IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO.91/2016**

In the matter between:

DERRICK DUBE **Appellant**

And

EZULWINI MUNICIPALITY **1ST Respondent**

COUNCILLOR GEORGE FALCOMER **2nd Respondent**

COUNCILLOR SIBUSISO MABUZA **3rd Respondent**

ZONKE MAGAGULA NO **4th Respondent**

PRESIDING JUDGES of the

INDUSTRIAL COURT OF APPEAL **5th Respondent**

REGISTRAR, INDUSTRIAL COURT of APPEAL **6th Respondent**

ATTORNEY GENERAL **7th Respondent**

Neutral Citation: *Derrick Dube and Ezulwini Municipality (91/2016) [2018] SZSC 49(30th November, 2018)*

Coram : MJ Dlamini JA, RJ Cloete JA, J Currie AJA, SJK Matsebula AJA and MJ Manzini AJA

Heard : 18th September, 2018.

Delivered: 30th November, 2018

Labour law *– Industrial Court of Appeal – Jurisdiction – Whether decisions of Industrial Court of Appeal reviewable – No express exclusion of review – Presumption of the intention of legislature - Finality of decisions of Industrial Court of Appeal – Whether Industrial Court of Appeal a superior or inferior court or tribunal – Industrial Relations Act No.1 of 2000 – Act expressly allowing High Court to review decisions of the Industrial Court but silent on review of the decisions of the Industrial Court of Appeal – Act equates Industrial Court of appeal with Supreme Court - Section 21(4) of Act considered.*

Constitutional law *– Courts - Superior courts – High Court - Jurisdiction – Inherent power to review proceedings of inferior courts and tribunals – Whether Industrial Court of Appeal equal in status to Supreme Court under the Industrial Relations Act No. 1 of 2000 and the Constitution, 2005 – Whether High Court has power to review decisions of the Industrial Court of Appeal - No express legislation excluding review of these decisions.*

The High Court *as a Superior Court has statutory as well as inherent / common law jurisdiction to review decisions and orders of courts or tribunals such as the Industrial Court of Appeal which is not a superior court in terms of the Constitution.*

Practice *- Precedent – Supreme Court may depart from its own previous decision when shown to be wrong – High Court bound by decisions of the Supreme Court until set aside – Lower courts bound by decisions of higher courts.*

Civil procedure *– Supreme Court Rules – Failure to submit proper record of appeal - No explanation for non-compliance with Rules – Appropriate costs.*

Held *that the Industrial Court of Appeal is not a superior court in terms of the Constitution and therefore the High Court can review decisions of that Court***.**

JUDGMENT

MJ Dlamini JA

Preliminary

[1] The hearing of this appeal opened with points *in limine* raised by Mr Mdladla, counsel for the first 3 respondents. The first point was with regard to the improper certification of the record on appeal. There was no signature accompanying the stamp to indicate who might have fixed the stamp. According to Mdladla the record was 'incomplete', not having been signed and certified by the Registrar of the High Court. The record that had been filed *"was stamped by the Registrar of the Supreme Court…. whereas it ought to have been stamped, signed by the Registrar of the High Court as a complete record certifying that it is a complete record of all pleadings in the High Court"*, Mr. Mdladla submitted. He stated that the *"irregularity of the incomplete record was not minor"* as there was also a number of pagination deficiencies, rendering the record not in accordance with Rule 30. Counsel then referred the Court to cases, *inter alia*, **Commissioner of Police v Christopher Vilakati** App. Case No 30/2012 and **Meshack Langwenya v Swazi Poultry Processors (Pty) Ltd,** App. Case No. 65/2012, in which this *"Honorable Court declared the appeal abandoned due to appellant filing an incomplete record"*.

[2] Mr. Mdladla further submitted that the incomplete record failed *"to show the errors which the appellant alleges the Court* ***a quo*** *has found"*, and that the incomplete record *"does not assist the respondents or this Court"* to *"dispose of the grounds of appeal and merits thereto"*. Accordingly, *"this appeal ought to be deemed abandoned and struck out"*. Mr. Mdladla stated that he had brought these

irregularities to the attention of appellant's counsel but got no response. Mr. Magagula, for the appellant, whose responsibility it was to prepare and have certified a proper record on appeal gave no explanation of how it all happened.

[3] The second preliminary point that Mr. Mdladla raised was that there was no application for condonation for late filing of appellant's heads of argument and list of authorities. It appears, however, that "Appellant's Heads of Argument" was filed with this Court on 2nd October 2017 and received by Mr. Mdladla's office the same day. Mr. Mdladla's heads of argument in which he raised these issues were filed on 21 August 2018, also complaining that a bundle of authorities had also not been filed by the appellant. It appears that the appeal had been initially set for hearing in October 2017, but was *"postponed due to unavailability of the Judges"*.

[4] Whilst Mr. Mdladla pressed the Court not to tolerate the blatant disregard of the rules in light of the various decisions of this Court Mr. Mdladla did not say in what specific way(s) his clients were prejudiced by the incomplete record. This Court is not called upon to review the decision of the Industrial Court of Appeal (ICA) or deal with the merits of the ICA decision. The issue before Court is whether the High Court has the competence to review decisions of the ICA. Whether the court *a quo* was wrong in its decision and if so, why it was wrong, in my view, is not critical to the issue for determination. The issue is one of law. Deeming the appeal to be abandoned and striking it off the roll would only serve to defer a matter which is otherwise urgent and ripe for hearing, as shown by the two

cases[1] that have since been heard and decided by the High Court while this appeal was pending.

[5] I should thank Mr. Mdladla for taking time to raise the matter of the incomplete record. It is by no means minor. Mr. Magagula did not help explain the deficient record. But unless the deficiency of the record rendered the proceedings impossible, it would serve no practical purpose to strike the appeal off the roll. I do consider, however, that even though costs have not been ordered on the appeal as such, Mr. Mdladla deserves his costs for the day as if the matter had been struck off. On its face, the irregularities complained of are serious and hard to tell what could be disclosed if pursued. All I need stress here is that the Registry office of this Court should keep properly and securely official stamps and other records. Such items and documents should never be accessible to unauthorized hands. Getting on with the hearing should by no means be considered as in anyway under-estimating the significance of the points raised *in limine* by Mr. Mdladla.

[6] It is true that if an appellant fails to lodge the record within the period prescribed by the rules and fails within the period prescribed to apply to the respondent or his attorney for consent to an extension of time within which to so file the record and inform the registrar that he has so applied, he is deemed to have abandoned or withdrawn his appeal. See *Herbstein and van Winsen,* 3rd ed. p 705, and **SANTAM Versekeringsmaatskappy Bpk v Pietersen** 1970 (4) SA 215 (AD) at 217. But this rule is by no means written on stone. Each case must be decided on its own facts. Conditions may exist, as *in casu*, which persuade the Court not to

[1] **Aveng Infraset Swazi (Pty) Ltd** (772/2017) [2017] SZHC 116 (6 June 2018); and **Swaziland Revenue Authority & others v Presiding Judges of the Industrial Court of Appeal** (1742/2017) [2018] SZHC 209 (26 September, 2018).

follow the rule. If it should appear to the Court that notwithstanding the deficiencies the matter is otherwise ripe for hearing and no serious prejudice will be suffered by the respondent, then the matter should not be struck off the roll. Appropriate costs may suffice to remedy the defect complained of or otherwise extant on the papers before Court and to signify the Court's disapproval of the disobedience of the rules.

The issue for determination

[7] We have already referred, in passing, to the issue for determination in this appeal as being whether the High Court may lawfully review decisions of the Industrial Court of Appeal. It seems to me that this question is really part of a bigger jurisdictional issue involving the relationship between the High Court/Supreme Court on the one hand and the Industrial Court/Industrial Court of Appeal on the other hand. These sets of courts do not exist in isolation. As courts or entities exercising a judicial function, they must be part of the Judiciary of eSwatini. The High Court and Supreme Court are established by the Constitution Act of 2005 while the Industrial Court ("IC") and Industrial Court of Appeal ("ICA") are established by the Industrial Relations Act, 2000 ("IRA"). If there is no common ground between these sets of courts, then we are talking of apples and oranges. Either these 'court' systems are separate and stand-alone entities or they are part of the Judiciary as set out under section 139 (1) read with section 140 of the Constitution.

[8] Under the IRA,1980, there was no ICA. In terms of that Act decisions of the IC were appealable to and reviewable by the High Court and from there to the Court of Appeal. The ICA was established in 1996 with the result that decisions of

the IC could only be appealed to the ICA. Only the review power of the High Court would seem to have remained unaffected. The significant change following the 1996 IRA is that instead of two appeals (to the High Court and Court of Appeal) there would be only one appeal to the ICA on a point of law. But there is nothing which expressly says that a decision of the ICA may not be reviewed by the High Court in the same way as that of the IC. The problem causing the uncertainty whether decisions of the ICA may or may not be reviewed by the High Court is Parliament's silence on the issue. It then remains to be determined by interpretation. The starting point must be an appreciation of the distinction between appeal and review. Parliament allowed the decisions of the IC to be appealable to the ICA and not beyond by not providing that the decisions of the ICA may be appealed. When Parliament prescribed finality of decisions of the ICA, did Parliament have in mind both appeal and review? This is the question for determination. If Parliament did intend review as well, to which Court was the application for review to be made? These issues are somehow raised in this appeal and I trust that the answers proffered are not entirely out of place.

The appeal

[9] The founding affidavit to this matter in the court *a quo* states, in part:

> "**10.** *This Honourable Court has jurisdiction to hear and make a determination on this matter by virtue of the review powers vested in it by the Constitution … of 2005, read together with the High Court Act No. 20 of 1954 and the Industrial Relations Act No. 1 of 2000 (as amended).* **10.1** *Specifically, section 19(5) of the Industrial Relations Act grant the Applicant jurisdiction to review a decision or order of the Industrial Court at the High*

Court on grounds of common law. **10.2** *In terms of section 152 of the Constitution …, this Honourable Court has powers to exercise review over all subordinate courts and tribunals. The Constitution, under section 139(1) (a) lists the Supreme Court and High Court as the superior courts. Henceforth the Industrial Court of Appeal not being a superior court is categorized under subordinate courts and this Honourable Court has the jurisdiction to hear and determine review applications over such courts. …* **11**. *In this application, the 1st, 2nd and 3rd applicants humbly seek an order in this Honourable Court reviewing, correcting and setting aside a decision of the Industrial Court of Appeal of Swaziland in terms of which the 1st respondent upheld the 2nd respondent's appeal…"*

[10] It should be noted that the court on review is not concerned with the merits or demerits of the decision reviewed: " … *review concerns the regularity and validity of proceedings, whilst appeal concerns the correctness of the decision arrived at in legal proceedings in respect of the relief claimed therein and, as such, are distinct and dissimilar remedies. They are also irreconcilable remedies in the sense that, where both are available, the review must be disposed of first as, if the correctness of the judgment appealed against is confirmed, a review of the proceedings is ordinarily not available* (see **Mahomed v. Middlewick NO & Another** 1917 CPD 539, 540, 541; **R v. D and Another** 1953 (4) SA 384 (A) at 390D – 391B".[2] In para [3] and the paragraphs immediately following, the court *a quo* narrated what it called the background to the matter and concluded as follows (per Hlophe J):

"[48] Having come to the conclusion I have, I make the following order:

[2] **Liberty Life Association of Africa v Kachelhoffer NO & Others** 2001 (3) SA 1094 (CPD) at 1108 F-G

1. The point raised on this Court having no jurisdiction to hear a review of the decision of the Industrial Court of Appeal be and is hereby dismissed.

2. The Industrial Court of Appeal, not ranked as a superior court in the Constitution, has its decisions or judgments reviewable by the High Court."

[11] To the above judgment the appellant has appealed on several grounds summarized as follows:

1. The Court *a quo* erred and misdirected itself by holding that it has the power in terms of section 139 read with section 152 of the Constitution to review a decision of the Industrial Court of Appeal.

2. The court *a quo* erred in law in reaching the conclusion that the High Court has power to review a decision of the Industrial Court of Appeal without first interpreting the provisions of section 152[or section 139] of the Constitution.

3. The court *a quo* erred in law by giving undue weight to section 139 when, as a matter of law and fact, the section deals with what constitutes the Judiciary in Eswatini.

[12] In coming to its conclusion the court *a quo* in part, reasoned as follows:

"[35] In my view, no institution or body can legitimately exercise judicial power in Eswatini unless it falls into one of the categories described in

section 139 (1) (a) and (b), namely as either one of the Superior Courts of Judicature such as the Supreme Court or High Court on the one hand or such specialized, subordinate or Swazi Courts or tribunals exercising a judicial function. I agree with Mr. Mdladla therefore that the Industrial Court of Appeal as an entity or institution that exercises judicial power should fall into one of these categories. It certainly cannot be one of the superior courts which are specifically spelt out. It can only be either a specialized court or a specialized tribunal in this context."

Case for the appellant

[13] The appellant states that the respondents relied on section 152 of the Constitution to establish jurisdiction of the High Court to review decisions of the Industrial Court of Appeal (ICA) contrary to section 21(4) of the IRA, on the basis that the ICA is not listed as a superior court under section 139 of the Constitution. Appellant then argues that the court *a quo* erred in approaching the matter as it did, that is, from the basis of section 139 instead of squarely from section 152:

"11. Whether the High Court has the jurisdiction to review decisions of the Industrial Court of Appeal depends on the interpretation of section 152 of the Constitution. If section 152 is interpreted to confer jurisdiction on the High Court to review decisions of the Industrial Court of Appeal, the High Court will have jurisdiction over this matter. If the provision is not to confer jurisdiction then the High Court will have no jurisdiction to review the decisions of the Industrial Court of Appeal.

