IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE

APPEAL NO. 19/2006

In the matter between

SWAZI OBSERVER (PTY) LIMITED Appellant

And

HANSON NGWENYA & 68 OTHERS Respondents

Coram: BROWDE, A.J.P

TEBBUTT, J.A

ZIETSMAN, J.A.

BANDA, JA

RAMODIBEDI, J.A.

JUDGMENT

BROWDE, AJP

[1] This matter originated in the Industrial Court of Swaziland in which the present respondents sought judgment against the present appellant in respect of compensation for what they alleged was unfair dismissal from their employment. The proceedings in that Court culminated in an award in favour of the respondents in the aggregate sum of E2 913 559-20.

[2] The appellant noted an appeal against that judgment to

the Industrial Court of Appeal. On 9 March 2006 that Court consisting of Annandale J.P., Matsebula J.A. and Maphalala J.A. dismissed the appeal with costs. Being dissatisfied with the judgment, the appellant filed a Notice of Appeal in this Court. The matter has come before us as one of urgency and we agreed to hear argument only on one issue in limine raised by the respondents, namely, that this Court has no jurisdiction to hear and determine an appeal against a judgment of the Industrial Court of Appeal. It has been agreed between the parties that in the event of our finding that this Court has jurisdiction to hear the appeal then the appeal on the merits will be adjourned for adjudication at a future session of this Court.

[3] In his argument before us on behalf of the appellant Advocate Smith SC submitted that this Court does have the necessary jurisdiction and has relied heavily on a case in South Africa which he submitted dealt with the precise point which we are called upon to decide. The case he referred to was *NUMSA AND OTHERS v FRY'S METALS (PTY) LTD* 2005(5) SA 433 (SCA) in which the Supreme Court of Appeal (SCA) considered whether an appeal lies to that Court from a decision of the South African Labour Appeal Court. In arriving at the conclusion that it had such jurisdiction the SCA analysed the relevant sections contained in the South African Labour Relations Act and the South African Constitution.

[4] In developing his argument before us Mr. Smith drew an interesting comparison between the South African Legislation and Constitution on the one hand and the

Swaziland Legislation and Constitution on the other. He referred particularly to Section 183 of the Labour Relations Act in South Africa which reads:

> "*Subject to the Constitution and any other law, no appeal lies against any decision, judgment or order given by the Labour Appeal Court*".

Despite that apparently clear provision, the SCA, as I have said, found that it nevertheless had the necessary jurisdiction to entertain an appeal from the Labour Appeal

Court. In extrapolation from that Mr. Smith submitted that the Industrial Relations Act 2000 of Swaziland does not deprive this Court of jurisdiction despite the wording of Section 21(4) which relates to the jurisdiction of the Industrial Appeal Court and reads:-

> "*The decision of the majority of the judges hearing an appeal shall be the decision of the Court and such decision shall be final.*"

[5] The SCA, in considering whether it had the jurisdiction to hear and determine an appeal from the Labour Appeal Court, referred in detail to the appellate structure of the relevant courts in South Africa as provided for in the Labour Relations Act read with the provisions of the Constitution. A brief summary of the grounds upon which it relied for coming to the conclusion that it had the jurisdiction referred to, illustrates clearly that the Court was to a marked degree influenced by the repeated references in

the legislation itself, to its provisions being subject to the Constitution. That summary follows with the relevant emphasis added to illustrate this.

[6] Section 183 of the Labour Relations Act, as already pointed out, commences with the phrase "subject to the Constitution." With reference to that the S.C.A. stated,

> "*The starting point therefore must be that the LRA's provisions conferring finality on the LAC have to be read in conjunction with the appellate powers the Constitution creates: and that premise goes a long way to resolving the question before us. For from it follows that the LRA's provisions must also be read in conjunction with the appellate power the Constitution vests in this Court; and this is what the CC has held.*"

The SCA then went on to deal with non-Constitutional matters in the following terms.

> "*It seems to us that acknowledgement of a constitutionally determined appellate structure superior to the LAC has unavoidably general implications. For if this Court has appellate jurisdiction over the LAC, deriving from the Constitution, outside the express terms of the LRA, there can be no reason to limit that power to constitutional cases alone...*"

[7] Finally the SCA referred to Section 168(3) of the South

African Constitution which specifically states that the SCA "may decide appeals in any matter", (emphasis added).

