IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Civil Appeal Case No: 96/2017

In the appeal between:

MINISTRY OF TOURISM AND ENVIRONMENTAL AFFAIRS	FIRST APPELLANT
THE ATTORNEY GENERAL	SECOND APPELLANT

And

STEPHEN ZUKE	FIRST RESPONDENT
SWAZILAND ENVIRONMETAL AUTHORITY	SECOND RESPONDENT

Neutral citation: *Ministry of Tourism and Environmental Affairs & Another vs Stephen Zuke & Another (96/2017) [2019] SZHC 37 (2019)*

Coram: **JUSTICE M. C. B. MAPHALALA, CJ**
JUSTICE S. P. DLAMINI, JA
JUSTICE M. J. DLAMINI, JA
JUSTICE J. P. ANNANDALE, JA
JUSTICE S. J. K. MATSEBULA, JA

Heard : 19th September, 2019

Delivered : 24th October, 2019

SUMMARY

Civil appeal – contract of employment – Minister taking a unilateral decision not to renew a contract of employment contrary to section 8(1) of the Public Enterprise (Control and Monitoring) Act No. 8 of 1989 requiring that he consults with the Cabinet Standing Committee before making an appointment, reinstatement or dismissal of the Chief Executive Officer and the Minister failing to give notice of termination to the first respondent six months before termination of the contract as required by the contract of employment;

The matter emanated from a labour dispute before the Industrial Court and it was referred to the High Court under section 35(3) of the Constitution and a *rule nisi* was issued interdicting and restraining the appellants from recruiting the Chief Executive Officer pending finalization of the matter - the first respondent's contention was that his right to administrative justice in terms of section 33 of the Constitution has been violated by the first appellant who has refused to renew his contract of employment without giving him a hearing – the

constitutional nature of the referral necessitated the sitting of the Full Bench of the High Court;

The substance of the labour dispute is the lawfulness of the unilateral decision by the first appellant on the non-renewal of the contract without consultation with the Cabinet Standing Committee as required by section 8(1) of the Public EnterpriseS (Control and Monitoring) Act;

Held by the *court a quo* sitting as a Full Bench that the contract of employment between the first appellant and the first respondent was tacitly renewed when the first appellant breached the contract by failing to give a notice of termination to the first respondent as required by the contract of employment; accordingly, the High Court set aside the unilateral decision of the Minister for the non-renewal of the contract and further discharged the *rule nisi*;

Held further before the full bench of the *court a quo* that the rules of natural justice and in particular the principle of *audi alteram partem* suffice to deal with the failure of the Minister to give the first respondent a hearing and that there was no need for the Industrial

Court to invoke section 35 (3) of the Constitution and refer the matter to the High Court to determine whether the first respondent's right to administrative justice under section 33 of the Constitution was violated; however, the High Court did not remit the matter to the Industrial Court to deal with the substantive labour dispute but it made a final determination on the substantive labour dispute:

The Full Bench with regard to the conflict between the Public Enterprises (Control and Monitoring) Act and the Environment Management Act, wrongly held that the Environment Management Act of 2002 supersedes and prevails over the Public Enterprises (Control and Monitoring) Act No. 8 of 1989 on the basis that it is a later legislation and of a special nature; and, that the Public Enterprises (Control and Monitoring) Act is an earlier legislation of a general nature;

On appeal to the Full Bench of the Supreme Court in its appellate jurisdiction held that it is only the Industrial Court that is seized with exclusive jurisdiction to hear and determine labour disputes between an employer and employee arising in the course of employment;

Held further that the High Court lacks jurisdiction to determine labour disputes and that the order for the tacit renewal of the contract of employment is therefore set aside as incompetent;

Held further that the matter referred to the High Court by the Industrial Court was capable of being determined in accordance with the principle of constitutional avoidance by employing the *audi alteram partem* and that there was no need to invoke section 35 (3) of the Constitution;

Held further with regard to the conflict between the two legislation relating to the appointment, renewal and dismissal of the Chief Executive Officer that the Public Enterprise (Control and Monitoring) Act supersedes and prevails over the Environment Management Act on the basis that it is clothed with supremacy by the Legislature;

Accordingly, the matter is referred back to the Industrial Court to be determined as a labour dispute between the first appellant and first respondent as employer and employee in accordance with the exclusive jurisdiction of the Industrial Court; and that the *rule nisi* issued by the

Industrial Court is revived with immediate effect pending the finalization of the matter.