"12. We respectfully submit that the High Court erred and misdirected itself by not interpreting section 152 of the Constitution when deciding

whether the Court had the power to review decisions of the Industrial Court of Appeal. The court was required to interpret whether Section 152 gives it jurisdiction to review decisions of the Industrial Court of Appeal.

"13. Instead, the Court *a quo* decided the matter on the basis that the Industrial Court of Appeal is not classified as a superior court in terms of section 139 of the Constitution…."

[14] According to the appellant, section 139 *"has nothing to do with whether the court has jurisdiction to review decisions of the Industrial Court of Appeal…"* By so approaching the matter, *"the court a quo ignored the plain language used in section 152"* in that the section provides that 'the High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals….': *"The Industrial Court of Appeal is not a subordinate court. It is an appellate specialist tribunal which in terms of section 20(1) of the Industrial Relations Act 1/2000 as amended shall have the same powers and functions as the Court of Appeal but shall only deal with appeals from the Industrial Court"*, argues the appellant who further points out that under section 20(2) of the IRA the ICA *"shall consist of judges who have the same qualifications as Judges of the Court of Appeal"* and *"appointed in same manner as Judges of the Court of Appeal"*. Thus, the ICA is not a subordinate court whose decisions are subject to review in terms of section 152. Instead, the ICA is a 'specialist tribunal' and a "court of final instance", on appeals from the Industrial Court.

[15] In his heads of argument, the appellant submits that the *"Industrial Court on the other hand is a subordinate court whose decisions are reviewable by the High*

Court". And that section 152 restates and codifies the *"High Court review powers that existed before the Constitution. It is not a special review jurisdiction such as is conferred on the Supreme Court by section 148"*. Therefore, to understand section 152 as conferring power on the High Court to review decisions of the ICA "would result in a glaring absurdity" which the legislator could not have contemplated – absurdities such as the High Court exercising review jurisdiction over a specialist court equivalent to the Supreme Court: there would be no finality to matters within the exclusive jurisdiction of the IC; matters between employer and employee would take longer to resolve contrary to the purport of the IRA; 'final judgment on merits would be susceptible to review on procedural irregularities which is the object of a review. This would result in endless litigation….'

[16] In support of his argument the appellant cites **Eagles Nest (Pty) Ltd**[3] which was an appeal to this Court from the High Court arising from a decision of the ICA. In that case, in para [12] (B) (19) this Court concluded: *"In the circumstances we uphold the Judge a quo's conclusion in this matter that the proper procedure for the appellant to complain about his grievance against the Commission is by way of an appeal to the High Court and not by judicial review under section 152 of the Constitution."* The Court further stated: *"The applicants submitted further that* ***it is decided case law in the Kingdom of Swaziland that the original jurisdiction of a superior court can only be ousted by clear and unambiguous language of a statute*** *and section 40 of the Act does not trump a party's rights held under section 151 of the Constitution and that a party could approach the High Court for relief of its dispute.* ***It is fair to point out that this***

[3] **Eagles Nest (Pty) Ltd and 5 Others v. Swaziland Competition Commission and Another** Civil Case No1/2014, [2014] SZSC 39

quintessential proposition is a refutable presumption of law".[4] Again at p.40 para (8) the Court wrote: *"It is now the generally accepted principle that there should be a right of appeal from a tribunal to the High Court, on a point of law, in order that the law may be correctly and uniformly applied. See* ***Wade and Forsyth,*** *(op. cit. p917*[5]*). Of course, a right of appeal is not ordained by common law.* ***It is conferred by statute****"*. (My emphasis).

[17] The appellant also sought reliance on the **Swazi Observer**[6] case. In that case, the appellant, after being dismissed by the Industrial Court of Appeal, **appealed** directly to the Supreme Court. The matter being one of urgency, the Court "agreed to hear argument only on one issue, *in limine,* raised by the respondents, namely, that this Court had no jurisdiction to hear and determine an appeal against a judgment of the Industrial Court of Appeal". The appeal on the merits was adjourned for adjudication at a future date, should it become necessary. This Court concluded that it had no jurisdiction to entertain appeals from the ICA. I have no problem with that conclusion. The IRA has not provided that decisions of the ICA may be appealed to any court. The **Swazi Observer** was not a case seeking the review of a decision of the ICA by the High Court. To that extent the decision of that case may be correct but not relevant *in casu*. In my opinion, the **Abel Sibandze**[7] case which appellant also cites in support must also suffer the same fate in this appeal as the **Swazi Observer** case, namely, that it was a case raising the issue of appeal from a decision of the ICA, which is not the case here.

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[4] Ibid, para [10] (4) at p. 24

[5] **Administrative Law**, 9th edition

[6] **Swazi Observer (Pty) Ltd v Hanson Ngwenya + 68 Others,** App. Case 19/2006

[7] **Abel sibandze v Stanlib Swaziland (Pty) Ltd and Liberty Life Swaziland (Pty) Ltd,** App. Case No.57/2009

7th Respondent's submissions

[18] The 7th Respondent, although representing the Attorney General, presented submissions in support of the appeal, arguing that the decisions of the ICA, being final, are not reviewable by the High Court. Accordingly, the Attorney-General does not support the reasoning of the court below. Counsel for 7th Respondent started off by pointing out that the court *a quo* should have considered itself bound by precedent, in particular, the cases of **Memory Matiwane**[8] and the **Swazi Observer**. Counsel correctly raised the issue of the doctrine of binding precedent or *stare decisis* (to stand by decisions previously taken). This doctrine binds courts and Judges in two ways: lower courts are bound by decisions of higher courts; and higher courts must obey their own judgments, subject to circumscribed considerations. Hahlo and Kahn[9] write: *"In the legal process, as in all human affairs, there is a natural inclination to regard the decisions of the past as guide to the actions of the future…This authority given to past judgments is called the doctrine of precedent. The Latin maxim is stare decisis … (to stand by precedents) …The advantages of a principle of stare decisis are many. .. Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis"*. It is evidently proper that our courts observe and uphold the doctrine as it is part of the rule of law, a cornerstone of every progressive legal system. Brand AJ writes: *"The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It*

[8] **Memory Matiwane v The Industrial Court of Appeal and Another**, Civ. Case No. 2378/98 -- (**High Court** case.)
[9] **The South African Legal System**, pp214-215

is a manifestation of the rule of law itself. … To deviate from this rule is to invite legal chaos".[10]

[19] Counsel raised the doctrine of precedent because it would appear that certain decisions of this Court relevant to the matter before Court such as, for instance, **Memory Matiwane,**[11] have not been respected by the court *a quo.* The court *a quo* in this regard considered that since the decision in the **Memory Matiwane** case, delivered in March 2000, "some major changes have occurred in the legal front" (para [30]). These changes were the repeal of the 1996 IRA and its replacement by the current IRA in June 2000 and the promulgation of the Constitution in 2005. The IRA and the Constitution introduced new provisions which were not present at the time of the **Memory Matiwane** decision. The court *a quo* then concluded in para [39]:

> *"I am convinced had there been such provisions or their equivalent, the Court would not have come to the conclusion it came to in the **Memory Matiwane** matter. I am bolstered in the view I have taken by what the Court said in the following excerpt from the same judgment, which in my view refers to what is now covered by sections 139 and 152 of the Constitution which had not been provided for by any existing law cited in the **Memory Matiwane** matter:*
>
> > *'The above (…) in my view is the power set out in the Constitution and the law then in force at the commencement of the Constitution. According to the above section, the High Court can review proceedings of subordinate courts of justice in Swaziland. **The Subordinate Courts of justice have not been defined in the High Court Act, nor in the Interpretation Act 21 of 1970**. That, notwithstanding, it is however clear that the use of the word*

[10] **Camps Bay Ratepayers' and Residents' Association v Harrison**, 2011 (4) SA 42 (CC) at para [28]

[11] **This Court entirely endorsed the High Court decision in a judgment delivered in December 2000.**

> *'subordinate court' in legal parlance in Swaziland is normally associated with Magistrate's Courts.… The reference to subordinate courts of justice in section 4(1) must in my view be regarded to refer to Magistrate's Courts. I am again of the view the ICA cannot be regarded as an inferior court of justice within the meaning of section 4(1) above and I hold that (it) is not. From the foregoing, I come to the view that the Constitution of Swaziland (referring to the 1968 Constitution) does not in section 104(1)(c) clothe the High Court with jurisdiction to review decisions of the ICA, which was in any event not then in existence'.*

> *"[40] There can be no doubt that with the advent of the 2005 Constitution and its provisions in sections 139(1), 151(1) (d) and 152, the Industrial Court of Appeal – having been left out of the Superior Courts of Swaziland in terms of classification and ranking – is either a specialized court or a tribunal that exercises judicial power or a specialist tribunal. Like all such entities, I have found it to be one of those set out in section 152 of the Constitution. It should then be one of those entities whose decisions fall to be reviewed by the High Court …"*

[20] Thus, clearly, according to the reasoning of the court *a quo*, the 2005 Constitution changed the rules of the game, demoting some players hitherto thought to belong to the A team to the B team. Be that as it may, the doctrine of precedent remains, and a lower court is not freed from the binding decision of a higher court. There are ways a lower court can express its unhappiness or reservation about a precedent while abiding by it. Brand AJ at para [30] says, and well-said too:

> *"If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change. Needless to say, this should be done in a manner which shows courtesy and respect, not only*

because it relates to a higher court, but because collegiality and mutual respect are owed to all judicial officers, whatever their standing in the judicial hierarchy".

[21] To the above highly persuasive statement must be added another equally persuasive pronouncement from the South African Constitutional Court in ***In re* S v Walters and Another** 2002 (4) SA 613 (CC). In that case, writing for a unanimous Bench, Kriegler J. in para [60] stated: *" … According to the hierarchy of courts … the SCA ranks above the High Courts. … (C)ourts are bound to accept the authority and binding force of applicable decisions of higher tribunals. [61] It follows that the trial Court in the instant matter was bound by the interpretation put on s 49 by the SCA in* ***Govender.*** *The Judge was obliged to approach the case before him on the basis that such interpretation was correct, however much he may personally have had his misgivings about it. High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise. …"* And Lord Diplock in **Hoffman La Roche & Co v Secretary of State for Trade and Industry** [1974] 2 All ER 1128 (HL) at 1154b said: *"Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare".*

[22] It is now water under the bridge that the court *a quo* did not proceed as stated above, but took it upon itself, for the reasons stated, to differ from a binding

decision of this Court. That the decision reached by the court *a quo* is supported by this Court does not absolve that court from abiding by a binding precedent. In this regard, section 146(5) of the Constitution, in part, reads: " … *The decisions of the Supreme Court on questions of law are binding on other courts"*. But the subsection as a whole is worth recalling in this matter since the decision to which I have come in this matter departs from the **Memory Matiwane** judgment and others like it. The subsection provides: *"(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 decision 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"*. That indeed is the position I have taken in this matter: either that the **Memory Matiwane** decision was as such wrong or it was wrong because of the coming into force of the 2005 Constitution. This Court is not bound in this appeal by section 152 as appellant would insist.

[23] The **Memory Matiwane** judgment cited was not of this Court but of the High Court. That judgment on the very point at issue in this matter was somehow unreservedly endorsed by this Court in the **Swazi Observer** case. That endorsement may well have been obiter but it was a strong acknowledgment. In the **Swazi Observer** case Browde AJP said the following in para [10]: *"In the case of* ***Memory Matiwane vs Central Bank of Swaziland*** *(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 reaching 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 …"

[24] In this Court, in this matter, we have been referred to the **Memory Matiwane** case as decided by Masuku J. in the High Court as if that case never came before this Court. Masuku J delivered his judgment in March 2000 and in December of that year this Court delivered its own unanimous judgment[12] upholding the decision *a quo.* After observing that the question for decision in that case was, as it is in this appeal, whether the High Court has jurisdiction to review decisions of the ICA, Browde JA continued:

> *"Masuku J who delivered judgment in the High Court on 8th March 2000 has comprehensively dealt with the issue and has admirably analysed the powers of the courts with particular reference to the Constitution, the High Court Act 20 of 1954, the High Court Rules, the Industrial Relations Act, 1996 and the common law.*
>
> *"I agree entirely with what the learned Judge said in the court below and find it necessary only to accentuate one or two aspects of his judgment.*

[12] [2000] SZSC 23 (13 December 2000)

> *"In his analysis of the powers of the High Court, Masuku J referred to section 4(1) of the High Court Act 20 of 1954 which empowers the High Court to review proceedings of all subordinate courts of justice within Swaziland. Although there is no definition of 'subordinate courts' in the High Court Act nor in the Interpretation Act 21 of 1970, I am of the opinion that the learned Judge a quo was correct in expressing 'the firm view that the Industrial Court of Appeal cannot be regarded as an inferior court of justice'. It is not a court of record and has appellate jurisdiction which is quite inconsistent with being an inferior court in this country".*

[25] Browde JA went on to refer to s 11(1) of the IRA and observed that in that subsection 'court' meant the Industrial Court, and that that was further borne out by s. 11(2). The learned Judge of Appeal then observed of s 11(5):

> *"It is once again clear that 'court' means the Industrial Court, as it could not have been the intention of the Legislature to use the word 'Court' in different senses in subsections of the same section. That it was found necessary to express the power of the High Court to review a decision or order of the Industrial Court necessarily indicates that the High Court has no power to review a decision of the Industrial Court of Appeal".*

It needs only be affirmed that section 2 of the IRA defines 'Court' to mean *Industrial Court.* I shall return to this definition and sec 21(4) later in this judgment.