[8] In his argument before us aimed at persuading us to find that this Court similarly has jurisdiction, despite the apparent clear wording of Sec. 21(4) of the Industrial Relations Act 2000, to hear appeals from decisions of the Industrial Appeal Court, Mr. Smith referred to the Constitution of Swaziland. He referred us to the first sentence in Section 146. It reads:

> "*The Supreme Court is the final Court of Appeal.*"

This, so the argument went, must be coupled with Section 2 of the Constitution which reads:

> "*2(1) This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.*"

It was submitted on that basis that the declaration of finality in Section 21(4) is inconsistent with the provision that this Court is the final Court of Appeal and is therefore void.

[9] That submission was countered by Mr. Dunseith who appeared before us on behalf of the respondents. He pointed out that prior to the coming into force of the Constitution of 2005, the question whether this Court

had final appellate power was a matter of some contention. It was in order to remove any vestige of doubt in that regard, he submitted, that the drafters of the Constitution included the words "The Supreme Court is the final Court of Appeal" and it was not intended to override the clear meaning of, for example, the Industrial Relations Act.

[10] This submission of Mr. Dunseith is supported by other considerations. Prior to the coming into force of the Constitution the appellate jurisdiction of the Supreme Court did not include appeals from the Industrial Court of Appeal. In the case of

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(the judgment on appeal from the High Court was delivered on 13 December 2000) the question to be decided was whether the High Court had jurisdiction to review a decision of the Industrial Court of Appeal. In coming to the conclusion that it had no such jurisdiction this Court cited with approval the following extract from the judgment of Masuku J in the High Court:-

> "*What is abundantly clear therefore is that the legislature gave jurisdiction to the High Court to review decisions of the Industrial Court only. Had Parliament intended to extend that power to reviewing the proceedings, decisions or orders of the Industrial Court of Appeal, it would have expressed its intention in clear language. What*

> *transpires therefore is that Parliament intended the Industrial Court of Appeal to be the last port of call in all industrial matters and with its decisions becoming final.*"

[11] The question arises, therefore, whether the Constitution has changed that. In my view it has not. There are no clear indications that the Swaziland Constitution effects such changes to the pre-existing situation as exists in the South African Constitution. On the contrary, the indications in Swaziland's Constitution, in my view, point the other way. I say this for the following reasons. Section 146 is headed "Jurisdiction of Supreme Court (General)". After referring to this Court as the final Court of Appeal it goes on to provide "accordingly the Supreme Court has appellate jurisdiction and such other jurisdiction as may be conferred on it by this Constitution or any other law". That, of course, merely sets out the common law which requires that a right of appeal must be provided for by statute. It is, however, important to bear in mind that every court's jurisdiction is limited to that conferred on it by statute. In R v PENNINGTON 1997(4) SA 1076(CC) at pi086 Chaskalson P. put it thus:-

> "*At common law a court has no jurisdiction to hear an appeal against a decision of another court. It can only do so if that authority is conferred on it by the statute under which it is constituted, and then it must function in terms of*

that statute."

See too: THE MINISTER OF LABOUR v BUILDING WORKERS INDUSTRIAL UNION 1939 AD 328 at 330.

THE MINISTER OF LABOUR & ANOTHER v AMALGAMATED ENGINEERING UNION 1950(3) SA 383(A)

In the latter case the Chief Justice also emphasised the clear distinction between the Appellate Division's statutory powers to hear appeals and its inherent powers of review.

[12] With those general principles obviously in mind the drafters of the Constitution then proceeded in Section 146(2) and Section 147 to provide in specific terms for the appellate powers of this Court. Those read as follows:-

"*2. Without derogating from the generality of the foregoing subsection, the Supreme Court has -*

(a) such jurisdiction to hear and determine appeals from the High Court of Swaziland and such powers and authority as the Court of Appeal possesses at the date of commencement of this Constitution; and

(b)such additional jurisdiction to hear and determine appeals from the High Court of Swaziland and such

additional powers and authority as may be prescribed by or under any law for the time being in force in Swaziland, (My underlining)