JUDGMENT

M. C. B. MAPHALALA, CJ:

[1] On the 4th April, 2019 the Supreme Court sitting as a full bench of three judges issued an order that the appeal between the parties should be struck off the roll, and that it should not be reinstated without leave of court having been sought and obtained. The basis of the Court Order was that the Record of Proceedings was incomplete; hence, the Court could not proceed to hear the appeal.

[2] On the 17th May, 2019 the appellants lodged an application before this Court for the re-instatement of the appeal. The application was opposed by the first respondent who filed an opposing affidavit, and the appellants subsequently filed a replying affidavit. Both parties filed heads of argument. At the hearing of the matter on the 5th August 2019 Counsel for the first respondent indicated that they were

no longer opposing the application for reinstatement. Consequently, the Court granted the order for reinstatement of the appeal. There was a further application for condonation lodged by the first respondent for the late filing of Heads of Argument and book of authorities in the main appeal. This application for condonation was not opposed, and it is accordingly granted on the basis that it complies with the requirements for condonation.

[3] In the substantive matter the first respondent had lodged an urgent application before the Industrial Court seeking relief in the following orders: Firstly, setting aside as unlawful the unilateral decision of the first appellant in refusing to renew the first respondent's contract of employment without consultation with the Cabinet Standing Committee. Secondly, directing the first appellant to refer the issue of the renewal of the first respondent's contract of employment to the Cabinet Standing Committee. Thirdly, reviewing and setting aside the decision of the first appellant for not renewing the contract of employment of the first respondent on the basis that the first respondent was not afforded the right to be heard before the adverse decision was taken. Fourthly, that pending the finalisation of the

matter, the recruitment of the Chief Executive Officer of the second respondent is hereby interdicted and restrained. Fifth, that the first appellant pays costs of suit.

[4] The basis of the application by the first respondent is that the first appellant failed to give him a hearing as required by section 33 of the Constitution before the decision was taken not to renew his contract of employment. The first respondent further contends that the first appellant took the decision contrary to the provisions of the Public Enterprises (Control and Monitoring) Act[1] which requires that he should consult with the Cabinet Standing Committee before taking the decision whether or not to renew the first respondent's contract of employment.

[5] The first respondent also contends that the proper procedure for the renewal of the contract of employment of the Chief Executive Officer of the second respondent is that the Board makes a recommendation to the Minister who is legally obliged to consult with the Cabinet Standing Committee before making his decision. It is common cause

[1] Section 8(1) of 1989

that the Board did recommend the renewal of the contract to the Minister who subsequently made a unilateral decision of non-renewal without consulting with the Cabinet Standing Committee. It is not disputed that the Minister when refusing the renewal of the contract made serious allegations against the first respondent including allegations that he had committed fraudulent and dishonest acts as well as misleading the Board with regard to his appraisal evaluations.

[6] The Constitution deals with the right to administrative justice in the following manner:[2]

> **"33. (1) A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken**

[2] Section 33

against that person with which that person is aggrieved.

(2) A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority."

[7] The Public Enterprises (Control and Monitoring) Act[3] provides the following:-

"8. (1) Except in the case of the University of ESwatini, the governing body of each Category A Public Enterprise shall nominate the Chief Executive Officer who shall be appointed or may be dismissed, by the Minister responsible acting in consultation with the Standing Committee."

[8] The present application was brought before the Industrial Court on a certificate of urgency on the basis that the first appellant had

[3] Section 8 (1) of 1989

advertised the first respondent's post immediately after the non-renewal of his contract of employment. The purpose of the urgent application was to obtain an interim order preventing the recruitment of another person into the post of Chief Executive Officer pending finalization of the Court proceedings challenging the unilateral decision of the Minister.