[26] 7th respondent also challenged the court *a quo* on its reliance on sections 139 (1), 151 (1) and 152 of the Constitution in coming to its decision that the High Court had the "extended revisional powers". Noting that under the 1968 Constitution there were superior courts and subordinate and specialist courts such as Magistrates Courts, water courts (per s40 of Water Act, 1967) or valuation

courts as per s 18 of the Rating Act 1995, 7th respondent concludes: "I submit that all section 139 (1) does is to constitutionalise what was even at independence" (sic). What exactly section 139 (1) constitutionalized is not clear if superior courts (High Court and Court of Appeal) had been established under the 1968 Constitution. Respondent then made observations on how the court *a quo* applied sections 151 (1) (d) and 152 of the Constitution. Suffices it here to state that I agree with 7th Respondent's submission that the "any law" appearing in paragraph 151(1) (d) cannot refer to 'any law' in terms of or under the same Constitution, for example, section 152. Those two words must refer to a law for the time being in force in Eswatini outside the Constitution as may be provided by an Act of Parliament. It is of course true, as 7th respondent observes, that there is "no extra-Constitutional legislation which confers jurisdiction on the High Court to review decisions of the ICA".

[27] What 7th respondent overlooks, above, is that review is usually inherent to a high court; only appeal is statutory. It is true that in para [12] (B) (9) p. 41 of **Eagles Nest** (op. cit.), Dr. Twum JA, after noting that section 4 of the High Court Act 1954 gave the High Court full power, jurisdiction and authority to review the proceedings of subordinate courts, had continued: *"This shows that the review jurisdiction of the High Court is not inherent as the English Kings Bench Division had, over inferior courts. This jurisdiction, like all the others stated in sections 151 and 152 of the Constitution, are statutory powers"*. With the greatest respect, I find it hard to agree with the learned Dr. Twum on this point. It would be disastrous for our administration of justice if review was entirely statutory. The scope of review prescribed under section 4 is very narrow as it is confined to subordinate courts only. I think the reference to section 2 of the High Court Act, which defines the

jurisdiction of the High Court should not be ignored. McNally JA in **Mlauzi** [13]states what is essentially our position as well, where he says *"The High Court's powers of review are both statutory and inherent. …"*

[28] Vieyra J. takes up the story[14]: *"The jurisdiction of the Supreme Court is laid down in Sec 19(1) of Act 59 of 1959 in terms similar to those to be found in the Statutes setting up the various pre-Union Courts. It is clear from the decided cases that those Statutes confer on the Supreme Court the same kind of jurisdiction and powers as were enjoyed by the Courts of the Netherlands; see Steztler v Fitzgerald 1911 AD 295at p 315. So that apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at common law it would be entitled so to entertain or give. It is to that reservoir of power that reference is made where in various judgments Courts have spoken of the inherent power of the Supreme Court: see eg Union Government & Fisher v West, 1918 AD 556 at 572-3. The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation"*. In light of our Roman Dutch Common law origins, I would fully associate myself with Justice Vieyra's statement as also reflective of our position on the issue of the inherent powers of the High Court. The exercise of this inherent or common law review power of the High Court has never been questioned as far as I am aware. (See Corbett CJ in **Hira & Another v Booyzen & Another** 1992 (4) SA 69 at 93-94).

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[13] **Mlauzi v Attorney General, Zimbabwe** 1993 (1) SA 207 (SC), 210C
[14] **Ex parte Millsite Investment Co (Pty) Ltd** 1965 (2) SA 582 (T) at 585F-H

[29] After citing the statement of Amissah JP in **Botswana Railways Organisation**[15] in which the Learned Judge President summarized his understanding whether the Industrial Court of that country was a 'court', strictly so-called, 7th respondent concluded that the "ICA is a court of law properly so-called and not an administrative tribunal". Respondent argued that the ICA was a court properly so-called because the ICA *"was established by the legislature as an adjudicative body which hears and determines appeals from the Industrial Court between persons listed in section 8 of the IRA and does so by applying law and equity and whose decisions are enforced in the same way as decisions of the Supreme Court"*. With utmost respect to learned counsel, what 7th respondent overlooks is that Amissah JP, in the Botswana case, among other features of what distinguishes a tribunal as a court, said that it must be *"created by [the country's] Constitution or by [the country's] legislative body, such as Parliament,* ***acting under powers conferred by the Constitution…"*** (My emphasis). Counsel for 7th respondent does not point out the section if any of the Constitution or of the statute pursuant to powers conferred by the Constitution under which the [IC or] ICA was created to be a court properly so-called. Indeed, as we shall show below, if the ICA is a court of the same status as the Supreme Court then it must be created by the Constitution itself or by power conferred by the Constitution. Section 139(1)(b) only prescribes a variety of subordinate courts and tribunals which are not superior courts as it is sometimes claimed for the ICA.

[30] The appellant has submitted that the **Memory Matiwane** decision "is still good law". 7th respondent concurs and says that *"the advent of the Constitution*

[15] **Botswana Railways Organisation v Setsogo and Others** 1996 BLR 763 (CA) at 799 A-C

*has expressly endorsed the correctness of **Memory Matiwane**"*. **Memory Matiwane** is a case in which Mr Matiwane had sought to have the High Court review a decision of the ICA under the IRA, 1996. The application for review was successfully opposed on grounds, *inter alia*, that there was no provision in the Act or in any other law allowing the review applied for; and that in any case the ICA was not an inferior court to be reviewed by the High Court. It was there also argued that the ICA was not a court of record 'whose record of proceedings would be required, in terms of Rule 53(3)'. The learned trial judge, Masuku J, concluded that the High Court had no jurisdiction to review decisions of the ICA. On appeal, this Court entirely agreed with the judgment of Masuku J, *a quo.* On this issue of the ICA being a court not of record, I refer to ***Halsbury's Laws of England,*** 4th ed. Vol 10: para 709: "**Courts of record.** *Another manner of division is into courts of record and courts not of record. Certain courts are expressly declared by statute to be courts of record. In the case of courts not expressly declared to be courts of record, the answer to the question whether a court is a court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences; if it has such power, it seems that it is a court of record"*. Curiously, the Industrial Court has power to punish for contempt of itself (sec. 14(b)); but nothing similar is said of the ICA. Can the ICA punish for contempt? I think it can. Unfortunately, Masuku J does not say why he says that the ICA is not a court of record.

[31] As we have noted above, the **Swazi Observer** case was an appeal from the ICA to this Court. I entirely agree with the decision of this Court in that case, that is, that this Court does not have jurisdiction to hear an appeal from the ICA. However, in para [17] of that case, the Court dismissed, as fallacious, Mr. Smith's

argument that if the ICA was not inferior then there were 'two final courts of appeal' within the Swazi jurisdiction. Browde AJP countered: *"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"*. The learned Acting Judge President went on to refer to sections 11(1) and 19(2) of the IRA 2000 as indicating the 'distinctive character of the Industrial Courts' and concluded that it should not be surprising, that the Constitution, in 2005, did not affect the finality of the Industrial Court of Appeal's decisions, predicated on the esoteric nature of industrial problems and the need for an exclusive jurisdiction peculiar to those problems. The ICA cannot therefore be a normal court or court strictly so-called. How can such a court then be equal to the Supreme Court?

[32] In the **Swazi Observer** judgment, Justice Browde does not refer to or discuss the provisions of the IRA which equate the IC and ICA with the High Court and Court of Appeal respectively. What Browde AJP seems to emphasise is that there is one final Court of Appeal, not two. The learned Judge President does not see any divide between the industrial and the common-law jurisdictional streams leading to possibly two final courts of appeal. In my view, this does indeed underscore the reality of the simple fact that there is one final Court of Appeal and whatever finality is exercised by the ICA does not affect the finality enjoyed by the Supreme Court: therein lies the inferior status of the ICA. Importantly, also, is Justice Browde's reference to "purely industrial cases which fall within the jurisdiction of the Courts specially created to deal with those matters". These words evoke the notion of 'specialised', therefore limited, character of the

industrial courts. Finally, Justice Browde concludes in para [19] that *"in industrial matters the Industrial Court of Appeal is the end of the road"*. That statement is correct subject only to its being limited to **appeals** only, as was the subject-matter before Court.

[33] In the **Swaziland Revenue Authority** v **Presiding Judges of ICA** (supra) case Mlangeni J refers *inter alia* to section 21(4) of IRA and emphasizes the word 'final'. The learned Judge compares s 21(4) with s 19(4) IRA 1996 and says that "the older clause was ambiguous surplusage and inconsequential". He then says, in para 19.4: *"… it appears to me to be beyond debate that the intention of Parliament in changing the wording of the 1996 clause was to decree unequivocally that labour disputes shall end at the Industrial Court of Appeal, literally"*. To the extent that Justice Mlangeni interprets section 21(4) as ousting both appeal and review, I cannot agree. Section 21(4) as was section 19 (4) is silent on the issue of review. The section only provides that *decisions* of the ICA are *final*. This is to be understood as only stopping any further appeal. Section 21(4) is, in my view, not beyond debate. The significance of the **Swazi Observer** case is that it provides a definitive judicial decision on there being no appeal from the ICA to the Supreme Court. This review application does not challenge the finality of ICA decisions as far as it concerns appeals. The conclusion in **Swazi Observer** denying appeal from ICA to this Court is unimpeachable.

[34] I agree with the classification of our courts and institutions exercising judicial function made by the court *a quo* in this appeal which Mlangeni J dismisses as elevating "classification to a point it counts for everything and

substance counts for nothing" (para [31]). Happily, Mlangeni J is mindful of this fact the classification is ordained by the Constitution (para [37]) even as he would want the debate to be outside of the Constitution. But how, ultimately, we can escape from the reach of the Constitution on this matter, Justice Mlangeni is not forthcoming. Whatever the courts have said of the ICA I am not aware that they have described it as a superior court. Mlangeni J dismisses the two judgments by Hlophe J and by Dlamini J, already referred to above, as "pedantic" and that "their conclusion defies the reality of the role of the Industrial Court of Appeal on the ground", having the effect of "lowering the Industrial Court of Appeal to a level that is implicitly lower than the High Court, to the extent that three justices of appeal may be reviewed by a single justice of the High court" (para [38]), or a "specialist court … be reviewed by a non-specialist court" (para [27]). With respect, it is not the number or status of the justices sitting as such but the jurisdictional competence of the court that matters. The review of ICA decisions by the High Court *would* mean that the ICA is lower in status to the High Court. Ultimately, the reviewability of the decisions of the ICA depends on whether the ICA is or is not an inferior court or tribunal. The position we have taken in this judgment is that the ICA is a court or tribunal lower than the High Court. In other words, neither the IC nor the ICA is a 'superior court'. This is not a new status, post-2005; the position has been like that since inception of these industrial courts.

Respondents' case (1st, 2nd and 3rd Respondents)

[35] Counsel for the respondents submits that the *"High Court has jurisdiction to hear [and] determine the matter by virtue of the review powers vested in it by the Constitution…of 2005 read together with the High Court Act No. 20 of 1954 and*

the Industrial Relations Act No. 1 of 2000". The respondents contend that "*from the reading of section 152 and 139 of the Constitution…, the Legislature* ***specifically*** *excluded*[16] *the Industrial Court of Appeal to be classified as superior court"*.(My emphasis) In the result, "*there are only two superior courts, the Supreme Court and the High Court"*; and that "*Section 152 empowers the High Court to review all the institutions which fall under section 139 (b)"* (sic), so argue the respondents who further "…. *aver that as the Industrial Court of Appeal is specifically excluded from section 139(1)(a)(i),(ii) it follows that it is a specialized court which is subordinate to the High Court. The expression* ***expressio unius est exclusio alterius*** *applies with force in this instance"*. The respondents also submit that the **Memory Matiwane** case *"is not applicable to the present circumstances. The position arrived at by the Court was due to the fact that there was the Constitution at that time (sic). It is of no moment presently. The present application is premised on the Constitution of 2005 which has now defined that only the Supreme Court and the High Court are superior courts. In fact, when one reads this case in so far as the interpretation of statutes is concerned, it is clear that the High Court has the necessary jurisdiction as authorized by Section152"*. Counsel for respondents emphasizes the words of section 152: *"The High Court shall have and exercise review and supervisory jurisdiction over all subordinate courts and tribunals or any lower adjudicating authority*…"

[36] It would seem to follow from counsel's argument that the ICA falls under paragraph (b) of s139 (1), which mentions not specific 'courts' but types of entities "*exercising a judicial function* ***as Parliament may by law establish***". (My emphasis) These entities are "specialised, subordinate and Swazi Courts or

[16] **It is noted that the Constitution in fact does not *specifically* exclude the ICA; it is only silent about it.**

tribunals". Thus, while paragraph (a) is specific i.e. 'Supreme Court' and 'High Court', paragraph (b) is only generic. Under paragraph (b) new types of courts or tribunals may be added without amendment of the Constitution. But this cannot be done under para(a).[17]

[37] Counsel also raises the point that it would be highly prejudicial to litigants if decisions of the ICA would be immune from any challenge even if they are affected with irregularities: even the Supreme Court can review its own decisions. It is said that the word 'review' has three distinct meanings: the first reads, "*(a)* ***Review*** *by summons denotes the process by which, apart from appeal, the proceedings of inferior courts of justice, both civil and criminal, are brought before the Supreme Court, in respect of grave irregularities or illegalities occurring during the course of such proceedings"*[18]. Further, that since in the **Abel Sibandze** case the ICA was described by Farlam JA as a *"specialist tribunal"*, specializing in appeals in industrial matters *"from which no further appeal lies to this Court"*, counsel for the respondents argues that such tribunal must then be *"categorized as a subordinate court in terms of section 139(1) (b) of the Constitution"* and as such susceptible to review by the High Court. Further, the 2005 Constitution, being the supreme law, has enhanced the powers of the High Court and "changed the legal geography significantly", argues counsel. It is difficult to disagree with counsel in these submissions.