3. *Subject to the provisions of subsection (2), the Supreme Court has for all purposes of and incidental to the hearing and determination of any appeal in its jurisdiction the power, authority and jurisdiction vested in the court from which the appeal is brought. (My underlining)*

4. *A decision of the Supreme Court shall be enforced, as far as that may be effective, in like manner as if it were a judgment of the court from which the appeal was brought.*

5. *While it is not bound to follow the decisions of other courts save its own, the Supreme Court may depart from its own previous decisions when it appears to it that the previous decision was wrong. The decisions of the Supreme Court on questions of law are binding on other courts.*

6. *Subject to the provisions of this Constitution or as may be prescribed by any other law, an appeal from the full bench of the High Court (or any other court) shall be heard and determined by a full bench of the Supreme Court.*

Appellate jurisdiction o f Supreme Court

147. (1) An appeal shall lie to the Supreme Court from a judgment decree or order o f the High Court-

a)*as of right in a civil or criminal cause or matter from a judgment o f the High Court in the exercise of its original jurisdiction; or*

b)*with the leave of the High Court, in any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest.*"

[13] I deal below with two submissions of Mr. Smith relating to sub-sections (3) and (6) respectively of section 146, submissions which I do not believe assist the appellant. Those apart, however, in my opinion there is no reference in these provisions similar to that in Section 168(3) of the South African Constitution which the SCA in the Numsa case described as "critical to the resolution of the issues the application raises". The SCA was referring to the provision that "The Supreme Court of Appeal may decide appeals in any matter." This country's Constitution, on the other hand, in explicit terms, confines the appellate jurisdiction of this Court to appeals from the High Court and in so doing leaves unaffected the finality of the decisions in the Industrial Appeal Court. The provision that the Supreme Court is the final Court of Appeal, therefore, means no more than that it is the final Court of Appeal in all matters within its jurisdiction, (emphasis added)

[14] Mr. Smith, faced as he was by the repeated reference in NUMSA to the provisions relating to the appellate jurisdiction of the SCA being "subject to the Constitution" and the absence of that in Swaziland's Constitution, was driven to submit that the decision of the SCA would have been the same even without those references. That, as I have shown by the repeated emphasis to its powers being subject to the Constitution, is quite irreconcilable with the reasoning of the SCA. It is made even more unlikely by the fact that in NUMSA the references to the Constitution were coupled by the SCA with an analysis of the provisions of the South African Labour Relations Act which, in the words of the SCA,

> "*undoubtedly constitute a legislative endeavour to rest final appellate powers in the Labour Appeal Court. But they must be interpreted in accordance with the Constitution. They expressly state themselves to be 'subject to the Constitution' [sections 157(1); 166(4); 173(1); 183). Section 167(2 does not; but the exception is only apparent, since section 3 of the LRA states that its provisions must all be interpreted 'in compliance with the Constitution.*"'

The judgment of the SCA then proceeds as follows: -

> "*And indeed the Constitution incontrovertibly qualifies the finality of the Labour Appeal Court's Appellate powers. Most obviously in respect of Constitutional questions it is not the final Court of Appeal.*"

There is no such incontrovertible qualification to the finality of the decisions of the Industrial Court of Appeal in the Swaziland Constitution.

Mr. Smith has also relied, for his submissions regarding the appellate jurisdiction of this Court, on Section 148(1) of the Constitution which reads:-

> "*The Supreme Court has supervisory Jurisdiction over all Courts of judicature and over any adjudicating authority and may, in the discharge of that jurisdiction, issue orders and directions for the purposes of enforcing or securing the enforcement of its supervisory power*".

It appears to me to be obvious that there is no reference in this section to the appellate jurisdiction of this Court. It merely deals with the authority vested in this Court to generally superintend the manner in which all the courts of the Kingdom are run. In fact, in his helpful heads of argument Mr. Smith cited two definitions from Black's Law Dictionary 5th Edition which in my judgment, are clearly against the inference he urged us to draw from the section. They were:-

(i) "*Supervise - to have general oversight over, to superintend or to inspect*"

(ii) "*Supervisory control - control exercised by Courts to compel inferior tribunals to act within their jurisdiction, to prohibit them from acting outside their jurisdiction, and to reverse their extra jurisdictional acts*".

