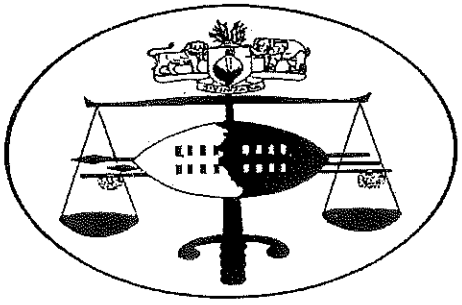

IN THE INDUSTRIAL COURT OF APPEAL OF ESWATINI

Case Number: 14/2021

In the matter between:

STANDARD BANK OF ESWATINI **Appellant**

and

FREEMAN LUHLANGA **Respondent**

NEUTRAL CITATION: ***Standard Bank of ESwatini v Freeman Luhlanga (11/2021) [2023] SZICA 9 (5 April 2023)***

CORAM: NSIBANDE JP, VAN DER WALT *et* NKONYANE JJA

HEARD: 25 October 2022

DELIVERED: 5 April 2023

Summary

Industrial Court - Intervention by Industrial Court in incomplete disciplinary proceedings – unknown in Roman Dutch common law

Industrial Court - Powers – Industrial Court enjoying no inherent, supervisory, review or like powers to restrain illegality or prevent miscarriage of justice – jurisdiction of Industrial Court is strictly as prescribed in section 8(1) of Industrial Relations Act 2000

Industrial Court - Jurisdiction – interpretation of "disciplinary action" for the purposes of the definition of "dispute" in section 2 of the Industrial Relations Act 2000 – existing law, in accordance with section 268(1) of Constitution 2005, to be construed in manner to bring it into conformity with Constitution – "unfair treatment" of workers provision in section 32(4)(d) of Constitution - wide definition of "disciplinary action" to be preferred

Industrial Court – Remedial powers - section 16(8) of Industrial Relations Act 2000 – "unfair treatment" during course of incomplete disciplinary proceedings may resort under "... otherwise disadvantaged or prejudiced contrary to a ... law relating to employment" portion of sub-section

Industrial Court - Jurisdiction – confirmed that a dispute in respect of incomplete disciplinary proceedings would be justiciable if exceptional circumstances present

JUDGMENT

Cur adv Vult

(Postea: 5 April 2023)

VAN DER WALT, JA

A BACKGROUND

[1] The respective parties are the Employee as Applicant *a quo* and Respondent on appeal, and the Employer as Respondent *a quo* and Appellant on appeal.

1.1 In terms of **Clause 1.11** of the Disciplinary Code governing the relationship between the parties (hereinafter referred to as the *"Code"*):

> *"All disciplinary action shall be taken and finalised (this including the issuance of the sanction) as soon as possible after the misconduct has been*

brought to the attention of management, in any case not later than thirty-five calendar days. This must be clearly understood not to mean, once management is of the view that a hearing must be conducted, but once the issue has come to the attention of management, in writing."

1.2 The Employee was summonsed to a disciplinary hearing and objected thereat that the right of the Employer to take steps against him had prescribed with reference to said Clause. The objection was not upheld by the Chairman and the Employee, prior to finalisation of the hearing, approached the Court *a quo* for an order against the Employer in the following terms:

"17.1 Setting aside as being wrongful and unlawful, the Respondent's action of seeking to bring disciplinary action against the Applicant through its correspondence dated 18th December 201.9

17.2 Declaration that the Respondent's power and prerogative to institute disciplinary action against the Applicant on the allegations contained in its letter dated 18th December 2019 became prescribed on the 9th December 2019."

[2] The Employer raised a Special Plea, the substance of which was that the Conciliation, Mediation and Arbitration Commission ("**CMAC**") did not have jurisdiction to conciliate on the dispute, and the Industrial Court did not have jurisdiction to determine the dispute, until such a time as the disciplinary hearing has run its course and a final outcome has been pronounced.

[3] The Court *a quo*, after consideration of *inter alia* the applicable Disciplinary Code dismissed the Special Plea and ordered that the matter proceed to the merits.

[4] In arriving at its ultimate conclusion that it was possessed of the necessary jurisdiction to intervene in incomplete disciplinary proceedings, the Court *a quo inter alia*:

4.1 Regarded the wide definition of "***disciplinary action***" as defined in the relevant Code, to be the same as "***disciplinary action***" for purposes of the definition of ***"dispute"*** in part **(c)** of **section 2** the **Industrial Relations Act 2000** (hereinafter referred to as the **"IRA;"**)

4.2 Seemed to suggest that the relevant clause of the Code amounts to a ***"benefit"*** under a collective agreement, within the definition of a ***"dispute"*** in **section 2** of the IRA, in part **(a)** thereof;

[5] Dissatisfied by the outcome *a quo*, the Employer noted an appeal on grounds formulated as follows:

"*Notice of Appeal*

1. *The court a quo erred in law in assuming jurisdiction and seeking to determine the issue of time bar as a dispute, when the disciplinary hearing had not run its course. The court a quo ought to have held that it can only determine the matter once the disciplinary hearing has run its course.*

2. *The court a quo erred in holding that it had the requisite jurisdiction to intervene and interfere in the incomplete disciplinary hearing, in the absence of any cogent and exceptional facts. The court ought to have held that it could only intervene and interfere in an incomplete disciplinary hearing where there exist exceptional circumstances.*

3. *The court a quo held [sic] in holding that the interpretation of clause 1.11 of the disciplinary code was justiciable prior to the completion of the disciplinary hearing.*

4. *The court erred in finding that CMAC did have jurisdiction to conciliate over the issue pertaining to the interpretation of clause 1.11."*

B INTERVENTION IN INCOMPLETE DISCIPLINARY HEARINGS REVISITED

[6] The chronological and historical position *re* such intervention, and without enquiring into the correctness or consistency of relevant case law, was set out as follows by the Supreme Court in ***Nedbank Swaziland Ltd v Phesheya Nkambule and Four Others:***[1]

> *"[27] I agree with the submission by Mr Jele, counsel for the Appellant, that the prevailing position of our law which persisted as at the time of the promulgation of section 39 (2) of the Employment was that the institution of court proceedings during the tenancy of a disciplinary hearing so as to interfere with an*

[1] *(70/2020)[2021] SZSC15 (1st September 2021)*

incomplete disciplinary process was not normal. The employer was at that stage entitled to exercise managerial authority or managerial prerogative with the employee being entitled to challenge only the outcome of a disciplinary process he was unhappy with as opposed to an ongoing disciplinary process. A typical case in point upholding or emphasizing that position was that of ***Bongani Mashwama and Others v Swaziland Electricity Board, Industrial Court of Appeal Case No. 21/2000.***

[28] The effect of a disciplinary process not susceptible to a challenge in Court during its tenancy was obviously that it would be commenced and concluded within one month hence the promulgation of section 39(2) of the Employment Act of 1980.