Brief excursion

[17] **Section 139 is specially entrenched. It seems, however, there was no need to equally entrench paragraph (b) of that section because it only anticipates possible additions by Parliament from time to time.**
[18] ***The South African Judicial Dictionary*** (1960) by JJL Sisson Q.C.

[38] Professor Rideout[19] wrote of the English labour relations situation: "*A body called the Industrial Court was established by the Industrial Court Act, 1919. It was never intended as a court in the normal sense of the word but it had characteristics similar to the labour courts which exist in certain Continental Western European countries. It has always been intended primarily to act as a permanent independent arbitration tribunal*". That body was renamed in 1971 as the Industrial Arbitration Board, and again renamed in 1976 the Central Arbitration Committee. I draw attention to the fact that though established as a 'court' it was never intended to be a "court in the normal sense" of the word even as it shared characteristics with other so-called labour courts. Indeed, labour or industrial courts differ somewhat from country to country. These courts tend to be protean, depending on the specific legislation. Even then controversies regarding the true character of these courts continue. If we find ourselves in similar controversies, we should not call the police.

[39] Of the South African labour situation, Grogan[20] tells that the Labour Court has a Judge President, a Deputy Judge President and Judges who are appointed from High Court judges or from among legal practitioners. The Court has exclusive jurisdiction in respect of all matters reserved for it by the Labour Relations Act, 1995, and that its judgements are subject to appeal only to the Labour Appeal Court, which is a Court of both law and equity. However, the Labour Court has concurrent jurisdiction with the High Court in respect of alleged or threatened violation of fundamental rights entrenched in Chapter 2 of the Constitution as may arise from 'employment and from labour relations'. The jurisdiction of the Labour Court is set out under section 157 and this section is said

[19] RW Rideout, **Principles of Labour Law**, 3rd ed (1979) p 219
[20] **Workplace Law** 10thed pp 433 ff.

to have been the subject of much debate *"and the dividing line between matters over which the Labour Court has exclusive jurisdiction and those in respect of which it shares jurisdiction with the High Court is sometimes difficult to determine"*.

[40] The Labour Appeal Court of South Africa, says Grogan, was established as a 'court of law and equity'. It is the final court of appeal in respect of all judgments and orders of the Labour Court. The Constitutional Court has, however, ruled that appeals from the Labour Appeal Court may be made to the Supreme Court of Appeal in cases involving constitutional matters. There is no right of appeal to the Labour Appeal Court except with the leave of the judge who delivered the judgment. The Labour Relations Act makes the judgments of the Labour Appeal Court binding on the Labour Court. Of present relevance is that the LRA (1995), as amended in 1988, changed the Supreme Court of Appeal, as was the case under the 1956 Act, from being the highest court of appeal in labour matters. Since then a separate Labour Appeal Court, equivalent to the Supreme Court of Appeal, was established, and became the final court of appeal in labour matters falling under the jurisdiction of the Labour Court.

[41] Grogan also says: *"The Labour Appeal Court ruled in two cases that is judgments were not appealable*[21]. However, in *Chevron Engineering (Pty) Ltd v Nkambule & Others*[22] a unanimous bench of the SCA ruled that these judgments were wrong. The right of appeal from the Labour Appeal Court to the SCA in

[21] **Khoza v Gypsum Industries Ltd** (1998) 19 ILJ 53 (LAC); **Kem-Lin Fashions v Brunton & Anor** (2002) 23 ILJ 882 (LAC).
22 (2003) 24 ILJ 1331 (SCA)
[22]23 (2005) 26 ILJ 689 (SCA)

matters that emanate from the Labour Court was confirmed in *NUMSA & Others v Fry's Metals (Pty) Ltd.*[23] Leave, however, must be obtained from the SCA for the appeal. Further appeal to the Constitutional Court is also possible, also with leave. The Constitutional Court has held that it has jurisdiction to decide any question from or connected with the Labour Court's interpretation of the general constitutional right to fair labour practices - See *Dudley v. City of Cape Town* (2004) 25 ILJ 991 (CC).

[42] Thus, as the law stands, unless there has been change, the legal position in South Africa would seem to be that in principle, labour matters within the exclusive jurisdiction of the Labour Court may find way to the highest court in that country. In our case, matters within the exclusive jurisdiction of the Industrial Court cannot reach the Supreme Court directly by way of appeal. The question that may soon have to be confronted is to what extent local labour issues raise questions of a constitutional nature and whether the IC or ICA would in case retain the exclusive jurisdiction to decide. What we learn from the South African situation is that it is not entirely taboo for labour matters to reach the apex court of the land, and that specialization in labour matters is not absolute. (See **Paper, Printing, Wood and Allied Workers' Union v Pienaar NO & Others** 1993 (4) SA 621 (A). Compare the language in establishing the Labour Appeal Court, passim.

The legislative style employed

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[43] The problem or part of the problem we have in this appeal is that the plenary powers of the IC or ICA have not been expressly spelt out. This has been due to the legislative approach followed in the Act; that is, legislation by reference. In this regard, we have the qualification, appointment, tenure of the judges and the powers and functions and enforcement of the orders or judgements of the IC equated to those of the High Court, and those of the ICA equated to those of the Supreme Court. For example: section 8(3) reads "In the discharge of its functions under this Act, the Court shall have *all the powers of the High Court*, …" and section 8(5) states "Any decision or order by the Court shall have the *same force and effect* as a judgment of the High Court …" Section 14, enforcement of an order of the Court shall be "*in the same manner* as an order of the High Court …" In the result, in practice, in any given situation, it is any body's guess what 'all the powers of the High Court' or the 'same force and effect' or 'in the same manner' actually mean or refer to. (My emphasis).

[44] Convenient as it may be, there is a problem with legislation by reference; it is ambiguous and uncertain, it is often broad and undefined. In the result these courts are equal but still not equal; equal in one respect but not in another. From a practical point of view this equality theory of the courts is unhelpful; it takes us nowhere. It is a drafting problem. The result is that the status, powers and functions of the IC and ICA are vague and ambiguous. In line with the general thrust of the provisions, the first confrontation we encounter is whether the IC and ICA are superior courts as the High Court and Supreme Court are. Are we also to assume that the IC and ICA are in fact established under the Constitution and not by an ordinary Act of Parliament? Critically, to what extent is the IC similar to the High Court and the ICA similar to the Supreme Court. That is, do these industrial courts

fully share the powers and status of the High Court and Supreme Court or only to the extent necessary for the narrow (industrial) purpose of their functions. Dr. Twum JA has also referred to the functions of these courts as purely industrial …

[45] Driedger[24] says: *"Legislation by reference, that is to say, the incorporation of the provisions of one Act in another Act, has been subjected to too much criticism. Some of it is, no doubt, deserved, but referential legislation is useful and necessary"*. (p123). Legislation by reference obviates the need to have to repeat the provisions of the Act incorporated in the other, later, Act. There are various uses of referential legislation: it is a short-hand form of drafting: "*Whether referential legislation is proper or improper in any particular case depends on the circumstances. There is no doubt that, carried to extremes, this device can make legislation unintelligible. On the other hand, if all our statutes were written without references to other statutes, they would be almost as bad… But legislation by reference should not be resorted to without a good deal of care and caution, and every effort should he exerted to make the law precise and intelligible"*. (p125). In our case, as this appeal shows, the referential legislation has not made the law to be entirely intelligible.

[46] Professor V.C.R.A.C. Crabbe[25] agrees with Driedger, even though somewhat less conciliatory than Driedger. Crabbe writes: "*The incorporation of the provisions of one Act into another is known as referential legislation which can be useful or even necessary;"* but warns: "*Thus unless absolutely necessary Parliamentary Counsel should desist from using referential legislation"*. Justice

[24] **The Composition of Legislation,** 2nd ed, 1976
[25] **Legislative Drafting** (1993) Care Hill, Barbados. West Indies.

Crabbe refers to two kinds of referential legislation: "*The first kind deals with the application of a previous section or groups of sections to a subsequent section or groups or section in the same Act. The second kind deals with provisions of a previous Act being referentially incorporated in a subsequent Act"*. Of the first kind, Justice Crabbe cautions that the provisions intended to be made to apply need careful examination; and if there is doubt, it is better to repeat the relevant provisions as it is always better to be precise than to be obscure. Of the second kind Crabbe says "*referential legislation should always be avoided"*, if only to avoid possible obscurity of the legislation.

[47] A large part of our problem in this appeal is due to the referential legislation used in composing certain parts of the IRA. And in all these similarities that continue to be dissimilar, equations that do not balance, it is said that the IC is not to be bound by strict rules of evidence or procedure which apply in civil proceedings. Whilst the High Court has virtually unlimited original jurisdiction, the IC has its jurisdiction limited to labour matters – a far cry from the High Court's plenary jurisdiction. Furthermore, the High Court and Supreme Court are established by the supreme law of the land, the Constitution, as superior courts of record. That alone places these two courts on a platform of their own – a kind of super league. None of the other courts of the land are so established. The IC and ICA are established by an Act of Parliament. How then do these industrial counts compare with the High Court or Supreme Court? That the High Court has neither original nor appellate jurisdiction in matters within the exclusive jurisdiction of the IC does not, as such, mean that the two courts are of the same rank. It is my considered opinion, therefore, that the rank equalization purported by the IRA does not succeed. The same fate must befall the ICA.

Judicial review and legislative presumptions

[48] Herbstein and van Winsen write:[26]

> *"Judicial review is in essence concerned, not with the decision, but with the decision-making process. 'Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality….' Upon review the court is in general terms concerned with the legality of the decision, not with its merits. The function of judicial review is to scrutinize the legality of administrative action, not to secure or to substitute a decision by a judge in the place of the decision of an administrator. In* ***Liberty Life Association of Africa v Kachelhoffer***[27] *the court stated:*
>
> > *'Review and appeal are dissimilar proceedings. The former concerns the regularity and validity of the proceedings, whereas the latter concerns the correctness or otherwise of the decision that is being assailed on appeal (see* ***Davies v Chairman, Committee of the JSC*** *1991 (4) SA 43 (W) at 46H, 48E). Because of that fundamental difference between review and appeal, they are inconsistent remedies in the sense that, if both are available, an appeal can be considered only once the review proceedings have been finalized as a decision in respect of the appeal would preclude the granting of relief by way of review … Similarly, a successful review obviates the need to consider the merits of an appeal…'."*

And Van Reenen J et Jali J also add that appeal and review "*are also irreconcilable remedies in the sense that, where both are available, the review must be disposed of first as, if the correctness of the judgment appealed against is confirmed, a review of the proceedings is ordinarily not available (see* ***Mahomed v***

[26] ***The CIVIL PRACTICE of the HIGH COURTS of South Africa***, 5th Ed. Vol. 2 pp 1266-1267
[27] 2001 (3) SA 1094 (C) at 1110 - 1111

Middlewick NO and Another *1917 CPD 539, at 540, 541;* ***R v D and Another*** *1953 (4) SA 384 (A) at 390D – 391B). …..”* (at p 1108F-G).

[49] Wade and Forsyth write:

> *“The system of judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is ‘right or wrong?’ On review the question is ‘lawful or unlawful?’*
>
> *“Rights of appeal are always statutory. Judicial review, on the other hand, is the exercise of the court’s inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law. This remains true even though nearly all cases in administrative law arise under some Act of Parliament.*
>
> *“Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not”*[28].

[50] Van Reenan J et Jali J write: “*Not only is there a presumption against an interference by the Legislature with existing rights (see ….), but in our view the fact that the Legislature, with awareness of the distinction between appeal and review, in item 22(5) expressly referred to an appeal and remained silent as to*

[28] **Administrative Law,** 10th ed (2009) pp 28-29

review is consonant with the absence of intention to interfere with the High Court's common law review jurisdiction (cf ***Richards Bay Bulk Storage v Minister of Public Enterprises****,1996 (4) SA 490 (A) at 495H). In any event we would have expected such an intention to have been articulated by express provisions to that effect".* ***Liberty Life Association of Africa,*** (op. cit.) p1107A-C. In **Eagles Nest**, op cit, Dr. Twum JA wrote: *"The applicants submitted that it is decided case law in the Kingdom of Swaziland that the original jurisdiction of a superior court can only be ousted by clear and unambiguous language of a statute and section 40 of the Act [the Competition Act 2007] does not trump a party's rights held under section 151 of the Constitution …. It is fair to point out that this quintessential proposition is a rebuttable presumption of law".* (Para [10] (4), p 24).

In the premises, I incline to the view that it does not flow as a necessary implication from the creation of the ICA that the Legislature intended to oust the High Court's common law powers of review in respect of industrial court decisions at the level of the ICA which is not a superior court of record.