Not only are appellate powers not referred to, but it is clear that the powers of "control" refer only to those of review on matters relating to any of the country's courts which may act beyond their jurisdiction. The terms of the section, therefore, are not relevant to the issue in casu.

[17] Mr. Smith has also submitted that if we have to find that the Industrial Court of Appeal has the final say in appeals to it, that would mean that there are two final Courts of Appeal in this country. This is fallacious. All it means is that the Court of Appeal is the final Court of Appeal in all matters which it has jurisdiction to decide -this does not include purely industrial cases which fall solely within the jurisdiction of the Courts specially created to deal with those matters. Some of the provisions of the Industrial Relations Act 1 of 2000 demonstrate clearly the distinctive character of Industrial Courts. For example section 11(1) reads:-

"*11(1) The Court shall not be strictly bound by the rules of evidence or procedure which apply in civil proceedings and may disregard any*

technical irregularity which does not or is not likely to result in a miscarriage of justice."

And in section 19(2) the Industrial Appeal Court, when considering an appeal, is enjoined

"*to have regard to the fact that the Court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings*".

It should not be surprising, therefore, that although the Constitution was gazetted in July 2005, the finality of the Industrial Appeal Court's decisions was left untouched when the Act was amended in certain aspects in September 2005. The esoteric nature of industrial problems led not only to the creation of the special Industrial Court, but also to the Industrial Court of Appeal with its exclusive jurisdiction to hear and determine appeals from that special court.

[18] The final basis upon which Mr. Smith attempted to build the appellants case arose from the terms of sub-sections 146(3) and (6) of the Constitution. Sub-section 3 reads:-

"*3. Subject to the provisions of subsection (2), the Supreme Court has for all purposes of and incidental to the hearing and determination of any appeal in its jurisdiction the power, authority and jurisdiction vested in the court from which*

the appeal is brought."

Counsel submitted that if the only Court was the High Court in respect of which the Supreme Court has appellate jurisdiction then the phrase "the court from which the appeal was brought" creates an anomaly, unless it includes the Industrial Court of Appeal among others. This submission must also fail despite its superficial attraction. In the context of Sections 146 and 147 it is clear that the sole purpose of the sub-section is to limit the Supreme Court's power when it decides a matter which originates in another Court and reaches the Supreme Court via the High Court. For example, if a criminal case originates in the Magistrate's Court and a sentence is imposed in that court, the Supreme Court, if it is seized of the matter as the final Court of Appeal, cannot increase the sentence beyond the jurisdiction of the Magistrate's Court. The sub-section in my judgment does not endow the Supreme Court with power to hear an appeal from the Industrial Appeal Court. To bestow such power on this Court, having established that before the Constitution came into force it had no such power, would require an express provision to that end - the implied authority which Mr. Smith contends for cannot in the circumstances be found to exist. As to sub-section 6, I agree with Mr. Dunseith's submission that read in the context of the sections dealing with this Court's jurisdiction, sub-section 6 was intended, by the words "or any other court", to cover any court which may presently exist or may yet come into existence and from which this court's power of appeal is not expressly excluded - as is the case in the Industrial Relations Act.

[19] There remains only one further indication, perhaps of a peripheral nature, for the conclusion that in industrial matters the Industrial Court of Appeal is the end of the road. As the position now stands employees who contend that they have been unfairly treated by their employers have to undertake a fairly laborious process to obtain compensation or other forms of redress. They first have to embark on a procedure of conciliation set out in the Industrial Relations Act. If that is unsuccessful they may then proceed to sue in the Industrial Court after which, if they are unsuccessful, an appeal lies to the Industrial Court of Appeal. Having in mind the financial burden involved in the process and the length of time it would take to obtain the compensation sought (we are informed the respondents in casu have been attempting to recover compensation since 1999) the drafters of the Constitution can hardly be held to have had the intention to lengthen the process even further.

[20] For the above reasons I am of the view that this Court does not have jurisdiction to hear an appeal from the Industrial Court of Appeal, and consequently the appeal is struck off the roll with costs.

BROWDE, AJP

I AGREE

P.H. TEBBUTT JA

I AGREE

N.W. ZIETSMAN, JA

I AGREE

R.A. BANDA, JA

I AGREE

M.M. RAMODIBEDX JA

DELIVERED IN OPEN COURT THIS DAY OF MAY 2006