[29] ***It is a fact that the said position of our law has changed over the years as can be seen from the position as espoused by among other judgments, that of Sazikazi Mabuza vs Standard Bank Swaziland and Another, Industrial court case no. 311/2001[2] which introduced, in this jurisdiction, the institution of proceedings challenging an incomplete disciplinary process in "exceptional circumstances".*** *[3]It was possibly the fluidity of the phrase "exceptional circumstances" that has seen the growth in matters challenging incomplete disciplinary processes of late with the attendant extension of the disciplinary process period and the related increase in the period of suspension of an employee pending the finalization of a disciplinary process. The change in the earlier position of the law, should bring with it the need to scrutinize the circumstance of each particular matter to determine whether a delayed conclusion of a disciplinary process as a result of the institution of proceedings should be construed against the employer or the employee."*

[7] With reference to the Employer's Special Plea *a quo* and the first Ground of Appeal, an enquiry arose in the mind of this Court as to whether the cases permitting intervention in incomplete disciplinary hearings, and in particular the Industrial Court case of ***Sazikazi Mabuza v Standard Bank Swaziland and Another***[4] (hereinafter referred to as the "***Mabuza*** judgment") had been correctly decided.

[2] Delivered 10 August 2007

[3] Underlining and emphasis Court's own

[4] Industrial Court Case No 311/2001

[8] At the commencement of the hearing the Court conveyed the following perspectives to Counsel:

8.1 The Roman Dutch common law shall be the law applicable in eSwatini save insofar as may be modified by statute. [5]

8.2 The principle of legality includes the common-law right of natural justice and its component of procedural fairness.[6] Procedural fairness under the common law was reflected in the tenets of natural justice that embodied two fundamental principles, the right to be heard (***audi alteram partem***) and the rule against bias (***nemo iudex in sua causa***), [7] which form the procedural cornerstones of modern labour law.

8.3 No Roman Dutch law permitting intervention in incomplete

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[5] Section 252 of the Constitution 2005 preceded by **ESwatini Proclamation No 11 of 1905**

[6] See e.g. **Twala v MEC For Education, Eastern Cape and Others 2016 (2) SA 425 (ECB),** Paragraph [18]

[7] See **South African Jewish Board of Deputies v Sutherland NO And Others 2004 (4) SA 368 (W),** Paragraph [32] and the authorities cited therein

disciplinary hearings, or the granting of any relief in respect thereof, could be located by the Court. Nor was such referred to in any of the cases under consideration in the ***Mabuza*** judgment or in the cases referred to in the parties' Heads of Argument.

8.4 Absent such Roman Dutch authority, if a right to seek intervention in incomplete disciplinary hearings and consequent relief exists, it would have to be established through statute, and the applicable statute law then would be indicated as the point of departure. The Industrial Courts are creatures of statute and bound by their dictates, in particular of those of their governing statute being the Industrial Relations Act 2000 (hereinafter referred to as the **"IRA."**)

8.5 Questions arising with reference to the provisions of the **IRA** would include:

8.5.1 Whether or not the powers of the High Court referred to in **section 8(3)**, and for purposes of the **IRA**, include the inherent

power to restrain an illegality or prevent a miscarriage. The sub-section reads:

"In the discharge of its functions under this Act, the Court shall have all the powers of the High Court, including the power to grant injunctive relief".

8.5.2 Whether or not the Industrial Court may concern itself only with matters provided for in the IRA and if so, if the reference in **section 8(4)** to "***In deciding a matter***" is to be interpreted as a "***matter***" over which it has jurisdiction in terms of **section 8.** **Section 8(4)** reads:

"8(4) In deciding ***a matter****, the Court may make any other order it deems reasonable which will promote the purpose and objects of this Act."*

8.5.3 Whether or not **section 16** of the **IRA** caters for all the types of disputes in part (c) of the definition of "***dispute***" in **section 2**;

8.5.3.1 **Section 2:** "*dispute*" includes-

"...a grievance, a grievance over a practice, and means any dispute over the —
(a) ***entitlement of any person or group of persons to any benefit under an existing collective agreement,*** *Joint Negotiation Council agreements or Works Council agreements;*
(b) existence or non-existence of a collective agreement or Works Council agreement and Joint Negotiation Council agreement;
(c) ***disciplinary action, dismissal****, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons;*[1]
(d) recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment;
(e) ***application or the interpretation of any law relating to employment****; or*
(f) ***terms and conditions of employment of any employee or the physical conditions under which such employee may be required to work;***

8.5.3.2 **Section 16** is titled *"Remedial powers of the Court in cases of dismissal, discipline or other unlawful disadvantage."* Dismissals are dealt with in **subsections (1)** to (7) and (9) and "***discipline or other unlawful disadvantage***" in **16(8)**, which reads:

> *"(8) Where the Court, in settling any dispute or grievance, finds that the employee has been disciplined or otherwise disadvantaged or prejudiced contrary to a registered collective agreement or any other law relating to employment, the Court shall make an order granting such remedy as it may deem just."*

8.5.4 What the meaning is to be attached to the phrase "***disciplinary action***" in the "***dispute***" definition in **section 2** and whether or not it is confined to completed disciplinary hearings.

[9] Counsel was afforded the opportunity to file Supplementary Heads of Argument in respect of the above, which Counsel did. Thereafter these issues were fully argued and Counsel further abided by the remainder of the contents of the respective Heads of Argument not expressly dealt with in the course of their addresses.

C SUMMARY OF SUBMISSIONS BY COUNSEL

C.1 ON BEHALF OF EMPLOYER (APPELLANT)

[10] Mr Z Jele contended that such intervention cannot be supported, not only in law but also in that employers hold a prerogative to discipline employees and the act of interfering in incomplete disciplinary proceedings constitutes an illegitimate intrusion into the employer's disciplinary jurisdiction. The intervention by courts in such incomplete proceedings undermines the statutory dispute resolution system and such intervention frustrates the expeditious resolution of labour disputes. The Court was referred to the statement by the South African Constitutional Court in **Gcaba vs Minister of Safety and Security and Others** that:[8]

> *"Once a set of carefully crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system"*

[8] [2010] (3) ILT CC

[11] As regards **jurisdiction**, Mr Jele submitted, the Industrial Court in the ***Mabuza*** [9]matter purported to derive jurisdiction to intervene in incomplete disciplinary hearings from **section 8(4)** (i.e., in deciding a matter the Court may make any other order it deems reasonable which will promote the purpose and objects of the **IRA**) read with **section 4(1)(b)** which provides as follows:

"4. (1) The purpose and objective of this Act is to —

(a)promote harmonious industrial relations;
(b) promote fairness and equity in labour relations;
...[10]."