[51] The principle is this: *"There is a strong presumption against legislative interference with the jurisdiction of courts of law. For the jurisdiction of a court to be ousted there has to be an express provision or a necessary implication flowing from the statutory provision under consideration (see* ***National Union of Textile Workers*** *v* ***Textile Workers Industrial Union (SA)and Others*** *1988(1) SA 925 (A);* ***Richards Bay Storage (Pty) Ltd v Minister of Public Enterprises*** *1996 (4) SA 490 (A);* ***Mgijima v Eastern Cape A.T.U. and Another*** *2000 (2) SA 291). As item 22(5) of the Schedule did not expressly oust the High Court's jurisdiction, the enquiry is whether it did so by necessary implication.*

"It is apparent from a substantial body of case law that the presumption against legislative interference with the jurisdiction of courts of law has been applied in various contexts. One such context is where an interpretation consonant with the ousting of the Court's jurisdiction would leave an aggrieved party without an effective remedy (see ***Lenz Township Co. (Pty) Ltd v Lorentz NO en Andere 1961(2) SA 450(A); Minister of Law and Order and Others v Hurley and Another*** *1986 (3) SA 568 (A)"*[29].

[52] In my view, it could not have been the intention of the Legislature that a litigant who previously could seek review and appeal at the High Court and therefrom to the Supreme Court was by the 1996 and 2000 IRA denied that privilege. It is true that one of the purposes of the IRA is to *"provide mechanisms and procedures for speedy resolution of conflicts in labour relations";* it is also another purpose of the IRA to *"promote fairness and equity in labour relations"* as well as *"harmonious industrial relations"*. But these purposes, in all fairness, cannot be defeated by a review of the ICA decision, guarding only against possible abuse of the process. It would indeed be unjust and possibly unconstitutional as well to deny a litigant such review in proceedings beset with grave irregularities or illegalities showing that there has been a failure of justice. We are by no means intimating that that is the situation in the purported review in this matter. Without the possibility of such a review, a litigant, faced with such challenges in the proceedings, would be without effective remedy. Zulman J. has summarized the position as follows[30]:

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[29] **Liberty Life Association of Africa** (op. cit.) pp 1105I-1106B

[30] **Davies v Chairman, Committee of the Johannesburg Stock Exchange** 1991 (4) SA 43 (W) at p46H-I

> *"2. The issue before this Court on review is not the correctness or otherwise of the decision under review. Unlike the position in an appeal, this Court of review 'will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official, for a review does not as a rule import the idea of a reconsideration of a decision of a body under review'".*

See **Schoch NO & Others v Bhettay & Others** 1974 (4) SA 860 (A), at 866E-F

[53] The similar principle of presumption against parliamentary interference is stated by Van Zyl J in **Mgijima**[31] as follows: *"The question whether the jurisdiction of the High Court has been ousted and conferred to some other tribunal or court must be determined in the context of the presumption against legislative interference with the jurisdiction of the High Court. It is a well recognised rule of statutory interpretation that the curtailment of the powers of a court of law will not be presumed in the absence of an express provision or a necessary provision to the contrary therein. In each case where this arises, the court will therefore closely examine any provision which appears to curtail or oust its jurisdiction* ***(see Lenz & Township Co (Pty) Ltd v Lorentz NO en Andere 1961 (2) SA 450 (A) at 455B; Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 584A****;…)"*

[54] The question is: By expressly permitting review of IC decisions, but neither appeal nor review of ICA decisions, did Parliament mean to deny litigants any right to challenge a decision of the ICA, even by way of review? I incline to the view that appeal having been denied but being silent on review Parliament left the door open for review of ICA decisions to take place. In this regard it is enough to

[31] **Mgijima v Eastern Cape Appropriate Technology Unit and Another** 2000 (2) SA 291, 297 C-E

point out that Parliament being aware of the distinction between appeal and review its silence on review is consistent with the absence of intention to interfere with the High Court's common law review jurisdiction. The difficulty a litigant faces in an industrial dispute is that there is one review and one appeal only. And a litigant cannot have them both in the same matter. I do not believe that that was the intention of Parliament. The distinction between appeal and review has been articulated in a variety of cases and textbooks as we have amply demonstrated herein.

Finality and Ouster Clauses

[55] **De Wet v Deetlets** 1928 AD 286 at 290, Solomon CJ wrote: *"It is a well-recognised rule in the interpretation of statutes that in order to oust the jurisdiction of a Court of law, it must be clear that such was the intention of the legislature"*. De Ville[32] writes: *"Legislation often contains a clause providing in respect of a specific administrative decision, that such decision will be 'final'. As already indicated, the courts strictly guard their review jurisdiction and a clause like this would usually be insufficient to exclude such jurisdiction. Where such a clause functions as an ouster clause, it has been found to be unconstitutional.* ***A finality clause is usually interpreted as only excluding or restricting the possibility of an appeal"***. (My emphasis).

[56] In **Schoch NO & Others** [33] Botha JA wrote:

[32] **Judicial Review of Administrative Action in South Africa** (2003) p460
[33] **Schoch NO & Others v Bhettay & Others** 1974 (4) SA 860 (AD) at 864H – 865A

"Secs. 41 and 45 confer upon the arbitrators complete discretion to determine the market value of expropriated property, and ***their decision is not subject to appeal by the ordinary Courts of law and is therefore final on the merits. That does not mean, however, that the jurisdiction of Courts of law are altogether excluded,*** *for Courts of law will interfere with the purported exercise of their discretion if it is made to appear that the arbitrators have, by failing to apply their minds to the issues before them in accordance with the principles of natural justice, failed to exercise the discretion conferred upon them;…."* (My emphasis). In **Anisminic Ltd** [1969] 2 AC 147 the words in issue were that the determination of the Commission ***'shall not be called in question in any court of law"***. But the determination was held not to be immune to judicial review. In *Ex parte* **Gilmore**, *"The Act provided that the decision of the Tribunal* ***'shall be final****', but the court would not allow this to impede its normal powers in respect of error of law. The normal effect of a finality clause is therefore to prevent any appeal. There is no right of appeal in any case unless it is given by statute"*[34]. (My emphasis).

[57] Wade and Forsyth (op. cit. at 610, 611) state that:

> *" … it must be stressed that there is a presumption against any restriction of the supervisory powers of the court. Denning LJ said in one case: 'I find it very well-settled that the remedy of certiorari is never to be taken away by any statute except by the most clear and explicit words'*[35]*. . . .*
>
> *"Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the*

[34] Ibid, at 611
[35] **R v Medical Appeal Tribunal ex parte Gilmore** [1957] 1 QB 574, 583

*operation of judicial review. As will be seen in this and the following sections, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court**.** Statutory restrictions on judicial remedies are given the narrowest possible construction, sometimes even against the plain meaning of the words. This is a good policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. 'Finality is a good thing, but justice is better'.*

"If a statute says that the decision or order of some administrative body or tribunal ***'shall be final'*** *or* ***'shall be final and conclusive to all intents and purposes'*** *this is held to mean merely that there is no appeal: judicial review of legality is unimpaired. 'Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in accordance with the law'. This has been the consistent doctrine for three hundred years. It safeguards the whole area of judicial review, including (formerly) error on the face of the record as well as ultra vires."*[36] (My emphasis)

The legal standing of the IC and ICA

[58] The court *a quo* turned to deal with the question of jurisdiction central to the issue before Court. I agree with the position stated under para [17] as submitted by Mr. Mdladla. The position is developed around section 139 (1) in terms of which there are superior courts of record, being the High Court and the Supreme Court, which may be called the 'A' team, represented under sec 139(1)(a) and a 'B' team represented under section 139 (1) (b). Indeed, unless the issue is narrowed to

[36] Wade and Forsyth, pp 610, 611

within certain specific parameters it will be difficult to manage it and offer an answer to the question before Court.

[59] Before the creation of the Industrial Court and later Industrial Court of Appeal there were industrial disputes in the Kingdom and like so many other types of disputes industrial disputes were subject to the jurisdiction of normal courts, like the High Court and Court of Appeal. For all we can say, judges of the industrial court and industrial court of appeal like judges of the High Court and Court of Appeal are recruited from the same Law Schools. There is no separate and special training for judges of the industrial courts. I therefore do not understand why it should be thought that judges of the High Court and Supreme Court are for any reason unsuitable to hear and determine industrial disputes. Any judge hearing an industrial dispute would have to be guided by the same Act and Rules which guide judges of the industrial courts. The principle of 'equity' is not necessarily peculiar to industrial relations and disputes. The IRA is even very clear in this regard in providing that the judges of the IC and those of the ICA will qualify, be appointed and tenured in the same way as judges of the High Court and the Supreme Court respectively. And, as it often happens in our jurisdiction, judges of the High Court are frequently appointed to act as judges of the ICA. That industrial court judges may be specialist in industrial law is not different from an ordinary superior court judge being a specialist in, say, company or constitutional law. Invariably, none of these judges is appointed on the basis of their specialization.

[60] The jurisdiction of the ICA is essentially predicated on the jurisdiction of the IC. The jurisdiction of the IC is set out in section 8 of the IRA as follows: *"(1)*

The Court shall….. 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 [Act]….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 … and a member thereof". The Act proceeds to provide that in the discharge of its functions 'under this Act' the IC shall have "*all the powers of the High Court, including the power to grant injunctive relief*", and the decision of the IC *"shall have the same force and effect as a judgement of the High Court…*"

[61] In the foregoing paragraph, by "*all the powers of the High Court"* I do not understand it in a literal sense because in fact the power of the IC is narrowly circumscribed and limited to 'industrial matters' while the power of the High Court is virtually unlimited. The ***all*** of the IC is not of the same weight or value as the ***all*** in respect of the High Court. Similarly, with the ICA, the IRA speaks of 'same' powers and functions as the Court of Appeal. But the 'same' is then qualified and limited to 'appeals from the IC". That to me clearly indicates that notwithstanding the wording used the powers and functions of the IC and ICA cannot equal those of the High Court and Court of Appeal. This is further demonstrated by the IC decisions reviewable by the High Court. And since the IC and ICA are connected conceptually, the review exercisable over the IC decisions attracts reviewability of decisions of the ICA. It being debated whether a licensing board was an *inferior court* of justice in terms of a section of the South Africa Act, Innes CJ responded thus: " … *the real test is not one of procedure, but of substance; it is the essential*

nature of the functions discharged by the licensing board which must decide whether it is or not a court for the administration of justice".[37]

[62] The IC itself (sec 6(1)) is endowed *"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 eSwatini"*. We have a similar provision in the case of the ICA, which states that the ICA *"shall have the same powers and functions as the Court of Appeal but shall only deal with appeals from the Industrial Court"*: section 20(1). The jurisdiction of the ICA is thus limited to hearing and determining appeals from the IC in respect of questions of law only and its **"decision shall be final"** (s 21 (4)), while a decision or order of the IC shall be **"subject to review by the High Court"** on grounds permissible at common law (s 19 (5)). To me, the review of the decisions of the IC by the High Court renders the purported equality of status between the IC and the High Court patently untenable. If the IC is inferior to the High Court, it seems to me that there is no easy way that the ICA can avoid also being inferior to the High Court. A structure in terms of which the High Court hangs in between the IC and the ICA would be so deformed it is unimaginable. Likewise, to have the ICA equal to the Supreme Court while the IC is not equal to the High Court is also somehow unnatural. The usual or natural thing is to have both the IC and ICA below the High Court. The IC cannot be equal to the High Court for the simple reason that the Legislature deemed it wise to have its decisions reviewed by the High Court. The ICA is not a court or tribunal substantively or structurally different from the IC. The point is, the High Court, being a superior court of justice, cannot be

[37] **Enyati Colliery Ltd & Another v Alleson** 1922 AD 24 at 30.

trumped by the ICA which is not such a court, even as a specialist appellate tribunal.

[63[Section 11 of the IRA provides that the IC *"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"*. In section 19(2), the ICA is then reminded that in considering an appeal it *"shall have regard to the fact that the [IC] is not strictly bound by the rules of evidence or procedure which apply in civil proceedings"*. These provisions have a telling effect on the status and character of the industrial courts as courts. If the industrial courts are courts at all they certainly are not courts in the normal sense, as Dr. Rideout would describe them. I will compare the provisions of the IRA establishing and describing the functions and jurisdiction of the IC/ICA with those of the Commissioner of Patents Court of South Africa established in terms of the Patents Act, 1952.

[64] Under the IRA, 1980, there was no ICA. In terms of that Act decisions of the IC were appealable to and reviewable by the High Court and from there to the Court of Appeal. The ICA was established in 1996 with the result that decisions of the IC could then be appealed only to the ICA. Only the review power of the High Court remained unaffected. There was thus no significant change following the 1996 IRA other than cosmetic. However, hitherto, the High Court had been elevated to an appellate level in respect of the decisions of the IC, even though its President was appointed "in the same manner as a judge of the High Court". The transfer of the appellate power from the High Court to the newly established ICA

was of no practical significance to the High Court or to the management of industrial disputes as such. Technically, the ICA was no higher than the High Court. That the decisions of the ICA were said to be final made no real difference to the prosecution of labour disputes, so long as there was possibility to move from the ICA to the High Court and thence to the Supreme Court, basically as the position was in terms of the 1980 Act. This shift away from the cul-de-sac created by the non-appealability of ICA decisions is achieved by the availability of review by the High Court of the ICA decisions.

65] The problem causing the uncertainty whether the review of the ICA decisions by the High Court is or is not available is Parliament's silence on the issue and the rather uncertain status of the ICA *vis-a-vis* the High Court. It then remains to be determined by interpretation. The starting point must be an appreciation of the distinction between appeal and review which has already been described above. Parliament allowed the decisions of the IC to be appealable to the ICA and not beyond by not providing that the decisions of the ICA may be appealed. Parliament must have had 'appeal' in mind when prescribing finality of ICA decisions. In the result, there really was no finality on review. The only question was to which court would the review be pursued: that is, to the High Court or the Court of Appeal.

The Gentiruco case (op cit).

