairman up to the stage where he issued a recommendation, regarding an appropriate sanction, as determined by the code. There is also no dispute of fact regarding conduct of the employer, after receiving the recommended sanction. The question of law that the Industrial Court was called upon to decide was: whether or not the conduct of the employer was unauthorized or invalid, and if so, to set it aside.

28.4 The wording in rule 14 (6) (b) is wide enough to include any dispute between the employer and employee whose determination is dependant solely on a question of law, including the employer's conduct that led to an invalid or unauthorized dismissal letter - being issued. There is no provision in rule 14 (6) (b) or in any other law, that excludes an invalid or unauthorized dismissal from the ambit of matters that are justiciable under rule 14 (6) (b), provided their determination is based soled on a question of law.

28.5 The employee's application was properly before the Industrial Court for determination. In this case, the conduct of the employer in dismissing an employee from work, was a matter that was capable of being determined (by the Industrial Court), solely on a question of law.

28.6 The Industrial Court made an error of law when it concluded that a dismissal of an employee from work could not be determined solely on a question of law. The correct approach is that: certain matters where an employee has been dismissed from work, would require the dismissal to be dealt with under part VIII of the Act, while

others may be determined solely on a question of law, in terms of rule 14 (6) (b). The matter before Court fell under the latter provision.

ERROR OF LAW

29. The Industrial Court therefore made an error of law when it upheld the point *in limine,* that the employer had raised. That error led to an erroneous decision. The employee's application had properly been placed before Court for determination.

30. The Industrial Court has also cited several judgments in support of its interpretation of rule 14 (6) (b). It is proper and fair that these judgments be given consideration.

SYLVIA WILLIAMSON CASE

31. The case of NEDBANK SWAZILAND LTD VS SYLVIA WILLIAMSON AND ANOTHER (17/2017) [2018] SZHC 02 (03/2018) was also cited. Excerpts from the judgment would help to highlight the legal issue that the Court was dealing with, in that case.

31.1 *"48 this leads me to what I consider to be the most pertinent and compelling reason why the 1st Respondent's position is untenable. It is that once there has been a dismissal or termination of employment either perceived as 'automatically, procedurally or substantively' unfair, the Industrial Court ultimately retains an exclusive statutory jurisdiction to hear and determined [determine] such matter in terms of the procedural and remedial provisions under Part VIII of the Act; its procedural prescripts must be followed.*

"49 The Act has provided for and avails the aggrieved litigant who has been unfairly dismissed, a special remedy which include [sic] the very substantive relief the 1st Respondent seeks to assert including reinstatement or compensation in the exercise by the Court's discretion following an unfair dismissal."

(Underlining added)

31.2 In the circumstances of the SYLVIA WILLIAMSON case, the Honourable Court made a correct pronouncement since it was dealing with an unfair dismissal claim. The Honourable Court

further mentioned that in a claim for unfair dismissal an employee may seek compensation or reinstatement as a form of relief.

31.3 In the matter before Court, the employee's claim is for setting aside a letter of dismissal because in law it is unauthorized or invalid. The case of SYLVIA WILLIAMSON is therefore distinguishable in that it was decided on a legal principle that is different from that which the Court is dealing with.

PHYLYP NHLENGETHWA CASE

32. The Industrial Court also quoted passages from the case of PHYLYP NHLENGETHWA AND OTHERS VS SWAZILAND ELECTRICITY BOARD SZIC case no 272/2002. In that case the employees had moved an urgent application for an interdict, inter alia, restraining the employer from implementing a restructuring exercise at the workplace. The application was dismissed on 3 (three) legal points.

32.1 The Industrial Court found that the employees had failed to satisfy the requirements of urgency. The matter could not therefore be enrolled as urgent. An excerpt of the judgment reads thus:

"... the court finds that the Applicants have failed to show why the court should jump the queque [queue] and deal with this matter on an urgent basis.

(At page 10)

32.2 The Court further came to the conclusion that the employees would not have succeeded in any event, because their application was fraught with material disputes of fact which required to be proved by oral evidence. An excerpt of the judgment reads thus:

"*Such issues of fact cannot be adequately resolved without the parties concerned leading evidence on the pertinent issues but definitely, not by way of papers filed in an urgent application.*"

(At page 12)

(Underlining added)

32.3 Thirdly, the Honourable Court relied on rule 3 (2) of the rules of the Industrial Court of 1984. This rule provides as follows:

32.3.1 *"The Court may not take cognizance of any dispute which has not been reported or dealt with in accordance with Part VII of the Act."*

32.3.2 The Honourable Court added the following explanatory note after quoting rule 3 (2) of the 1984 rules:

"*This rule is now to be read to refer to Part VIII of the Industrial Relations act no 1 of 2000 and in particular the reporting procedure provided under Section 76 (1) of the Act.*"

(At page 6)

32.3.3 The 1984 rules were revoked by Legal notice 165 of 2007. This is the same instrument that promulgated the 2007 rules, which are the rules currently in force. Rule 3 (2) in the 1984 rules was not incorporated in the 2007 rules. Instead rule 14 (6) (b) was introduced in the 2007 rules and it provides contrary to what was provided in rule 3 (2) of the 1984 rules. Therefore, a Court judgment that is based on rule 3 (2) of the 1984 rules is not relevant to this Court, in light of rule 14 (6) (b).