11.1 Mr Jele argued that **section 8(4)** does not confer jurisdiction but only speaks of orders the court may issue once it has acquired the requisite jurisdiction; the emphasis further was that there is a fundamental difference between jurisdiction and powers.

11.2 As far as **section 4(1)(b)** is concerned, the objects of the IRA include the need to protect both employer and employee rights within the realm of the framework of industrial relations. The

[9] In Paragraph 35 thereof
[10] Abbreviation Court's own

concerns set out above, Mr Jele submitted, demonstrates that such intervention does not fulfil the objectives of the **IRA.**

[12] As regards ***powers*** as opposed to jurisdiction:

12.1 The South African **Labour Relations Act 1995** (hereinafter referred to as the "**LRA**") in **section 158** thereof extensively sets out the powers of the Labour Court and there is no equivalent provision in the **IRA**; the **IRA** in its **section 16** deals with remedial powers in the case of dismissal, discipline or other unlawful disadvantage.

12.2 Section **8(3)** of the **IRA**, set out above, deals with the exercise of powers of the High Court.

12.2.1 The **LRA** in **section 151(2)** thereof stipulates that:

> *"The Labour Court is a superior court that has authority inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to the matters under its jurisdiction."* [11]

12.2.2 Mr Jele submitted that superior courts intervene on account of their inherent powers and this means that the Labour Court is expressly clothed with supervisory powers over the conduct of proceedings in labour matters whereas the Industrial Court does not have ***inherent powers***; the source of the Industrial Court's power is the enabling legislation and **section 8(3)** is explicit and provides for parallel powers only *"... in the discharge of its functions under the Act."*

[13] The next topic concerns whether a grievance or compliant about incomplete disciplinary proceedings constitutes a ***"dispute"*** under **section 2** and more in particular, under the concept ***"disciplinary action"*** in (c).

13.1 Mr Jele referred to the following grammatical definitions in support of his submission that it refers to completed proceedings:

> *"A disciplinary action is a reprimand or corrective action in response to employee misconduct, rule violation, or poor performance. Depending on the severity of the case, a disciplinary action can take different forms, including, a verbal warning, a written warning, a poor performance review, demotion or termination,"*[12] and *"Disciplinary actions means any action that can be taken on the completion of /during the investigation proceedings including but not limiting to a warning, imposition of a fine, suspension from*

[12] Source not stated

official duties or such action as is deemed to be fit considering the gravity of the matter." [13]

13.2 It behoves one to state at this juncture that there are other definitions out there which encompass the whole spectrum of steps pertaining to disciplinary proceedings and which do not confine the concept to completed proceedings, such as is reflected in the quotations by the Court *a quo* from the relevant Code.

13.3 Mr Jele proceeded to deal with the wording of the **IRA** in **section 16 (8)** which provides for relief where "... ***the employee has been disciplined or otherwise disadvantaged or prejudiced...***" and submitted that this means relief only once the (disciplinary) process had been completed, as is the case with the remainder of **section 16** which pertains to dismissals. Had this not been the case, the submission went, the present tense would have been employed.

[14] In line with a plea that dispute resolution mechanisms should be kept sacrosanct, Mr Jele submitted that in cases of review

[13] "Law Insider"

internal remedies must first be exhausted; by analogy, employees usually have a right of appeal once the disciplinary hearing had been concluded.

[15] Mr Jele also made reference to the judgment of this Court in the 2001 case of ***Swaziland Electricity Board v Mashwama Michael Bongani & 2 Others***[14] (hereinafter referred to as the "***Mashwama*** judgment") which Mr Jele submitted is as a clear precedent *contra* such intervention and by which the Industrial Court in the ***Mabuza*** matter was bound, but which the Industrial Court did not refer to or follow in the ***Mabuza*** judgment. This judgment will be reverted to later hereunder.

C.2 ON BEHALF OF EMPLOYEE (RESPONDENT)

[16] Mr A Dlamini strenuously argued to the contrary.

[14] Industrial Court of Appeal Case No 21/2000 (10th February 2001)

[17] As regards **section 8(3)**, Mr Dlamini submitted that the High Court has jurisdiction to prevent any illegality or miscarriage of justice and that the appropriate interpretation of this sub-section is that the Industrial Court may do so in the same way as the High Court.

[18] As regards the concept of ***"dispute,"*** Mr Dlamini's submission was that the definition of "*dispute*" in **section 2** is very wide in that it reads: *"... means any dispute over the –..."* with the emphasis on the word "**any.**"

18.1 Further, that the issue *a quo* was the interpretation of a clause of the relevant Disciplinary Code, which brings it within the ambit of a ***"dispute"*** with reference to **(a)** and/or **(e)** in **section 2** i.e., ***"entitlement of any person or group of persons to any benefit under an existing collective agreement"*** and ***"application or the interpretation of any law relating to employment"*** because the parties in law are contractually bound by the terms of any collective agreement. Mr Dlamini also referred to **section 58(2)** which make provision for an unresolved dispute that "...***concerns the***

application to any employee of existing terms and conditions of employment" which would include the interpretation of a Disciplinary Code.

18.2 All of the above, the submission went, operates against a bar to intervention in incomplete proceedings.

[19] As regards **section 16(8),** which refers to a person who has been disciplined already, Mr Dlamini argued that the wide definition of *"dispute"* would prevail and intervention would still be justified. Put differently, the Court understood Mr Dlamini to contend that **section 16(8)** is not restrictive.

[20] In addition, Mr Dlamini submitted, a constitutional right to a fair hearing in terms of **section 21** of the **Constitution 2005** would afford some protection for purposes of intervention. **Section 21(1)** reads:

> *"21(1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law."*

[21] As far as ***jurisdiction*** is concerned, Mr Dlamini contended that the parties, through their collective agreement, can confer jurisdiction through the doctrine of submission should the Court not have jurisdiction, i.e., a person may elect to be bound by a decision of a court which originally had no jurisdiction over him.

[22] Suffice it to state, for purposes of this judgment, that said **section 21(1)** pertains to a right to a fair and speedy public hearing and this section in our opinion cannot serve as a passport to intervention in incomplete proceedings before another person, body or court and as for submission, where a Court has no jurisdiction to entertain a particular kind of action, submission by one or both parties will not confer jurisdiction. [15] These aspects therefore do not require any further consideration.