[66] Farlam JA in **Abel Sibandze** described the ICA as a 'specialist tribunal'. 7th Respondent says "Farlam JA used the noun 'tribunal' to mean a body established to settle labour disputes". 7th Respondent then criticises the court *a quo* for holding

that decisions of the ICA are reviewable by the High Court because the ICA is a specialist court. Respondent says this is without principle and says that something more is needed to make these decisions reviewable as the court *a quo* held. Respondent cites **Gentiruco AG v Firestone SA (Pty) Ltd** 1972 (1) SA 589 (A). The issue in **Gentiruco** was whether decisions of the Court of the Commissioner of Patents were reviewable by the Supreme Court (High Court) in light of the provision, *inter alia*, that the "proceedings, decisions and orders" of that Court equated with those of the Supreme Court in civil case proceedings. The Appellate Division said the Supreme Court could not so review the decisions in question because the Commissioner's Court was of the same standing as the Supreme Court. 7th Respondent says the same must follow *in casu*; that is, the decisions of the ICA should not be reviewable by the High Court in light of section 20 which equates the ICA with the Supreme Court. **Gentiruco is** a case of the High Court purporting to review decisions of another tribunal of equivalent status; *in casu*, the High Court is prayed to review decisions of the ICA, an appellate tribunal claiming the status of the Supreme Court.

[67] In **Gentiruco,** Trollip JA makes it clear that the Commissioner of Patents' Court was a Court of equal status with the Supreme Court (High Court). To that end, Trollip JA points out that under the Patents Act 37 of 1952 – which established the Patents Court presided by Commissioner – there was no provision for the review of the decisions of the Commissioner by the Supreme Court, and so the review was brought under the Supreme Court Act 59 of 1959. The Justice of Appeal, however, considered that: *"The correct approach to the problem is, … to start by considering the Patents Act, 37 of 1952, for it is a special statute that, inter alia, established the Commissioner's Court and governs its proceedings, …*

*According to the Patents Act, 1952, the Commissioner has always had to be a trained and qualified lawyer. Prior to 1964, he had to be a former Judge or an advocate … since 1964 he has been a Judge or Acting Judge of the TPD, designated from time to time as such by the Judge President of that Division (…). In terms of the Act his function is to sit as a Court to adjudicate in all disputes concerning patents … Indeed, sec. 77(1) says that '****no tribunal other than the commissioner shall have jurisdiction in the first instance to hear and determine any action or proceedings, other than criminal proceedings, relating to any matter under this Act****'*." (pp 600F-601AG). The Commissioner is assisted by "specially qualified advisers" who sit with him during proceedings.

[68] According to Trollip JA: "*Those provisions indicate that the Commissioner's Court is a special court that is established, not for any area or province but for the whole country, in order to hear and determine disputes of a particular kind. In regard to proceedings in his court sec 76 (1) endows the Commissioner with specific judicial powers and concludes: **'and generally the Commissioner shall… have all such powers and jurisdiction as are possessed by a Judge sitting alone to try a civil action before a provincial division of the Supreme Court…'***" (p 601B). The learned Justice of Appeal observes: *"Complementarily, sec. 82(1) says that the procedure before the Commissioner must, as far as practicable, be in accordance with the law and rules governing the procedure in civil cases in that Provincial Division. And sec 82(2) rounds it off by enacting that '****any decision or order of the Commissioner… shall have the same effect and shall be regarded for all purposes as a decision or order****' of the Provincial Division''* (p601C). And, finally, the learned Judge says: "… *the undoubted effect of the above- mentioned provisions is virtually to equate the*

proceedings, decisions, and orders of the Commissioner's Court with those in a civil case in a Superior Court. It was common cause that the latter's proceedings etc are not reviewable; the only remedy of an unsuccessful litigant is to appeal., …" (p601D-F).

[69] I have no qualms with the judgment in **Gentiruco**. The judgment is very informative but I find it distinguishable from present case. That is, the Patents Act, 1952, differs from the IRA 2000 in terms of the specialist tribunal established. The provisions of the Patents Act equating the Commissioners Court and its proceedings with those of a Supreme Court (High Court) are pitched or asserted at a higher and more definitive level than those of the IRA. In the first place, sec 76(1) of the Patents Act endows the Commissioner with 'specific judicial powers', including powers and jurisdiction as possessed by a single Judge in a civil action before a provincial division of the Supreme Court; in the second place, sec 77(1) provides that no tribunal other than the Commissioner shall have jurisdiction in the first instance to hear and determine any action or proceedings relating to a matter under the Act. In the third place, sec 82 (1) says the procedure before the Commissioner's Court must as far as practicable be in accordance with the law and rules governing procedure in civil cases in that Provincial Division; and, in the fourth place, sec 82(2) provides that any decision or order of the Commissioner shall have the same effect and shall be regarded "for all purposes" as a decision or order of that Provincial Division. The cumulative effect of the above provisions, as Justice Trollip found, was *"virtually to equate the proceedings, decisions and orders of the Commissioner's Court with those in a civil case in a Supreme Court"*. I would have serious reservation in saying the same of the ICA.

[70] On the other hand, the position of the ICA in terms of the IRA is that even though there are provisions equating the ICA with the Supreme Court, for instance, that the ICA has the "same powers and functions" (sec 20(1)), and the "same" qualification, appointment and tenure (sec 20 (2) and (3)) as the Judges of the Supreme Court in matters within its jurisdiction, and there is no provision for further appeal (or review), there is, in my opinion a serious drawback or detraction from the equation in the language used. But more serious, and may be decisive, is the provision that decisions of the IC are reviewable by the High Court. No similar or equivalent provision from other jurisdictions has been indicated to this Court. This provision, sec 19(5), casts a sombre shadow over the real status of the ICA. That is, if the IC is really equivalent to the High Court as sections 6(3), 8(3) and (5) provide, then its decisions should **not** be reviewable by the High Court. We have noted above where Trollip JA, with reference to the Patents Court, says: *"It was common cause that the latter's proceedings etc were not reviewable"*, because the Patents Court had the status of a supreme court. The IC cannot be equal and at the same time be not equal to the High Court. The equation clearly fails. In *footnote 76,* on page 224, Wade and Forsyth note, what must be the general rule, that: *"The High Court, as a court of unlimited jurisdiction cannot act beyond its powers, i.e., act ultra vires, and so cannot be subject to judicial review"*. Likewise, if the IC is equal to the High Court then it must be a court of unlimited jurisdiction whose decisions cannot be reviewed by any other court within the system.

[71] Furthermore, sec. 19 (2) provides that the ICA "*in considering an appeal …. shall have regard to the fact that the Court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings"*. This provision seems to be in stark contrast to the provision in the Patents Act which provides that the

procedure before the Commissioner must as far as practicable be in accordance with the law and rules governing the procedure in civil cases in the particular Provincial Division. Section 11(1) to which section 19(2) refers, reads *"The Court shall not be strictly bound by the rules of evidence or procedure which apply in civil proceedings …"*. How then is the IC equivalent to the High Court? Thus, the ICA is subject to and suffers from the congenital disabilities of the IC not being able to rise, at least as far as may be practicable, to the level of the High Court. The IRA does not have a similar or equivalent provision to sec 82 (2) of the Patents Act to the effect that any decision or order of the ICA shall have the same effect and shall be "regarded for all purposes" as a decision or order of the Supreme Court. Incidentally, sec 14 of the IRA provides that an order of the IC for payment of money or for performance or non-performance shall be enforceable in the same manner as an order of the High Court. There is no equivalent provision covering the decisions and orders of the ICA. This is not surprising but it does show the jurisdictional deficiencies that the ICA has compared to the Supreme Court.

[72] In the final analysis, however, between the **Gentiruco** and this case, we are comparing apples and oranges. In **Gentiruco** the Commissioner's Court is a court of first instance. Appeals from that Court go to an appeal Court of the status of a Full Court of the Provincial Division. In terms of the Patents Act, *"The appeal must be prosecuted '**in the manner prescribed by law**' for appeals to the appropriate Provincial Division against a civil judgment or order of a single Judge of such Division, … The Appeal Court is therefore the Full Court of the Provincial Division … The latter is endowed by sec, 79(3) and (5) with extensive powers on hearing such an appeal: it can confirm, set aside, or vary the order or*

decision of the Commissioner or remit the proceedings for further proceedings or evidence, or for further consideration and report where the appeal involves technical or scientific questions." (pp 601H-602A). In our case, the ICA is of course a court of second instance, composed of three Justices of Appeal, qualified and appointed in the same manner as Justices of the Supreme Court. It is to be noted, however, that the purported equality of status between the ICA and the Supreme Court is only artificial and not real. There is simply an unbridgeable gulf between Act No. 1 of 2000 and Act No. 001 of 2005. The inevitable conclusion is that in no way can the ICA be equal to the Supreme Court, the apex court of eSwatini. In my view, because of sec. 19(2), section 21(3) which provides that the ICA "*may confirm, amend or set aside the decision or order against which the appeal has been noted or make any other decision or order including an order as to costs, according to law and fairness*" does not take the cause of the ICA as a superior court very far. ***Gentiruco*** does not give us an answer in the matter before Court; it has helped us see our case better.

The ICA and the Constitution

[73] Section 6(1) of the IRA establishing the IC states that the IC has "*all the powers and rights set out in this Act or any other law*…" Section 8(3) states that in discharging its functions under the Act the IC shall have "*all the powers of the High Court, including the power to grant injunctive relief*". In terms of section 8(5) a decision or order of the IC "*shall have the same force and effect as a judgment of the High Court.*…" Section 20(1), which establishes the ICA, states that the ICA "*shall have the same powers and functions as the Court of Appeal but shall only deal with appeals from the Industrial court*". In terms of section 20(2)

and (3) the qualification, appointment and tenure of the ICA judges are the same as those of the Court of Appeal. The question that arises is whether by these provisions the Industrial Court is at par with the High Court. As the law stands, however, there cannot be another High Court or Supreme Court short of amending the Constitution. The same goes for the ICA. In the result, the IC and ICA cannot be superior courts.

[74] Are the IC and ICA part of the Judiciary of Eswatini? This question is fundamental to the issue for determination in this matter. We have to locate the IC/ICA somewhere within the bigger picture of adjudicating entities in this country. The IC/ICA cannot just float, unfettered, and be Mistress unto themselves. That could lead or give rise to a constitutional hiatus in the judicial hierarchy and the rights of persons who fall under the jurisdiction of the industrial courts would possibly find no effective remedy under the law. The judiciary as established in terms of section 139 of the Constitution must be the centre and point of departure in the search for the place and standing of every adjudicating authority in the Kingdom. Neither sec 138 nor sec 139(1) establishes the judiciary but take its existence for granted. Section 139(1) has two paragraphs categorizing the existing courts, namely, (**a**) "*the Superior Court of Judicature*[38] *comprising (i) The Supreme Court and (ii) The High Court*", and (**b**) comprising "*such specialized, subordinate and Swazi courts or tribunals exercising a judicial function as Parliament may by law establish*". During the hearing it seemed common cause that the IC/ICA are a part of the judiciary. There was, however, sharp divergence of opinion as to where exactly the IC/ICA feature under sec 139. Counsel for appellant was insistent that the IC/ICA do not fall under section 139 (1) (b), but

[38] **It is noted that the Superior Court of Judicature is one Court consisting of the High Court and Supreme Court.**

that these courts are superior adjudicating tribunals under subsec. (1) (a). This position could be argued for in terms of sections 6(3) and 20(1) (2) (3) of the IRA 2000 as amended. The alleged equality, however, must be rejected as not firmly established.

[75] Looking at sec 139(1) two things become very clear. Subsection (1) (a) is very different from subsection (1) (b). Under subsection (1) (a) definite superior courts of record are prescribed, namely, the High Court and the Supreme Court (formerly the Court of Appeal). You cannot add or subtract from subsection (1) (a) (i) or (ii) without amending the Constitution[39]. On the other hand, subsection (1) (b) establishes no specific court or adjudicating authority or tribunal. The reference under sub-section (1) (b) to "*specialized, subordinate and Swazi courts or tribunals exercising judicial function*" is a reference to generic entities which may or may not exist. The subsection then concludes by the phrase *"as Parliament may by law establish"*. It must be clear then that under sub-section (1) (b) there could be specific entities exercising judicial function established by Parliament. One of those entities could be the Industrial Court or the Industrial Court of Appeal[40]. The two industrial courts can exist and be legally recognised as part of the judiciary only if they fall under sub-section (1) (b). There is no need to amend any part of section 139(1) because sub-section (1) (b) does anticipate the creation of specific courts and tribunals by the words "as Parliament may be law establish". Thus, if the Industrial Court and the Industrial Court of Appeal are part of the Judiciary, they must find their existence under section 139 (1) (b).

[39] Section 139 is one of the specially entrenched sections of the Constitution. In retrospect, ss (1)(b) should not have been so entrenched since under this category Parliament may at any time add new courts and tribunals.
[40] There are a number of other courts or tribunals or commissions under various legislation.

[76] Section 140(1) states that "*The judicial power of eSwatini vests in the Judiciary*". Sections 139(1) and 140(1) seem to presuppose a unitary state of the *Judiciary* and *judicial power* in the Kingdom. There is officially one source and reservoir of judicial power. That would then exclude the possibility of self-contained independently existing authorities purportedly exercising judicial power outside the reach and ambit of the constitutionally recognised judiciary. To think otherwise could result in an untenable situation of two centres of judicial power: one under the Constitution and the other under the IRA. We are constrained to look at the Constitution as the supreme law of the land for an answer to the dispute before Court. When the Constitution was promulgated in 2005, the IC/ICA had been in existence since 1996. If the legislature's intent was to make the IC/ICA superior courts it would have been so easy to list these under s 139(1)(a). By not so including these industrial courts in subsec (1)(a) the inevitable conclusion must be that they were to be excluded from the ambit of superior courts.