32.3.4 The PHYLYP NHLENGETHWA judgment was decided on different legal principles and does not assist in deciding

the legal issue that this Court is presently dealing with. To be precise the PHYLYP NHLENGETHWA judgment does not deal with rule 14 (6) (b) of the current rules. Moreover, the PHYLYP NHLENGETHWA judgment was based, inter alia, on issues of fact, as shown in the preceding quotation from that judgment.

ELIJAH ZWANE

33. The Court also referred to the case of ELIJAH ZWANE VS SWAZILAND POSTS AND TELECOMMUNICATIONS CORPORATION AND 4 OTHERS [410/2013] SZIC 56 (20 June 2018).

33.1 The Industrial Court quoted the following passage from the judgment in the ELIJAH ZWANE case: *"If the Applicant's complaint is that the termination of his contract was unlawful and invalid his remedy does not lie in a review or declaratory order but lies under the mechanism provided under Part VIII of the Industrial Relations Act 2000 (as amended)."*

(At paragraph 13)

33.2 In the ELIJAH ZWANE case the Industrial Court made a finding that the employee's application was for a review of the decision of the employer. The Industrial Court came to the conclusion that it had no power to review the employer's decision.

33.3 The ELIJAH ZWANE judgment did not deal with the import of rule 14 (6) (b). It therefore distinguishable from the case that is before Court.

ALFRED MAIA CASE

34 When the Industrial Court decided the ELIJAH ZWANE case, it relied heavily on the judgment in the case of ALFRED MAIA VS THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION AND 2 OTHERS (1070/2015) [2016] SZHC (17 February 2016). The Industrial Court quoted a passage from the ALFRED MAIA judgment which reads thus:

"As already indicated above, a review is not one of the appropriate reliefs to be granted by the Industrial Court, because as a creature of statute that power is not extended to it anywhere. It also could not have been part of those powers given the Industrial Court under the broad reliefs it is entitled

to grant, which are those that arise between employer and employee as it does not so arise."

(Underlining added)

(At paragraph 21)

34.1 In the ALFRED MAIA case, the High Court came to a conclusion that; when an employee is challenging his dismissal and proceeds to file his application direct with the Industrial Court (without dealing with part VIII of the Industrial Relation Act), that conduct amounts to the employee reviewing a decision of the employer. As will be shown later in this judgment, that legal position is not correct.

34.2 In the matter that is before Court, the Industrial Court followed the reasoning in both the ALFRED MAIA and the ELIJAH ZWANE cases.

STEPHEN ZUKE CASE

35. The *ratio decidendi* in the ALFRED MAIA case was analysed in detail by the Supreme Court in the matter of: MINISTRY OF TOURISM AND

ENVIRONMENTAL AFFAIRS AND ANOTHER VS STEPHEN ZUKE AND ANOTHER (96/2017) [2019] SZIC 37 (2019). The Supreme Court, inter alia, made the following pronouncement:

35.1 *"The time has come for the judgment in the Alfred Maia case to be set aside as having been wrongly decided. When the Industrial Court determines a labour dispute between an employer and employee it does so within the ambit of its jurisdiction in terms of section 8 of the Industrial Relation Act. This does not constitute review proceedings. In determining whether the dispute falls under section 8 of the Industrial Relation Act, the test is whether the dispute between the parties arises solely from a contract of employment between an employer and employee during the course of employment."*

(Underlining added)

(At paragraph 37)

35.2 *"As stated in the preceding paragraphs, generally the Industrial Court has exclusive jurisdiction to deal with all labour disputes arising from contracts of employment between an employer and*

employee during the course of employment. When discharging its mandate the Industrial Court is not exercising review proceedings."

(At paragraph 52)

(Underlining added)

35.3 *"From the definition of re-instatement in the Industrial Relations Act, it is apparent that a labour dispute between an employer and employee arising from their contract of employment does not constitute review proceedings; hence, the Common law grounds of review are not applicable.*"

(At paragraph 42)

(Underlining added)

35.4 "*The Alfred Maia case was dealing with substantive and procedural fairness in the dismissal of the applicant.*

(Underlining added)

(At paragraph 47)

35.5 *"During the hearing of the matter before this Court, the appellants' attorney indicated that the first respondent was bound to follow the*

procedure laid down in chapter VIII of the Industrial Relations Act.

This contention cannot be sustained in law."

(Underlining added)

(At paragraph 53)

36. A summary of the pronouncement in the STEPHEN ZUKE case is that -

36.1 an employee who is challenging his dismissal is not necessarily obligated to file his grievance under part VIII of the Industrial Relations Act, and

36.2 provided the employee has complied with the rules of Court, the employee may bypass part VIII of the Industrial Relations Act and file his claim direct with the Court, particularly in terms of rule 14 (6) (b) and rule 15, and

36.3 when the Industrial Court hears an application that has been filed under rule 14 (6) (b) or rule 15, the Court does so as a Court of first instance and not as a review Court.