[23] Mr Dlamini further fully supported the *ratio decidendi* in the ***Mabuza*** matter, which was predicated on **sections 8(4)** read with

[15] See for instance American Flag PLC v Great African T-Shirt Corporation CC: In Re Ex Parte Great African T-Shirt Corporation CC 2000 (1) SA 356 (W) at 375 and the authorities cited therein

4(1)(b). The Industrial Court, he submitted, balanced the scales of justice by including the words *"grave injustice"* and *"where justice may not otherwise be obtained."*

[24] As for the ***Swaziland Electricity Board v Mashwama Michael Bongani & 2 Others*** case, Mr Dlamini submitted that it can be open to more than one interpretation. Mr Dlamini also referred to the judgment of this Court in ***Bhekiwe Dlamini v Swaziland Water Services Corporation***[16] (hereinafter referred to as the ***"Bhekiwe Dlamini*** judgment") which was delivered subsequent to the ***Mashwama*** case and wherein room for such intervention clearly had been acknowledged.

D ANALYSIS

D.1 ROMAN DUTCH COMMON LAW

[25] Unfair dismissal in any manner, shape or form, was not

[16] (13 of 2006) [2006] SZICA 9 (19 September 2006)

recognised or known in Roman Dutch common law. An employer could fire an employee for a bad reason or for no reason at all provided the dismissal was on notice, and the employer did not have to hear the employee's side of the story before he could dismiss him, all of which changed with the advent of legislation requiring *inter alia* fair reasons for termination (**Employment Act 1980**) and providing redress for substantial and procedural unfairness (**section 16** of the **IRA.**)[17]

[26] As is evident from the above, a disciplinary hearing was not a Roman Dutch law prerequisite, from which it follows that any procedural aspects relating to modern day disciplinary hearings are part and parcel of subsequent statutory creation.

[27] The South African model of intervention in incomplete disciplinary proceedings was imported into our law and the issue for current determination, as previously indicated, is whether this

[17] Compare e.g. Modise and Others v Steve's Spar, Blackheath 2001 (2) SA 406 (LAC), Paragraphs [16] and [17]; Fedlife Assurance Ltd v Wolfaardt 2002 (1) SA 49 (SCA), Paragraph [13] and Steenkamp and Others V Edcon Ltd 2016 (3) SA 251 (CC), Paragraph [105] in respect of the parallel evolution of statutory *"unfair labour practice"* in South Africa

adoption was sound in law. Also, as will be seen *infra*, there are two disparate Industrial Court of Appeal judgments on the issue of such intervention.

D.2 NOTABLE ESWATINI CASE LAW

[28] Ordinarily a court is bound by precedent (***stare decisis***) but not in the case of ***per incuriam*** i.e., where the Court failed to apply a relevant provision or ignored a binding precedent; or in the case of a judgment made ***sub silentio*** i.e., without notice being taken or without making a particular point of the matter in question. In Sealandair **Shipping and Forwarding v Slash Clothing Co (Pty) Ltd**[18] **1987 (2) SA 635 (W)** the following statement by "***Cross on Precedent in English Law***" was cited with approval:

> "*In some cases, the court may make no pronouncement on a point with regard to which there was no argument, and yet the decision of the case as a whole assumes a decision with regard to the particular point. Such decisions are said to pass sub silentio, and they do not constitute a precedent.*"

[18] 1987 (2) SA 635 (W) at 259

D.2.1 INDUSTRIAL COURT

[29] The judgment which is perhaps the most demonstrative of the above importation of foreign law, is the ***Mabuza*** judgment wherein the Industrial Court expressed itself as follows: [19]

"30. *The attitude of the courts has long been that it is inappropriate to intervene in an employer's internal disciplinary proceedings until they have run their course, except in exceptional circumstances.*

This approach arises from a principle long established in our courts, that as a general rule a superior court will not entertain an appeal or application for review, when such appeal or review seeks to interfere with uncompleted proceedings in an inferior court.

Lawrence v Assistant Magistrate, Johannesburg 1908 TS 525;
Walhaus v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A);
Ismail & Others v Additional Magistrate, Wynberg & Another 1963 (1) SA (1) A.

31. *This general rule is however subject to a limited qualification. In* ***Walhaus' case***[20] ***(supra) at 119H-120E*** *the court held:*

"By virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief by way of review, interdict or mandamus – against the decision of a Magistrates Court given before conviction. This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances .... and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained ...."

32. ***The principle in the Walhaus case (supra) has been extended to apply equally in civil proceedings and in the labour law field***

Newell v Cronje 1985 (4) SA 692 E at 699;
Towles, Edgar Jacobs Ltd v President, Industrial Court and Others (1986) 7 ILJ 496 (c) at 499 I-J;
Van Wyk v Midrand Town Council & Others 1991 (4) SA 185 (W);
Ndlovu V Transnet Ltd t/a Portnet (1997) 18 ILJ 1031 (IC);
Moropane v Gilbeys Distillers & Vinters Ltd (1998) 19 ILJ 635 (LC);
Police & Prisons Civil Rights Union v Minister of Correctional Services and Others (1999) 20 ILJ 2416 (LC);
Mhlambi v Matjhabeng Municipality v Another (2003) 24 ILJ 1659 (O).

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[19] Emphasis and underlining Court's own

[20] **1959 (3) SA 113 (A)**

33. *In **Van Wyk v Midrand Town Council (supra at 189 C-D) Lazarus J** stated:*

"There is no difference between the principles applicable to interfering with criminal proceedings in a lower court and proceedings in a disciplinary enquiry before a disciplinary board."

34. ***We do not think that any distinction can or should be drawn between statutory disciplinary tribunals and private disciplinary enquiries in the application of the Walhaus principles. The notion that the Industrial Court may intervene in uncompleted disciplinary proceedings "in rare cases where grave injustice might otherwise result or where justice might not by other means be obtained" appeals to one sense of justice.***

35. ***The intervention of the court, though in the nature of a review, is based upon the court's power to restrain illegalities and promote fairness and equity in labour relations***

Van Wyk v Midrand Town Council & Others (supra) 187-8
Section 8 (4) of the Industrial Relations Act 2000 as read with Section 4 (1) (b).

36. *Whether the court will intervene depends on the facts and circumstances of each particular case. It is not sufficient merely to find that the chairperson of the disciplinary enquiry came to a wrong decision. In order to justify intervention the court must be satisfied that this is one of those rare or exceptional cases where a grave injustice might result if the chairperson's decision is allowed to stand. (see **Weber and Another v Regional Magistrate, Windhoek & Another 1969 (4) SA 394 (SWA) at 399 D).***"

[30] This 2007 Industrial Court judgment is oft cited in support of intervention in incomplete disciplinary hearings and the *ratio decidendi*[21] with reference to **sections 8(4)** and **4(1)(b),** reads that:

"The intervention of the court, though in the nature of a review, is based upon the court's power to restrain illegalities and promote fairness and equity in labour relations."