[77] There is one source or location of 'judicial power' in this Kingdom: that is in terms of s140 of the Constitution. That being the case, the IC and ICA must have a place under section 139(1). Evidently, the ICA cannot be housed under subsection (1)(a) because here there are only two occupants, namely, (Mr.) Supreme Court and (Ms.) High Court: the entrance is firmly closed, and there is no room for squatters. The ICA (and IC) must then seek shelter elsewhere such as under subsec. (1) (b), where the door is wide open. Subsection (1)(b) is generic and not specific and thus ready to accept a variety of specific entities "as Parliament may by law establish". The IC and ICA would seem to be definite candidates for subsection (1) (b), as specialist or specialized tribunals established by Act of Parliament. Sections 139 and 140 of the supreme law of the land are

the only pillars available to analyse and classify any judicial entity and assign it a place within the hierarchy of superior and subordinate courts and tribunals exercising a judicial function that the Constitution or Parliament has thrown up thus far. I have no problem with the ICA called a 'specialist tribunal', but that does not really answer to the issue before Court. In my view, the specific nature or character of the ICA is ultimately not critical. What is critical is whether the ICA finds a place under subsection (1) (a) or (1)(b) of section 139.

[78] It must now be clear beyond cavil that if the ICA and IC owe their existence to paragraph (b) of section 139(1), these two 'courts' are lower than the High Court. In other words, the IC is not equal in status to the High Court and the ICA not equal to the Supreme Court notwithstanding the provisions of sections 6(3) and 20(1)(2) and (3) respectively. What may be necessary to articulate at an appropriate occasion are the instances when the IC and ICA may be equal to the High Court and Supreme Court respectively. For now, the IRA is sufficient as it indicates when the IC acts as High Court and ICA as the Supreme Court. In my view the instances are isolated and cumulatively do not transform the IC to the High Court or ICA to the Supreme Court. In other words, it does not follow that because there are provisions in the IRA indicating same powers as in the High Court or Supreme Court then the IC and ICA are equal in status with the High Court or Supreme Court. In my opinion and notwithstanding the language used in describing their powers and functions, including the appointment, qualification and tenure, the industrial courts are not of the same legal or constitutional standing as superior courts in terms of and despite section 139(1). The language used in establishing these industrial courts is unfortunate because it is a source of much confusion as this appeal – and the similar appeals before it – demonstrates. Be that

as it may, a proper place for the industrial courts must be found within the local jurisdiction. That is the only way we can determine whether the High Court is competent to review decisions of the Industrial Court of Appeal.

The review jurisdiction of the High Court

[79] Innes CJ in **Johannesburg Consolidated Investment Co. v Johannesburg Town Council** 1903 TS 111 at 115 said the following: "*Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.* ***This is no special machinery created by the Legislature; it is a right inherent in the Court which has jurisdiction to entertain all civil causes and proceedings arising within the Transvaal****"*, (that is, within the area of the Court's jurisdiction); (Emphasis added). Herbstein and van Winsen, *op. cit*. at pp 1276-1277, concur:

> *"Subject to statutory limitation or modification in a particular case, a High Court has an inherent right to review the proceedings of anybody or tribunal on which statutory duties are imposed, without the necessity for any machinery of review created by the legislature. This form of review has consequently been termed 'review under the common law'. The mere creation of statutory right of review or appeal does not oust the court's inherent jurisdiction to review, unless it is excluded expressly or by necessary implication"*. (Foot notes excluded)

[80] The review power of the High Court is embedded in the common law and section 4 of the High Court Act 20 of 1954, and assisted by High Court Rule 53. If sec 152 of the Constitution is of any significance, it is only as a cherry on the cake. The High Court can live and function without sec 152. The value of the section is to manifest what is otherwise inherent. Section 2 of the High Court Act must be mentioned as it extends the jurisdiction of the High Court to possessing and exercising *"all the jurisdiction, power and authority vested in the Supreme Court of South Africa"*.[41] Section 4 endows the High Court with *"full power, jurisdiction and authority to review the proceedings of **all** subordinate courts of justice within Swaziland …"*. (My emphasis) As the learned Judge *a quo* pointed out, the Act does not define "subordinate court", nor do the Rules. Rule 53(1) speaks of *"decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions"* as decisions and proceedings reviewable by the High Court. No one has ever argued that Rule 53(1) is in any way *ultra vires* for enlarging the ambit of sec. 4(1). The Rule refers, *inter alia*, to "**any** inferior court" and "**any** tribunal", (my emphasis). Presumably, therefore, all these entities that are mentioned under the Rule may be subsumed under the expression "subordinate courts of justice" in terms of sec, 4(1).

[81] Rule 53 still obtains for reviews by the High Court. It would be unfortunate if the ICA would not be reviewable by the High Court *but for* the current Constitution, which would mean that the Constitution has downgraded the ICA. It helps no one to simply say that the ICA is not a "subordinate court" or 'tribunal' or

[41] In passing, it may be mentioned that there are provisions in some of our laws, such as the Civil Evidence Act 1902 and the Criminal Procedure and Evidence Act 1938, which refers the High Court to the law as apply in the Supreme Court of Judicature in England where there is no local provision available.

'board', but is a 'court'. All courts of the land are qualified as appeal court, high court, magistrate's courts, industrial court etc. There are superior and inferior courts: there is nothing like a 'court' simply. Rule 53 could be used with or without section 152 of the Constitution. I do not find it necessary to rely on section 152 for the decision in this case. The court *a quo* in considering the **Memory Matiwane** case, was of the view that the coming of the Constitution in 2005 down-graded the ICA from being a superior court to an inferior or subordinate court. See para [33]. I have already opined that the ICA has never been a superior court.

[82] I have endeavoured to show that even under the old constitutional order the industrial courts were never superior courts equal in status to the High Court and the [High] Court of Appeal. It will be realized that the High Court Act 20 of 1954 and the Court of Appeal Act 74 of 1954 do not establish the High Court or the Court of Appeal. Act 20 simply states in the long title "***An Act to consolidate the law relating to the High Court of Swaziland"***; and Act 74 states "***An Act to prescribe the jurisdiction, powers and authorities of the Court of Appeal***". These Acts presume the existence of these Courts. The establishment of these Courts is then to be found in section 97 and 105, respectively, of the 1968 Constitution, as saved. Both Courts were described as "superior courts of record". It is true that section 139 (1) simplifies our analysis of the issue and renders the judicial hierarchy neater than before. Even without reference to the Constitution, a close analysis of the constitution, powers and functions of the industrial courts would show that they cannot be equal to the high courts; and nowhere are these courts expressly described as "superior courts" except by reference. We have pointed out that section 138 and 139 do not establish the Judiciary or the superior courts. The continuation in existence of these superior courts is then provided under section

264 of the Constitution which reads, in part, "*The Court of Appeal and the High Court, in existence immediately before the commencement of this Constitution, shall be deemed … to have been established under this Constitution …*"

[83] In the **Memory Matiwane** case the learned Judge referred to 'subordinate court' in section 4(1) of the 1954 Act as meaning a 'magistrate's court'. As shown above, Rule 53(1) indicates a wider scope of review than is intimated under section 4(1). Realistically, the review jurisdiction of the High Court could not be expected to cover only magistrates' courts. The Industrial Court, it not being a superior court, could only be a 'subordinate' court even under the old constitutional dispensation. It must now be clear that it is not the mere description of a 'tribunal' to be equal to the High Court or the Court of Appeal that makes the 'tribunal' a High Court or Court of Appeal. Something more must go into the (mode of) establishment, composition and description of the tribunal to set it as a superior court or its equivalent. The IRA is light or weak on the provisions that would substantively escalate the industrial courts to superior courts. In fact, I dare say, nothing can be done by ordinary Act of Parliament to establish a superior court or equivalent in our jurisdiction.

[84] Section 151(3)(a) states that the High Court has neither *original* nor *appellate* jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction. This provision must cover the ICA as well. The first and clear thing to note of the subsection is that it expressly ousts *original* jurisdiction of the High Court as provided under subsection (1)(a) as well as *appellate* jurisdiction of the High Court as provided under subsection (1)(b). What clearly has not been ousted

in terms of subsection (3)(a) is the common law or inherent ***review*** jurisdiction of the High Court "in any matter in which the Industrial Court has exclusive jurisdiction". One may argue that the non-ouster is only in respect of the IC. It should be remembered that the jurisdiction of the ICA is largely predicated on the jurisdiction of the IC. Without an express ouster of review jurisdiction, the subsection in my view allows decisions not only of the IC as expressly provided but also decisions of the ICA on the basis of the inherent jurisdiction of the High Court to be reviewed. The only way the possibility of review by the High Court of ICA decisions and orders could be avoided would be if the ICA were adjudged as a superior court. This, in my opinion, would be a Herculean task as it would signify an amendment of the Constitution.

[85] Whilst in **Memory Matiwane** Masuku J stated that it was clear that the legislative language establishing and empowering the ICA "*cannot lead to a conclusion that the Legislature intended creating an inferior court which is subject to review by the High Court*", the learned Judge did not explain and reconcile the fact that the same Legislature subjected the IC to review by the High Court while pretending that the two courts were equal. This needed to be explained since there are provisions in the same IRA which appear to equate the IC to the High Court, yet the IC and the ICA basically share the same threshold jurisdiction, and further that the ICA is enjoined to have regard to the fact that the IC is "not strictly bound by rules of evidence or procedure which apply in civil proceedings". In my view, the pitfall, with respect, that Justice Masuku fell into was in dealing with the ICA in isolation from the IC. The IC and ICA are *industrial courts* and creatures of the same Act, unlike for instance, the High Court and Court of Appeal, even though joined in the Constitution. It is often easy to speak of the ICA as a superior court

equal in status to the Supreme Court, and forget whether the IC is also a superior court equal to the High Court. Since the Act renders the IC to be inferior to the High Court the ICA cannot be equal to the Supreme Court. The IC cannot be an inferior and superior court at the same time. Part of the reason the ICA cannot be equal with the Supreme Court is that it cannot be a superior court. That being the case, the ICA cannot also be equal with the High Court. Justice Masuku needed to say something on these mind-boggling issues.

[86] When it was argued that the inherent review powers of the High Court should be invoked, Masuku J responded and said that would not be in order as it would "collide with the expressed intention of the Legislature". Masuku J did not deny the inherent power of the High Court. With respect, there was and still is no "expressed in intention" of Parliament regarding the review or otherwise of ICA decision by the High Court or by any other Court or entity under or outside the IRA. Justice Masuku himself was aware of this fact as he continues: "In this case, Parliament did not make provision for the review of decisions, orders and proceedings of the ICA…" Justice Masuku's explanation for this non-provision is that "it would run counter to the wider objectives of the Act". But why should a review of orders of the ICA fall foul of the wider objectives of the IRA and not the review of the IC? The long and short of it is that the Act is silent on the review of decisions and orders of the ICA by the High Court. It remains for the Courts to construe the meaning of this silence without "subverting the intention of the Legislature".

[87] In dealing with the right to review as provided under section11(5), IRA 1996, Masuku J correctly refers to 'Court' in that subsection as meaning the IC and

ICA, but then limits 'Court' to the IC when it comes to the decisions to be reviewed. Surely, if 'Court' as used in the subsection is the 'Court' as found in the definition section (sec 2) then, in my view, it cannot, as Masuku J says, be "abundantly clear" that decisions of the IC only were to be reviewed excluding those of the ICA in light of s19(4). I note, in passing, that Justice Masuku did not also refer to section 19(4) (now sec 21(4)) which provided that the decisions of the 'Court' shall be final. We deal with this point below. The **Memory Matiwane** case falls under the repealed 1996 IRA and the Saved Provisions of the 1968 Constitution, now also repealed. It is, of course, sometimes correct to ascribe meaning to a word in light of the context. That the High Court has statutory and inherent review powers has been shown. Only if the ICA can be adjudged a superior court can the review of its decisions be avoided.

Reviewability of ICA decisions

[88] In my opinion, the position under the IRA cannot be likened to that under the LRA1995. In respect of the latter Act the High Court (CPD) in **Liberty Life Association of Africa** said:

> *"With a view to achieving an expeditious and inexpensive resolution of labour disputes by overcoming the problems that had beset the dispensation under the 1956 Act….. the 1995 Act introduced a new and more accessible dispensation, the key features whereof are conciliation, mediation, arbitration and adjudication. It entrusted adjudicative functions to the Labour Court, which has a status of a Superior Court and with authority, inherent powers and standing in relation to matters under its jurisdiction equal to that which 'a Court of a Provincial Division of the Supreme Court has in relation to the matters under its jurisdiction', and the present Labour*

Appeal Court, which is a final Court of appeal in respect of all judgements and orders made by the Labour Court in respect of matters within its exclusive jurisdiction, and with authority, inherent powers and standing in relation to matters under its jurisdiction equal to that which the Supreme Court of Appeal has in relation to matters under its jurisdiction. Unlike the Labour Court, which is imbued with circumscribed powers of review… the present Labour Appeal Court, when sitting as a Court of appeal, does not have any statutory powers of review" (p 1103 D-G).

