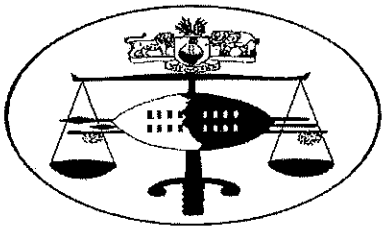


IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

JUDGEMENT

Case No. 13/2022

In the matter between:

THE JUDICIAL SERVICE COMMISSION	1st Appellant
BONGANI MALAMBE	2nd Appellant
NONTOBEKO NGUBANE	3rd Appellant
NOMBULELO VILAKATI	4th Appellant

and

THE CHAIRMAN OF THE CIVIL SERVICE COMMISSION	1st Respondent
THE PRINCIPAL SECRETARY IN THE MINISTRY OF FINANCE	2nd Respondent
THE ACTING ACCOUNTANT GENERAL	3rd Respondent
THE MINISTER FOR FINANCE	4th Respondent
THE ATTORNEY GENERAL	5th Respondent

Neutral citation: The Judicial Service Commission and 3 Others v The Chairman of the Civil Service Commission and 4 Others [2022] (13/2022) SZICA 05 (24 March 2023)

Coram: **S. NSIBANDE J.P., M. VAN DER WALT JA AND N. NKONYANE JA**

Date Heard: 01 August 2022

Date Delivered: 24 March 2023

Summary: *Appeal to Industrial Court of Appeal – Industrial Court holding that the Judicial Service Commission has no locus standi to sue and be sued in its own name and that Industrial Court has no jurisdiction in terms of Section 8(1) to grant the relief sought by appellants.*

Held – *That Industrial Court has no jurisdiction in terms of Section 8(1) and (2) to hear the Judicial Service Commission*

– *That the 2nd to 4th appellants were properly before the Industrial Court*

– *That the matter be remitted to the Industrial Court for hearing on the merits in so far as the 2nd to 4th appellants are concerned.*

JUDGMENT

INTRODUCTION AND BACKGROUND

[1] The first appellant is the Judicial Service Commission (hereinafter referred to as the "JSC,") a statutory body established in terms of **Section 159(1) of the Constitution of the Kingdom of Eswatini** and having its offices at the High Court building in Mbabane.

[2] The 2nd to 4th appellants are adult Swazi employees of the Government of Eswatini, all employed under the Accounts/Accounting Cadre.

[3] The 1st respondent is the Chairman of the Civil Service Commission, a statutory position established in terms of **Section 186 of the Constitution of the Kingdom of Eswatini** with offices situated at the Public Service Building Mbabane.

[4] The second respondent is the Principal Secretary in the Ministry of Finance with offices at the Ministry of Finance Building Mbabane.

[5] The third respondent is the Acting Accountant General with offices at the Treasury Building, Mbabane.

[6] The fourth respondent is the Minister for Finance with offices at Ministry of Finance Building, Mbabane.

[7] The respondents, in their heads of argument and in the submissions before Court pointed out that the Court *a quo* upheld two preliminary objections of the respondents – one relating to the issue of *locus standi* and the other to jurisdiction. It was the respondents' submission that the appellants confined their appeal to the ruling on *locus standi*, that their notice of appeal, their heads of argument and their argument

before this Court were all confined to the point in respect of *locus standi*, that there was no appeal against the finding that the Industrial Court had no jurisdiction to grant the relief sought by the first appellant (applicant in the *Court a quo*). It was the respondent' submission that the jurisdictional finding therefore stands and that the failure to appeal the jurisdictional finding makes the appeal purely of academic interest. It was their further submission that the appellants want the matter to be remitted back to the Industrial Court should they be successful (in terms of paragraph 43 of the appellants' heads of arguments) and that there could be no determination of the merits where the Court *a quo* has found that it has no jurisdiction to grant the relief sought by the first appellant; that there was therefore no live controversy before the *Court a quo*.

[8] Secondly, the respondents submitted that the practical effect of the jurisdictional decision is that the Court *a quo* could not make the decision on the 1st appellant's capacity to sue and be sued in its own name. It was the respondents' final submission (on the jurisdiction point) that the appellants' failure to appeal against the decision on jurisdiction means that the appeal is not competently before this Court.