[21] Paragraph 35

[31] Preliminary observations by the Court to which Counsel's attention was drawn, include:

31.1 The only reference to the **IRA** in this judgment is to **section 8(4)** read with **4(1)(b);**

31.2 There is no reference to the definition of ***"dispute"*** in **section 2** or to the remedial powers of the Industrial Court under **section 16**;

31.3 The Industrial Court case of ***Simelane v National Maize Corporation***[22] referred to therein, does not all refer to **IRA** or any of its provisions.

31.4 There are no palpable references to equivalents or comparative concepts of ***"dispute"*** or **section 16** in any of the cases referred to in the ***Mabuza*** judgment or in the judgment itself.

[22] *Industrial Court Case No. 453/06*

[32] Decisive reliance was placed on South African law. As previously pointed out by this Court, there are significant differences between the respective labour law fields of eSwatini and South Africa, including jurisdiction, and South African case law should be approached with due circumspection.

32.1 The **LRA** does not contain a concise ***jurisdiction*** provision, as is the case with **section 8(1)** of the **IRA**[23] which under the heading "***Jurisdiction***" reads that:

> *"8(1) The Court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employers' association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof."*

32.2 In contrast, **section 157(1)** of the **LRA** is couched in very non-specific terms:

[23] See section 157 of the LRA

"Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."

32.3 The South African Labour Court and High Courts have concurrent jurisdiction in some instances. See for instance **Mhlambi v Matjhabeng Municipality v Another** referred to in Paragraph 32 of the ***Mabuza*** judgment.

32.4 The **LRA** does not contain any reference to discipline by the employer except in the Code of Good Practice.[24]

32.5 As regards the South African cases cited in the ***Mabuza*** judgment many relate to criminal matters and the Labour Court cases referred to therein too are of limited value due to the material differences in the respective labour laws of eSwatini and South Africa.

[24] Schedule 8. A copy of the predecessor of the 1995 Act being the Industrial Conciliation Act 1956 renamed the Labour Relations Act 1956, could not be located by the Court.

[33] Another pertinent local case is the one of ***Graham Rudolph v Mananga College and Another***[25] wherein the following was stated with reference to the (South African) concept of ***"unfair labour practice"***:

> *"46. The court has often expressed its reluctance to interfere with the prerogative of an employer to discipline its employees or to anticipate the outcome of an incomplete disciplinary process.* ***See Bhekiwe Dlamini v Swaziland Water Services Corporation (ICA Case No.13/2006); Thobile Bhembe v Swaziland Government and Others (IC Case No. 5/2001); Swaziland Electricity Board v Michael Bongani Mashwama & Others (ICA Case No. 21/2000).*** *At the same time, the court will interfere to prevent an unfair labour practice which may cause the Applicant irreparable harm. The outcome of the disciplinary hearing will have a significant impact on the Applicant's future career as a school principal. Having resigned from the college, the result of the enquiry will determine whether he leaves with the stigma of dishonesty. He is entitled to expect a fair hearing under the chairmanship of an independent person whose independence and impartiality is beyond suspicion."*

D.2.2 INDUSTRIAL COURT OF APPEAL

[34] During the course of arguments before us two judgments of this Court emerged front stage, to wit in the aforementioned 2001 ***Swaziland Electricity Board v Mashwama Michael Bongani & 2 Others*** case and the 2006 ***Bhekiwe Dlamini v Swaziland Water Services Corporation*** case. These two matters are distinguishable from each other:

[25] **Case No 94/2007** referred to in Paragraph 39 of the ***Mabuza*** judgment

34.1 The ***Mashwama*** case was decided on the basis that the requirements for a final interdict had not been met and that the application was premature:

"The respondents contend that since the decision to institute disciplinary proceedings against them arises out of the investigations of the board of enquiry it is extremely prejudicial and unfair to conduct a disciplinary enquiry, while the procedures of the board are under scrutiny of the commission of enquiry. On this account they contend the disciplinary hearings should be held in abeyance until the commission has presented its report to the Minister. This submission of "prejudicial and unfair" conduct (for a submission it is, and not a statement of fact, nor based on fact) will require examination in the later course of this judgement."[26]

*"**The relief claimed is essentially a temporary interdict preventing the appellant from continuing with the disciplinary enquiries until the commission of enquiry has made its report to the Minister.** The appellant replied to this affidavit at length. In order to avoid considerations of the factual findings of the court a quo I have approached this matter purely on the basis as to whether a case was made out for the interdicts granted by that court, in the founding affidavit."*[27]

"On a number of occasions the court a quo has reaffirmed that it would not interfere with management's right to hold a disciplinary hearing. See Swaziland Engineering Metal Automobile and Allied Workers Union v Tracar Simon Mvubu v Ngwane Mills (Pty) Ltd.

***Cases of unfairness in the <u>conclusions</u> of disciplinary tribunals are dealt with by the court a quo as and when they arise.** At present no circumstances are revealed disclosing unfairness and the disciplinary hearing have as yet not commenced. How then can it be said that the proceedings are unfair.*

On the other hand I can see no competing right vesting in the respondents to prevent the holding of a disciplinary enquiry. The Respondents have not shown how the findings of the commission, when and if reported to the Minister, and when published, can be expected to counter the evidence of misconduct alleged on the part of the Respondents, of which management of the appellant is possessed.[28]

"In this instance the application was entirely premature and there is no reasonable ground for apprehension of any prejudice or damage to them.

Furthermore the respondents have an alternative remedy should the disciplinary board find against them and should on the basis of such findings the appellant decides to punish them in some way even if this amounts to dismissal. The remedy lies in seeking appropriate relief from the industrial court. In this sense the holding of the enquiries can occasion them no irreparable loss."[29]

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[26] At p.4

[27] At p.32

[28] At pp.34/35

[29] At p.36; Emphasis Court's own

34.2 The ***Bhekiwe Dlamini*** judgment was decided on the basis that intervention was not justified because no rare or exceptional circumstances were present, with reliance on a South African Labour Court case.

34.2.1 Judgment in the ***Bhekiwe Dlamini*** case was delivered on the 19 September 2006 and pre-dates the ***Mabuza*** judgment dated the 10th August 2007; it was not referred to in the ***Mabuza*** judgment and was only brought to our attention *via* the supplementary Heads of Argument.