[9] It is common cause that the first respondent had concluded a contract of employment with the second respondent in the capacity of a full time Chief Executive Officer on the 21st August 2013. The terms and conditions of employment for the first respondent were provided in the contract of employment, the provisions of the Environment Management Act, the Public Enterprises (Control and Monitoring) Act as well as the Employment Act. The duties of the first respondent were outlined in the Environment Management Act as well as the contract of employment. The first respondent reported directly to the Chairman of the Board of the second respondent.

[10] The first respondent was employed for a period of thirty six months. Whilst the contract provided that it would automatically terminate at the end of the contract period, it also provided that the employer shall notify the employee of such termination six months prior to the termination date. It is not disputed that the employer failed to abide by this contractual provision by giving such notice of termination. The contract further provided that it may be renewed for a further period not exceeding thirty-six months on such terms and conditions agreed upon between the employer and the employee.

[11] The application was opposed by the first appellant as well as the second respondent on the basis that the non-renewal of the contract was essentially an act of termination of services by effluxion of time. Their further contention was that the Industrial Court lacks jurisdiction to review the decision of the Minister in light of the authority of **Alfred Maia v. Civil Service Commission and Two Others**[4]. **The Alfred Maia** decision is a full bench decision of the High Court which held that the Industrial Court does not have review jurisdiction. I will analyse this decision later in my judgment whether

[4] High Court Civil Case No. 1070/2015

or not it could still stand. Similarly, it was their contention that the Industrial Court lacks jurisdiction to determine whether or not the first respondent's constitutional rights under section 33 of the Constitution were violated in light of section 35(1) of the Constitution.

[12] Section 35 of the Constitution provides the following:

> **"35. (1) Where a person alleges that any of the foregoing provisions of this Chapter has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member (or, in the case of a person who is detained, where any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person, (or that other person) may apply to the High Court for redress.**

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made in pursuance of subsection (1);

(b) to determine any question which is referred to it in pursuance of subsection (3); and may make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter.

(3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall where a party to the proceedings so requests, stay the proceedings and refer the question to the High Court unless, in the judgment of that person, which shall be final, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the High Court in pursuance of subsection (3) the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an

appeal to the Supreme Court, in accordance with the decision of the Supreme Court.

(5) An appeal shall not lie, without leave of the Supreme Court, from any determination by the High Court that an application made in pursuance of subsection (1) is merely frivolous or vexatious.

(6) Provision may be made by or under an Act of Parliament for conferring upon the High Court such powers in addition to those conferred by this section as may appear to be necessary or expedient for the purpose of enabling that court more

effectively to exercise the jurisdiction conferred upon it by this section.

(7) The Chief Justice may make rules for purposes of this section with respect to the practice and procedure of the High Court (including rules with respect to the time within which applications to that court may be made).”

[13] The first appellant in particular, argued that the dispute whether the non-renewal of the contract was procedurally fair fell to be determined by the Conciliation Mediation and Arbitration Commission in terms of section 65 of the Industrial Relations Act[5]. It was further argued that the first respondent has not filed the dispute with the Commission. In as much as they challenged the urgency of the matter, they made an

[5] Act No. 1 of 2000 as amended

undertaking during the hearing of the matter that the process of recruitment of a new Chief Executive Officer would not proceed pending the finalization of the matter; and, this agreement between the parties was made an interim Court order.

[14] During the hearing of the application before the Industrial Court, the Minister argued erroneously that section 8(1) of the Public Enterprises (Control and Monitoring) Act requires that he consults with the Cabinet Standing Committee only in respect of appointments and dismissals, and not re-instatement.

[15] The Public Enterprises (Control and Monitoring) Act establishes in the Ministry of Finance a Public Enterprises Unit[6]. The interpretation section in the Act defines a public enterprise in two-fold. Firstly, in relation to Category A of the Schedule to the Act, it is defined as a body which is either wholly owned by Government or in which Government has a majority interest or a body which is dependent upon Government subvention for its financial support. Secondly, in respect of Category B of the Schedule to the Act, it is defined as a body in

[6] Section 3 of Act No. 8 of 1989

which Government has a minority interest or which monitors other financial institutions or which is a local Government authority.