It was submitted that on this basis alone the appeal stands to be dismissed.

[9] The respondents' case was that, in terms of **Section 8(1) of the Industrial Relations Act 2000 (as amended)** the *Court a quo* only has jurisdiction to *"hear, and determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of the* ***Industrial Relations Act, the Employment Act, the Workman's Compensation Act*** *or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, or between an employer or employer's association and a trade union or staff association or between an employers' association, a trade union or a staff association a federation and a member thereof."*

[10] The Court *a quo* came to the finding that *"the subject matter of this litigation has nothing to do with the purpose and objects of this Court as captured in its founding statute."*

The Court stated as follows;

"Further, that even if the Isaac Dlamini case was not binding [on] this Court, in casu no sufficient facts were averred by the Judicial Service Commission to establish the legal basis of the alleged duty to be consulted which they attributed to the First Respondent. Further, that even assuming that such legal duty were present, it is common cause that the remedy for its enforcement would not have been tenable before Court."

It was on this basis that the *Court a quo* found that it had no jurisdiction to hear the matter.

[11] This Court asked the parties to address it on **Section 8 (2) of the Industrial Relation Act 2000** and **Rule 23(2) of the Rules of the Industrial Court**. In terms of **Section 8(2) (a)** *"An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a Trade Union, staff association, an employers' association, an employees' association, a federation, the Commissioner of Labour or the Minister."*

[12] **Section 8(2)** clearly excludes the first appellant from those entitled to bring an application or to be sued before the *Court a quo, in the*

circumstances of this matter. The JSC does not fall within the category of entities listed in that section. It can therefore not legitimately bring an application before the Court. It is my view therefore that the first appellant clearly lacked the jurisdiction to bring the application before the *Court a quo*. The *Court a quo* having so found on the basis of **Section 8(1)** had to close the issue at that stage. The practical effect of that finding, as the respondent's pointed out; is that the Court *a quo* could not make any further decisions on the matter; it could not legitimately make a finding on the first appellant's capacity to sue and be sued.

But this is only true in so far as the first appellant is concerned. The second to fourth appellants are employees of the first respondent and they brought to the *Court a quo* a complaint in terms of **Section 8 (1)** of the Act. They are entitled to be heard on the merits regardless of the Court's lack of jurisdiction to hear the first appellant.

[13] It may be proper to mention that in terms of **Rule 23(2) of the Industrial Court Rules of 2007,** the respondent would have been a proper party to join in or be joined in proceedings instituted by the 2nd to 4th

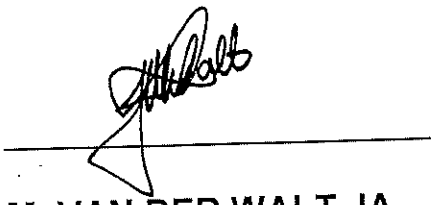
appellants as it, in my view, has a substantial interest in the subject matter and outcome of the proceedings. It is our view that the first respondent, being a receiver of **"services"** (in the form of accountants) has a substantial interest where those services are being withdrawn because the withdrawal of these services affects the first appellant in one way or the other. The first appellant would be a party joined but one against whom or in favour of whom no order would be granted.

[14] In the circumstances and for the further reasons set out above, we hold that the *Court a quo* was correct on the question of jurisdiction in so far as it concerned the first appellant. We therefore make the following order:

1. **The appeal is dismissed;**
2. **The matter is remitted to the Industrial Court for hearing on the merits in so far as it relates to the second to fourth appellants' application;**
3. **Each party is to pay its own costs.**

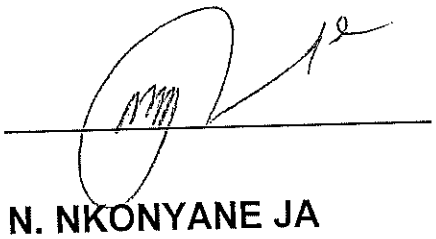
S. NSIBANDE JP

I agree



M. VAN DER WALT JA

I agree



N. NKONYANE JA

For Appellants: Mr. D. Z. Jele
(Robinson Bertram Associates)

For Respondents: Mr. M.M. Vilakati &
Mr Hlawe S.M.
(Attorney General's Office)