34.2.2 This Court held in the ***Bhekiwe Dlamini*** matter that:

> *"[13] All the difficulties arising out of the charges intended to be preferred against the appellant, time limits and the procedures to be* ***followed are issues that lie clearly within the ambit of the disciplinary hearing. It is well established law that this court will not normally usurp the functions of an internal disciplinary enquiry. It will only do so under rare and exceptional circumstances****. These rare and exceptional circumstances would be present where the disciplinary enquiry constitutes an interference with the activities of a trade union.*
>
> *It is my considered view that the present matter is not one where this court can justifiably intervene. The appellant will have ample opportunity to raise its objection before a disciplinary hearing. See in this regard* ***SA COMMERCIAL CATERING AND ALLIED WORKERS UNION VS TRUWORTHS 1999 20 TLJ 639 LC****. This court shares the sentiments expressed in that case; in view of the attitude this court is adopting concerning the order made by the court a quo in its paragraph (33) of its judgment."*

[35] The ***Mashwama*** judgment suggests room for intervention should all the requirements for the interdict sought be met and, in our view, did not establish a precedent *per se* barring intervention in incomplete disciplinary proceedings. The ***Bhekiwe Dlamini*** judgment does not refer to the ***Mashwama*** judgment or to any other eSwatini case and on the face of it creates precedent permitting intervention under rare and exceptional circumstances.

35.1 In addition to being distinguishable, the two judgments are not reconcilable.

35.2 Neither judgment refers to any provision in the **IRA** and in particular, to the definition of ***"dispute"*** in **section 2** and the remedial powers of the Industrial Court under **section 16** do not appear to have enjoyed any mention or consideration.

D.3 *CAPITA SELECTA*

[36] Section 4(2) charges that:

> ***"Any person applying or interpreting any provision of this shall take into account and give meaning and effect to the purposes and objectives referred to in subsection (1) and to the other provisions of this Act."***

[37] The pertinent provisions of the IRA in holistic context therefore require closer scrutiny mindful of the current canons of interpretation expounded in for instance **Natal Joint Municipal Pension Fund v Endumeni Municipality,** [30] namely that not only the language employed by the Legislature should be taken into account; the proper approach would be to also look at the context, the circumstances under which the provision came into being and all the surrounding facts. The cited portion of the Headnote reads:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in light of all*

[30] 2012 (4) SA 593 (A)

these factors. The process is objective, not subjective. A sensible meaning to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to and guard against the temptation to substitute what they regard as, reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

D.3.1 WHETHER OR NOT THE POWERS OF THE HIGH COURT REFERRED TO IN SECTION 8(3), AND FOR PURPOSES OF THE IRA, INCLUDE THE INHERENT POWER TO RESTRAIN AN ILLEGALITY OR PREVENT A MISCARRIAGE OF JUSTICE

D.3.1.1 "*In the discharge of its functions...*"

[38] Section 6(1) provides that:

> ***"6. (1) An Industrial Court is hereby established with all the powers and rights set out in this Act or any other law, for the furtherance, securing and maintenance of good industrial or labour relations and employment conditions in Swaziland."***

[39] Section 8(3) is preceded by **section 8(1)** which defines the parameters of the Industrial Court's exclusive jurisdiction as:

> *"...**to hear, determine and grant any appropriate relief** in respect of an application, claim or complaint or infringement of any of the provisions of this, the Employment Act, the Workmen's Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law..."*

[40] **Section 8(4)**, as seen above, provides:

> *"8(4) In deciding* ***a matter****, the Court may make any other order it deems reasonable which will promote the purpose and objects of this Act."*

[41] As regards "***appropriate relief***" and as mentioned previously, a right to seek intervention and consequent relief in incomplete disciplinary hearings was unknown in Roman Dutch law.

[42] **Section 16** is titled ***"Remedial powers of the Court in cases of dismissal, discipline or other unlawful disadvantage"*** and **section 16(8)** expressly provides for relief where an employee ***"has been disciplined"*** contrary to an applicable agreement or law. There is no reference to a disciplinary hearing that is in process.

D.3.1.2 "*... all the powers of the High Court*"

[43] It can be safely assumed that **section 8(3)** is to be read in the context of the **IRA** and is not intended as an automatic superimposition of the sum total of the powers of the High Court, which would include the High Court's statutory powers of appeal

and supervisory powers including review and powers to determine constitutional matters.

[44] The jurisdictional provision articulated in **section 8(1)** is generally referred to as conferring "***exclusive jurisdiction***" by the Industrial Court over labour matters. This, however, *strictu sensu* only holds true in respect of matters expressly provided for in the **IRA**:

D.3.1.2.2 Inherent powers

[45] The ***inherent power*** of a High Court to restrain illegalities, is exercised by way of review, interdict or mandamus. [31]

[46] A High Court's power of review and power to intervene in incomplete proceedings, derives from a supervisory power:

[31] Compare the Wahlhaus and Van Wyk (at 187I/188A) cases referred to in the ***Mabuza*** judgment

46.1 As was held in **Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission:**[32]

"In the very nature of a power of review the Court exercises its inherent powers within its own area of jurisdiction in respect of decisions taken by its own incolae. Furthermore, review proceedings are entirely different to appeal proceedings such as those discussed in Estate Agents Board v Lek 1979 (3) SA 1048, since by review the Court is exercising an inherent supervisory power in respect of the decision taken, eg, by statutory bodies within its jurisdiction. It is for instance inherent in that power that the Court may call upon the body in question to account to it."

46.2 It was held as follows by the South African Supreme Court of Appeal in **Magistrate, Stutterheim v Mashiya:** [33]

"[13] That the higher Courts have supervisory power over the conduct of proceedings in the magistrates' courts in both civil and criminal matters is beyond doubt. This includes the power to intervene in unconcluded proceedings. This Court confirmed more than four decades ago that the jurisdiction exists at common law."

[32] 1982 (3) SA 654 (A) at 658I/659A
[33] 2004 (5) SA 209 (SCA) at 215

[47] As for the Industrial Court, the Supreme Court in ***Ministry of Tourism and Environmental Affairs & Another v Stephen Zuke & Another*** referred to above, authoritatively held to the effect that the Industrial Court does not review or sit as court of review but only sits as a court of first instance to determine disputes under the **IRA.**

47.1 The **IRA** only provides for one instance of review by the Industrial Court, being in **section 27(8)** which provides for review of a decision of the Commissioner of Labour in respect of registration of an organization, which is not a matter as between employer and employee.

47.2 Any cases referring to "*review*" by the Industrial Court or seeking to draw an analogy to the High Court's power of review, including as regards alleged procedural irregularities, should therefore be regarded with extreme circumspection.