37 In the STEPHEN ZUKE judgment the Supreme Court has stated the correct legal position regarding the implementation of rule 14 (6) (b) and rule 15. The legal position as stated in the STEPHEN ZUKE case is consistent with the pronouncement in the SABELO DLAMINI case.

38. The Supreme Court has clearly made a determination that the ALFRED MAIA case was wrongly decided and was consequently set aside. That determination meant that the cases that relied on the ALFRED MAIA judgment were based on a wrong principle of law and that fact includes ELIJAH ZWANE and the BHEKITHEMBA VILAKATI cases, and the latter, is the case that is currently subject of the present appeal.

DUMSILE R. SHONGWE case

39. The employer also referred to the judgment in the case of DUMSILE R. SHONGWE VS SWAZILAND NATIONAL PROVIDENT FUND (072/2016) [2016] SZIC 32 (25 July 2016), as supporting its argument.

39.1 The employer's argument was that an employee who has been dismissed can only challenge the dismissal or conduct of the employer which led to the dismissal, by initially reporting his

grievance or dispute through part VIII of the Industrial Relations Act, failing which the employee's application would amount to a review of the employer's decision.

39.2 The Court decided the matter in favour of the employer, particularly in line with the ALFRED MAIA judgment.

39.3 As shown above, the STEPHEN ZUKE judgment has set aside the principle on which the ALFRED MAIA judgment is based.

39.4 In the DUMSILE SHONGWE judgment the Court did not express itself on the application of rule 14 (6) (b). The DUMSILE SHONGWE judgment is therefore distinguishable as it was decided on a different legal provision.

SWAZILAND POULTRY PROCESSORS case.

40. The employer has also referred this Court to the case of: SWAZILAND POULTRY PROCESSORS VS THE PRESIDING JUDGE OF THE INDUSTRIAL COURT AND OTHERS (382/2014) [2015] SZHC 190 (30 October 2015).

41.1 The employer quoted paragraph 15 of that judgment which reads thus:

"To set aside a decision that has led to the dismissal of an employee there must be a finding that the dismissal is unfair, substantively, or otherwise. The statutory process for that purpose it [is] in Industrial Relations Act 2000 as amended. It appears to me that this procedure can neither be circumvented nor abridged. The matter must be reported as a dispute, dealt with by the appropriate structures before it gets to the Industrial Court as an unresolved dispute."

(Underlining added)

41.2 The High Court (sitting as a review Court) was dealing with an unfair dismissal claim, hence the Honourable Court referred to the Industrial Relations Act as the authority in support of its decision.

41.3 The SABELO DLAMINI case has made a distinction between an unfair dismissal and a dismissal that is invalid or unauthorized. Consequently this case that is cited by the employer is not relevant

to the question of law that is subject of determination in the present appeal.

PART VIII OF THE INDUSTRIAL RELATIONS ACT

41. Both parties were given sufficient latitude to argue the provision of part VIII of the Industrial Relations Act as well as rule 14 (6) (b). The importance of these principles of law arose in the course of submission and is relevant in determining the questions of law that are before Court for determination.

GROUND 3 OF THE NOTICE OF APPEAL

42. Ground three of the Notice of Appeal reads thus:

"The Court a quo erred in law and in fact in holding that Court had no jurisdiction to entertain a review application against a decision by an employer to terminate the services of an employee even in the absence of disputes of fact in such a decision."

(Underlining added)

42.1 The employee's argument was correct in law that: in the absence of a dispute of fact his application was determinable solely on a question of law. Therefore rule 14 (6) (b) was applicable in the

determination of the matter before the Industrial Court. There was no legal requirement for the employee to file his claim (or grievance) under part VIII of the Industrial Relations Act.

ERROR OF LAW

42.2 The Industrial Court made an error of law when it upheld the employer's point *in limine*. The Industrial Court has jurisdiction to hear the employee's application. That error of law led to an erroneous decision, which is subject of this appeal.

CAUTIONARY NOTE

43. This Court noticed an element of poor drafting in the Notice of Appeal. The Court however allowed the parties to proceed to argue the appeal on the papers as they stood, since both parties understood the case each had to argue and there was no prejudice that each party could suffer subsequent thereto. The employer's written submission had sufficiently covered the case that the employee had raised on appeal. The Court did however issue a warning that its accommodating gesture does not mean that it is encouraging ineptitude drafting by the litigants and their representatives.

44. Wherefore the Court orders as follows:

44.1 The appeal succeeds with costs.

44.2 The order of the Industrial Court is set aside and substituted with the following order.

44.3 The dismissal letter dated 28th April 2020 is set aside, and its consequences accordingly fall way with effect from the date the letter was issued.

D. MAZIBUKO
JUSTICE OF APPEAL

I agree

N. NKONYANE
JUSTICE OF APPEAL

For the Appellants: Mr A. Dlamini
of BS Dlamini Association

For the Respondent: Mr Z. Jele
of Robinson Bertram