[89] The above cannot be said of the legal status of the industrial courts in terms of the IRA. As I have alluded above, our IRA is weak in its language of equation of the industrial courts with the superior courts. The statutory weakness is further exacerbated by the provision allowing decisions of the IC to be reviewable by the High Court. It would not make sense to say that by reason of the reviewability of its decisions it is the IC alone that is inferior to the High Court and not the ICA as well. In my view, the low standing of the IC attracts a similar treatment of the ICA. That is, by submitting to the authority of the High Court the IC, as it were, inevitably pulled down the ICA with it. Whether this result was the intention of Parliament or a glitch in Parliamentary Counsel's workmanship is not for us to determine here. But it certainly looks awkward to have the Industrial Court equal in status to the High Court but still reviewable by the High Court and at the same time have the Industrial Court of Appeal perfectly equal to and at peace with the Supreme Court. The equation of the High Court/Supreme Court on the one hand and the IC/ICA on the other hand is clearly lopsided. This leads to the inevitable conclusion that the IC/ICA cannot be equal to the High Court/Supreme Court as the IRA professes. This also means that the ICA is only an inferior court of appeal.

[90] Under the 1980 IRA the IC ranked lower than the High Court since its decisions were both reviewable by and appealable to the High Court. This was the situation until 1996 when the ICA was created and became the appellate court for IC decisions in the same manner the High Court was before 1996. In my view the highest that the ICA could aspire to after 1996 would be a High Court status. Even this was only nominal; the reality was otherwise. Accordingly, when the ICA was continued in 2000, on terms that did not change any significantly from the 1996 Act, and the IC still had its decisions reviewed by the High Court, it cannot be presumed that the ICA attained a legal status higher than that of the High Court even though the decisions of the ICA were described as final. Clearly then before 1996 the High Court enjoyed both review and appellate jurisdiction in industrial relations matters dealt with by the IC. What the 1996 IRA did was to remove and transfer to the ICA the appellate jurisdiction hitherto vesting in the High Court and leave behind the review power. The High Court therefore did not lose its common-law/statutory review jurisdiction over industrial relations decisions generally since there was nothing in the IRA 1996 or 2000 which directly or indirectly, expressly or by necessary implication, excluded the decisions of the ICA from review by the High Court.

[91] In **Vereniging,** Franklin J. compared the language used in the **Gentiruco** case (supra) and observed (at pp 1149H): *"As to the reliance on s.17(11)(a), the fundamental point is that it describes the functions, but not the status of the industrial court. What it does not say is what the Patents Act does say, namely:*

*(a) that it has all the powers and jurisdiction as are possessed by a Judge of the Supreme Court (s 76(1); and (b) that any decision or order of the Court shall have the same effect and shall be regarded **for all purposes** as a decision or order of the Supreme Court (s82 (2)).”*[42]

Franklin J, after referring to what Trollip JA had said at p601B-E in **Gentiruco** with respect to sections 76(1) and 82 (2) of the Patents Act, stated, at page 1150B-G:

*“The above-mentioned comments of the Appellate Division in the **Gentiruco** case on the Patents Act make it clear that when the Legislature intends to create a Court which is to have equivalent powers and jurisdiction to those of a Superior Court, it says so expressly and stamps the presiding officers clearly with the status, powers and jurisdiction of Judges of the Supreme Court. Such provisions are, however, conspicuously lacking in the Labour Relations Act.*

*“A further important ground of distinction given in the **Gentiruco** case between the Commissioner’s Court and the industrial court appears from the judgment at 601. At 601F-G the Court reaffirmed the ground already referred to and went on to say:*

> *‘And it was held in Svenka’s case supra 1960 (2) SA 601(A) at 606 C-F that, by reason of the equating provisions in the Patents Act…. The Commissioner’s Court was not an “inferior court” in ordinary parlance. The irresistible conclusion is that the Legislature in enacting the Patents Act intended that its proceedings, decisions, and orders should not be reviewable. That intention is expressly manifested by the language of s82(2); a decision or order of the Commissioner “shall be regarded **for all purposes**” as one of a Supreme Court’.*

“ . . . The Court held that the inference to be drawn from all that was that the only remedy which the Legislature intended to accord was an appeal, and that the remedy of review was therefore impliedly excluded”.

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[42] **Vereniging van Bo-Grondse Mynamptenare van Suid - Afrika v President of the Industrial Court and Others** 1983 (1) SA 1143 (T) at 1146G

[92] The language employed in the IRA does not impress one as sufficiently strong to adequately clothe and stamp the ICA with such power and jurisdiction as would leave one in no doubt that 'for all purposes' the decisions of the ICA are at par with those of the Supreme Court. That air of full authority of the ICA as an appellate court equal to the Supreme Court is missing in the IRA. The mere reference to the Judges of the ICA being qualified, employed and tenured as those of the Supreme Court does not, with respect, without much stronger language used in defining and describing their jurisdiction and status, generate the irresistible feeling and conclusion that the intention of Parliament was to establish a court of law of equivalent authority and status as the Supreme Court. Thus, the language used in section 21(4) that the '*decision of the majority…. shall be the decision of the Court and such decision shall be final'* also leaves one with a concerning feeling as to what exactly it means. On the issue of finality other than absence of further appeal, the language is not strong and clear enough that there will be no review of the decisions of the ICA. The necessity for absolute clarity must be self-evident: the ICA would be the only court in the Kingdom of equivalent status with the apex court in the land, the Supreme Court of Appeal. The ICA is therefore not of the same status as the Labour Appeal Court described in Liberty Life Association of Africa which had all the relevant trappings of the Supreme Court of Appeal.

[93] In **Paper, Printing, Wood**[43] Botha JA said "'*The court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, …*'. In **Richards Bay Bulk Storage,** EM Grosskopf JA had occasion to observe:

[43] **Paper, Printing, Wood & Allied Workers' Union v Pienaar NO & Others** 1993 (4) SA ^@! (AD) at 635A-B

"The question at issue is therefore whether the Court had jurisdiction to hear the review application. This in turn depends on whether the Act excluded such jurisdiction. The Act does not do so in express terms, and the question then is whether it contains an implication to that effect…It is to be noted that the Act is silent as to powers of review in relation to the Special Court. This is in sharp contrast with other provisions of the Act. Thus s15(13)…expressly states that the decision of a Special Court shall not be subject to 'appeal to or review by' any court of law. Section 10(5) of the Act bestows on the Minister powers of granting by notice…. Subsection (6) then provides that such a notice 'shall not be subject to review by or appeal to any court of law'. In my view these provisions are very significant. They show, firstly, that the Legislature was alert to the distinction between appeal and review. More importantly, the Legislature expressly excluded appeal and review as far as the interim orders were concerned. Concerning the more definitive orders contemplated by s14(1)(c), however, it granted a special right of appeal and remained silent as to review. The clear inference is that the ordinary rights of review remain unimpaired". (*Op. cit*. at 494G, 495 F-H)

[94] The foregoing statement by an eminent Judge of Appeal is apposite to the present case. The IRA excluded appeal on decisions of the ICA but remained silent on review. The appellant argues that review was struck down with appeal: appellant has not shown how that is the case. The express exclusion of appeal was by the use of the word 'final' in s 21(4) and not providing for appeal. As a rule, appeal is statutory. Where no statute provides for appeal it cannot be claimed. On the other hand, review is usually inherent; unless expressly excluded,

depending on the context, it is available. This, in my view, is what obtains *in casu*. There is no necessary implication that review was also ousted with the appeal as far as ICA decisions are concerned. As already explained, the only other way to exclude review is for the appellant to prove that the ICA is a superior court, which is denied.

Swaziland Revenue Authority & Others v ICA Judges & Others

[95] Whilst the hearing of this matter has been pending two judgments of the High Court raising the same question as in this appeal have been delivered. In the first case, per M. Dlamini J, (6 June 2018), the judgment sided with the judgment on appeal in this matter; and the other judgment, (per Mlangeni J., 26 September 2018) was against it. The latter case is **Swaziland Revenue Authority and Others v Industrial Court of Appeal Judges and Others:** we deal with it. Reference to both cases has been made above.

[96] The conclusion we have reached in this matter is that a court, tribunal or adjudicating authority exercising a judicial function established by Act of Parliament in regular sitting can never be equal to the High Court or Supreme Court no matter how it is composed in terms of its membership and alleged powers. In my view, therefore, the status of a court or tribunal, specialized or regular is not necessarily determined by its appellate or non-appellate character or by its membership. Even if the IC or ICA were chaired by the Chief Justice, that would not enhance its status from what it is in law; whether there was an appeal or not to its decisions is not absolutely critical to its status. In **National Transport**

Commission[44]Holmes JA stated: *"3 There is no appeal against the decision of the Commission. The Legislature has appointed it as the final arbiter in its special field and, right or wrong, for better or worse, reasonable or unreasonable, its decision stands – **unless it is vitiated by proof on review** in the Supreme Court that-*

> *(a) the Commission failed to apply its mind to the issues in accordance with the behests of the statute and the tenets of natural justice … ;*
> *(b) the Commission's decision was grossly unreasonable to so striking a degree as to warrant the inference of a failure to apply its mind.… .*

The authorities are legion…." (My emphasis)

Conclusion

[97] On the position we take in this matter, there is nothing wrong with section 21(4) which may require it being struck down as unconstitutional. The subsection means that there is no further appeal beyond the ICA. There is nothing wrong with that. What is wrong is to understand the subsection as ousting the review jurisdiction of the High Court. The word 'final' in the subsection does 'mean just that'. It is not a matter of logic but one of law that "finality must apply to appeals and not apply to review" unless otherwise so expressly or impliedly stated because appeal and review are dissimilar remedies. The review by the High Court would not render the ICA decisions not final. This is so because on setting aside the decision of the ICA, if that be the result, the matter must return to the ICA for a

[44] **National Transport Com. and Another v Chetty's Motor Transport (Pty) Ltd** 1972 (3) SA 726(A), at 735E-G

proper decision. Thus, on review, the High Court does not impose its own decision on the matter.

[98] I believe I have shown that legally the IC and ICA cannot be and are not superior courts on the same footing as the High Court and Supreme Court, because to achieve that status would involve amending the Constitution which has not been amended by the IRA 2000. We have intimated on divers occasions hereinabove that if the IC and ICA exercise any form of judicial function even as they are not bound by strict rules of evidence and procedure as normal courts are wont, it must follow that the attempt to equate these industrial courts with the superior courts has not been successful. In whatever way the IC and ICA may be described as equal to the High Court and Supreme Court in law and reality, these entities do not rise to the same constitutional standing on the judicial hierarchy of eSwatini, having regard to section 139(1). There is nothing in law which prevents decisions of the ICA from being reviewed by the High Court except the disputed issue that the ICA is superior to the High Court. We have already demonstrated the untenability of this argument. The catch is in that there cannot be an appeal and a review in the same matter, whether by the same party, or by either party. The point is that if there is a review at the level of the IC it means that the decision of the IC on merits is acceptable. If not, there must be an appeal rather than review on the understanding that whatever reviewable defects might be present the appeal will take care of those as well. So, the review to the High Court will conclude the matter, subject to possible appeal to the Supreme Court. The point is, there can be no appeal to the ICA after review at first instance. Very rare and exceptional must be the circumstance that would give rise to a review and an appeal at the same time: the party affected would have to choose one of the two. Ultimately,

whatever may be the correct legal status of the IC and ICA, these industrial courts cannot be equal or superior to the High Court.

Section 21(4) of IRA reconsidered.

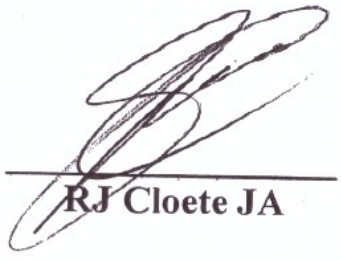
[99] Another way of looking at the issue before Court, which may be the more correct, has however never been explored in this and the earlier decisions. The proceedings of a superior court are generally speaking not reviewable. If the ICA is a superior court equal in standing to the High Court or the Supreme Court, then its decisions are not reviewable. The only way the decision of such a court could be subject to review by the High Court is if legally the decision of such a court could be said to be a decision of the IC. Section 21(4) of the IRA reads as follows: *"The decision of the majority of the judges hearing an appeal shall be the decision of the Court and such decision shall be final."* It seems to me that the debate regarding the issue before Court has been misdirected due to a mistaken reading of the subsection. On a careful reading the subsection says that the decision of the ICA is in fact the decision of the IC. The decision of the IC is the decision which is then said to be final. This is so because the word "Court" in that subsection means the "Industrial Court" as defined in section 2. The argument then is not whether a decision of the ICA is susceptible to review by the High Court. The IRA is silent on this issue. The decision susceptible to review is that of the IC 'cleansed' by the ICA. This is expressly provided in section 19(5).

[100] In my opinion, the word 'final' is used in the subsection to deny any further appeal beyond the ICA. If review was also being denied after an appeal Parliament needed to expressly so provide. The fact that Parliament knew that

decisions of the IC were reviewable by the High Court it should have made its intent very clear if the High Court lost its review power over IC decisions emanating from the ICA. There is no necessary implication that Parliament so intended. The contrary interpretation 'would leave an aggrieved party without an effective remedy'. Thus, in terms of section 21(4) the decision of the majority, being the decision of the 'Court' and the 'Court' being the Industrial Court, the road to review of what are nominally decisions of the ICA but legally decisions of the IC is an open highway, without any blind rises or corners.

[101] In the result, I can find nothing wrong with the judgment of the court *a quo.* It is my considered opinion, that the decisions of the Industrial Court of Appeal are subject to review by the High Court. The appeal is accordingly dismissed, and wasted costs awarded to 1st, 2nd and 3rd respondents.

MJ Dlamini JA



I Agree **RJ Cloete JA**

I Agree **J Currie AJA**

I Agree

SJK Matsebula AJA

I Agree

MJ Manzini AJA

Counsel for Appellant **M Magagula**

Counsel for 1st, 2nd & 3rd Respondents **SV Mdladla**