D.3.1.3 "*...including the power to grant injunctive relief*"

[48] This is the less problematic portion of the subsection; the power to grant ***injunctive relief*** is a simple and straight forward reference to ***interdicts*** *per se.* It is trite that interdicts are either mandatory (i.e., a mandamus) or prohibitory in nature i.e., ordering a party to do something or to refrain from doing something and further, can be *interim* or final.

[49] The basic requirements are restated in for instance ***Tsabedze and Others v Swaziland Provident Fund and Others*** [34] and ***Indvuna Wilson Mavimbela v Petros Dvuba & 5 Others***[35]to be:

49.1 ***Interim interdict*** – (1) *prima facie* right i.e., a right which though *prima facie* established is open to some doubt; (2) A well-grounded apprehension of irreparable harm if the *interim* relief is not granted and the applicant ultimately succeeds in establishing his right; (3) that a balance of convenience favours the granting of *interim* relief; and (4) that the applicant has no other satisfactory remedy;

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[34] **(26 of 2011) [2011] SZSC 30 (30 November 2011); Paragraphs [12] to [14]**
[35] ***(2131/12) [2013] SZHC173 (9 August 2013)***

49.2 ***Final interdict*** – (1) a clear right; (2) an injury actually committed or reasonably apprehended and (3) the absence of an adequate alternative remedy.

[50] For current purposes, the only ***general*** limitation would be that the granting of interdicts is confined to disputes recognised by the **IRA** over which the Industrial Court has jurisdiction, and which would entitle an aggrieved party to pursue appropriate remedial relief within the confines of the **IRA.**

[51] As for ***incomplete disciplinary proceedings***, an employee may still be found not guilty or if found guilty, may still exhaust internal remedies such an internal appeal, which means that the requirements of irreparable harm and/or absence of adequate alternative remedy are unlikely to be capable of being met. This *prima facie* lends support to a conclusion that the **IRA** did not intend to occupy itself with incomplete disciplinary proceedings.

D.3.2 WHETHER OR NOT THE INDUSTRIAL COURT MAY CONCERN ITSELF ONLY WITH MATTERS PROVIDED FOR IN THE IRA AND IF SO, IF THE REFERENCE IN SECTION 8(4) TO "*IN DECIDING A MATTER*" IS TO BE INTERPRETED AS A "*MATTER*" OVER WHICH IT HAS JURISDICTION IN TERMS OF SECTION 8

[52] The indicated answer to this question is that the Industrial Court may only consider a matter over which it enjoys jurisdiction and it only enjoys jurisdiction over matters provided for in the **IRA**.

D.3.3 THE APPLICATION OF SECTION 16 *VIS-À-VIS* THE DEFINITION OF "*DISPUTE*" IN SECTION 2

[53] **Section 16** provides for remedial powers "*... in cases of dismissal, discipline or other unlawful disadvantage.*" The section contains nine (9) sub-sections of which all except **16(8)** deals with dismissals; **section 16(8)** caters specifically for instances:

> "*Where the Court, in settling any dispute or grievance, finds that the employee has been disciplined or otherwise disadvantaged or prejudiced contrary to a registered collective agreement or any other law relating to employment...*"

53.1 Part (a) of the definition of "*dispute*" reads:

> "*(a) entitlement of any person or group of persons to any benefit under an existing collective agreement, Joint Negotiation Council agreements or Works Council agreements.*"

53.1.1 It appears that the Court *a quo*[36] regarded interpretation of the relevant clause of the Code as a disagreement over entitlement to a benefit and as such to fall under part (a).

53.1.2 This cannot be supported in that part (a) evidently relates to the entitlement of a type or category of person or group to rely on certain agreements.

53.1.3 An example of a case in point would be ***Lewis Stores (Pty) Ltd & Swaziland Commercial and Allied Workers Union and Others***[37] wherein the question for determination was whether a non-union member is entitled to benefit from a negotiated salary in the absence of an agency shop agreement and in the face of the "*No free riders*" concept.

53.1.4 Were the interpretation in 54.1.2 not correct, no party can declare a dispute regarding entitlement of a type or category person or group to rely on or benefit from the provisions of any particular agreement, in

[36] Paragraphs [31] and [32] of the Judgment
[37] *(647/2020) [2020] SZHC 196 (29th September, 2020)*

that no other part of the ***"dispute"*** definition caters for such an eventuality.

53.1.5 A part (a) dispute would be similar to a part (b) dispute i.e., ***"(b) existence or non-existence of a collective agreement or Works Council agreement and Joint Negotiation Council agreement"*** and also similar to a part (d) dispute i.e., ***"(d) recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment"*** in the sense that a determination outside of the direct relationship between an individual employee and his/her employer is required in these three instances.

53.2 *In casu* the bone of contention is prescription of the right to take disciplinary action, which would resort under part (c) disciplinary action ["***disciplinary action, dismissal, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons***"] and/or part (e) interpretation ["***application or the interpretation of any law relating to employment***"] and/or part (f) terms and conditions of employment ["***terms and conditions of employment of any employee or the physical conditions under which such employee may be required to work.***"]

53.3 This is where **section 16(8)** finds application, i.e., an act or state of affairs where an employee "...***has been disciplined or otherwise disadvantaged or prejudiced contrary to a registered collective agreement or any other law relating to employment...***"

53.3 As for disputes not related to dismissals, **section 16(8)** correlates with parts (c) ["***disciplinary action, dismissal, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons***"]; (e) ["***application or the interpretation of any law relating to employment***"]_and (f) [***terms and conditions of employment of any employee or the physical conditions under which such employee may be required to work***] of the definition of "***dispute***" in **section 2.**

[54] This creates room for an argument that the **section 16(8)** remedial powers, implicitly and by necessary inference, cannot be invoked unless and until the employee had been disciplined or otherwise disadvantaged or prejudiced *vis-à-vis* a dispute as described in parts (c), (e) and (f) of the definition of "***dispute.*** This also would tie in with the proposition–that the employee who seeks to interdict the employer or *vice versa*, has to demonstrate injury or harm already suffered or committed, as is demanded by the

employment of "*...has been disciplined or otherwise disadvantaged or prejudiced...*"

[55] This issue will be reverted to later hereunder.

D.3.4 WHAT THE MEANING IS TO BE ATTACHED TO THE PHRASE "*DISCIPLINARY ACTION*" IN THE "*DISPUTE*" DEFINITION IN SECTION 2 AND WHETHER OR NOT IT IS CONFINED TO COMPLETED DISCIPLINARY HEARINGS

[56] "***Disciplinary action***" is not defined in the **IRA** and on pure grammatical basis, is capable of more than one interpretation, Mr Jele contending for a narrow interpretation and Mr Dlamini for a wide one.

[57] Parties more often than not insert their own definitions in Disciplinary Codes and other collective agreements. *In casu*, for instance, the relevant Code reads that: *"Discipline shall mean any action initiated by management in response to unacceptable employee*

performance or behaviour" and the Court *a quo* favoured this wide definition as the appropriate definition.[38]

[58] Needless to say, when the matter lands on the doorsteps of the Industrial Court and for the sake of uniformity, there should be clarity as to the appropriate meaning vis-à-vis the applicable statute, being the **IRA.**

[59] As was held in the **Natal Joint Municipal Pension Fund** case *supra*, the process of interpretation is objective, not subjective, and *"A sensible meaning to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."*

[60] A wide definition would include matters such as the very launching of an investigation, an instruction to return a workplace computer or telephone, the very decision to level charges against an employee, or the choice of venue. It can be argued that to approach CMAC and/or the Industrial Court in respect of such

[38] Judgment Paragraphs [27] and [28]

complaints cannot be said to be reasonable or business like; the courts are not there to micromanage the exercise of the employer's prerogative to discipline.

[61] Because **section 16(8)** correlates with *inter alia* part (c) of the definition of "***dispute***", the use of "***has been disciplined***" (as opposed to "***is being disciplined***") in **section 16(8)** would favour a narrow definition which qualifies the ambit of "***disciplinary action***" and which restricts it, for purposes of **section 16**, to completed proceedings with an adverse result other than actual dismissal, such as a final written warning or a fine or a demotion.

[62] As set out in [55] *supra*, the **section 16(8)** remedial powers seemingly cannot be invoked unless and until the employee had been disciplined or otherwise disadvantaged or prejudiced. This would fortify a conclusion that ***"disciplinary action"*** for purposes of remedial powers refers to concluded proceedings with an adverse outcome for the employee.

[63] On the other hand, what is the position where it has become

glaringly evident that disciplinary proceedings that are still in progress, are patently iniquitous in nature or have been fatally compromised, for instance by egregious pre-existing bias on the part of the chairman? Does the aggrieved employee have to wait until the hearing had been concluded and any internal appeals or other internal remedies had been exhausted before seeking relief? Put differently, is the aggrieved employee, prior to conclusion of the disciplinary proceedings, left remediless?

[64] **Section 168(2)** of the Constitution commands that:

> ***"The existing law, after the commencement of this Constitution, shall as far as possible be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution."***

[65] Two provisions in particular rise to the fore being **sections 32** and **33** i.e., rights of workers and right to administrative justice.

65.1 **Section 32** applies to all workers i.e., to all employees and there is no distinction drawn between private and public employees, and in **section 32(4)(d)** Parliament is called upon to enact laws

to protect employees from ***"victimisation and unfair dismissal or treatment."***

65.2 The South African Constitution's **section 33** reads similarly to its eSwatini counterpart.

65.2.1 It was held by the Constitutional Court in **Chirwa v Transnet Ltd and Others**[39] *inter alia* that:

> *"[149] **In my judgment labour and employment relations are dealt with comprehensively in s 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer a distinction between private and public sector employees under our Constitution..."***

65.2.2 The above conclusions *prima facie* would apply *mutatis mutandis* to employees in eSwatini [40] but the question whether or

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[39] **2008 (4) SA 367 (CC)** Paragraphs [148] and [149]

[40] This does not appear to have been drawn to the attention of the eSwatini Supreme Court, or ventilated in ***Ministry of Tourism and Environmental Affairs & Another v Stephen Zuke & Another*** [40] which in respect of constitutional matters within the labour law sphere arrived at a conclusion that: *"[22]The referral of the matter to the full bench of the High Court was not warranted in the circumstances. **The Industrial Court could have decided the matter without invoking section 33** of the Constitution. The rules of natural justice are adequate in deciding the matter and in particular the principle of "audi alteram partem" which requires an administrative official to give the other party a hearing before a decision is made."*

not **section 33** applies to employees, is a matter that falls beyond the purview of this Court.

[66] What is relevant for purposes of the instant judgment, is the intended constitutional protection of employees against ***"victimisation"*** or ***"unfair treatment."*** *En passant,* these two concepts conceivably may overlap or in certain instances be synonymous but for current purposes, the focus will be on what appears to be the more encompassing concept, being unfair treatment.

66.1 The supremacy of the Constitution has to prevail over all else.

66.2 The phrase in **section 16(8)** of the **IRA** "*... the employee has been disciplined or otherwise disadvantaged or prejudiced contrary to ... any other law relating to employment...*" therefore has to be interpreted accordingly to include unfair treatment during the course of disciplinary proceedings in progress, and as such "*disciplinary action*" would encompass a wide, and not a narrow spectrum.

[67] The matter however does not end there. In accordance with the doctrine of *de minimis non curat lex* read with the employer's prerogative to discipline, it appears to us that it is just and equitable that intervention in incomplete proceedings is to be permitted in exceptional circumstances only, as per the test consistently articulated in previous judgments.

E CONCLUSIONS

[68] In view of all the aforegoing, it is our considered view that:

68.1 The Industrial Court enjoys no inherent, supervisory, review or like powers to restrain illegality or prevent miscarriage of justice; its jurisdiction is strictly as prescribed in **section 8(1)** of the **IRA**;

68.2 The concept "*disciplinary action*" under "*dispute*" in **section 2** of the **IRA** is to be interpreted in the wide sense as to include incomplete disciplinary proceedings;

68.3 Unfair treatment during the course of incomplete disciplinary proceedings may amount to the unfair treatment of employees, which is sought to be avoided by **section 32(4)(d)** of the Constitution;

68.4 Such unfair treatment, in turn, may justify the invocation of the Industrial Court's remedial powers under **section 16(8)** of the **IRA**, provided that exceptional circumstances for such intervention are shown;

68.5 Previous decisions to the effect that intervention in incomplete disciplinary proceedings may be permitted in exceptional circumstances, stand to be confirmed but same are so confirmed based on the *ratio decidendi* set out above.

F ORDER

[69] In the result, it is the Order of this Court that:

1. The appeal is dismissed.

2. No order as to costs.

J.M. VAN DER WALT
JUSTICE OF APPEAL

I agree

S. NSIBANDE
JUDGE PRESIDENT

I agree

N. NKONYANE
JUSTICE OF APPEAL

For the Appellant: Mr. Z. Jele of Robinson Bertram Attorneys
For the Respondent: Mr. A Dlamini of B S Dlamini & Associates