[16] It is common cause that the Minister for Finance exercising his powers under section 12 of the Public Enterprises (Control and Monitoring) Act has since classified the Swaziland Environment Authority as a Category A Public Enterprise[7]. Contrary to the provisions of the Public Enterprises (Control and Monitoring) Act, the power to appoint and dismiss includes the power to re-appoint or re-instate. The Interpretation Act[8] provides the following:

> **"14. Where a power to make an appointment is conferred by a law, then, unless the contrary intention appears, the authority having power to make the appointment shall also have the power to remove, suspend, dismiss, re-appoint, or re-instate any person appointed by it in exercise of the power."**

[7] Legal Notice No. 157 of 2007

[8] Section 14 of Act No. 21 of 1970

[17] The Public Enterprises Unit advises the Minister for Finance, the Cabinet Standing Committee on Public Enterprise as well as the Minister responsible for that Public Enterprise in the discharge of the functions conferred upon them by the Act[9]. With regard to the appointment, dismissal and renewal of the contract of employment of the Chief Executive Officer of a Public Enterprise, the Act provides that the Board shall make the recommendation to the Minister who shall make a decision after consultation with the Cabinet Standing Committee.[10]

[18] The Environment Management Act[11] also deals with the appointment of the Executive Director of the Swaziland Environmental Authority and provides the following:

> **"17. (1) The Minister, in consultation with the Board, shall appoint a Director of the Authority.**

[9] Section 4 of the Act

[10] Footnote 3 above

[11] No. 5 of 2002

(2) The Director shall be appointed on terms and conditions specified by the Board.

(3) The Director is the Chief Executive of the Authority and is responsible for the management of the affairs of the Authority and the fulfilment of its functions, in accordance with policies and directions established by the Board.

(4) Without limiting the ambit of subsection (3), the Director shall –

(a) report regularly to the Board on the performance of the functions of the Authority;

(b) present an annual report, financial statements and a budget for

the forthcoming year, to the Board for consideration and approval;

(c) represent the Authority in its dealings with other organisations and organs of Government;

(d) supervise the employees and officers of the authority; and

(e) issue orders as provided for in this Act, and take other measures to give effect to the purpose of the Act and to implement and enforce its provisions."

[19] The Industrial Court upon hearing the application made the following orders: Firstly, that the Court has no jurisdiction to hear and determine the dispute on the basis that it has no review jurisdiction. Secondly, that the issue relating to the unilateral decision of the Minister not renewing the first respondent's contract of employment without affording him the right to be heard in terms of section 33 of the Constitution is hereby referred to the High Court for determination in accordance with section 35(3) of the Constitution. Thirdly, that pending the final determination of the issue referred to the High Court, the recruitment of the Chief Executive Officer of the Swaziland Environment Authority is hereby interdicted and restrained. Fourthly, no order as to costs.

[20] The Industrial Court made a finding that this matter fell outside the purview of the Industrial Court on the basis that it was not between an employer and employee as contemplated by section 8(1) of the Industrial Relations Act[12]. The Court relied on the decision of Alfred Maia v. The Chairman of the Civil Service Commission and Two Others to reach the conclusion that the Industrial Court has no

[12] No. 1 of 2000 as amended

jurisdiction to entertain review proceedings brought on the basis of the Common law for an alleged contravention of an employee's right to administrative justice under section 33 (1) of the Constitution. The Court did not deal with the question whether or not the Minister acted properly in making the unilateral decision without consulting the Standing Committee as contemplated by section 8(1) of the Public Enterprises (Control and Monitoring) Act.

[21] The Industrial Court made another finding that the Minister was not the employer of the first respondent and that he was merely exercising administrative powers in terms of the Public Enterprises (Control and Monitoring) Act. The Court further referred to the contract of employment between the first and second respondents as evidence that the Minister was not the first respondent's employer. However, a reading of the Public Enterprises (Control and Monitoring) Act provides that the appointment of the Chief Executive Officer shall be made by the Minister on the recommendation of the Board and after consultation with the Cabinet Standing Committee. On the other hand the Environment Management Act provides that the Chief Executive

Officer shall be appointed by the Minister after consultations with the Board.

[22] The referral of the matter to the full bench of the High Court was not warranted in the circumstances. The Industrial Court could have decided the matter without invoking section 33 of the Constitution. The rules of natural justice are adequate in deciding the matter and in particular the principle of *"audi alteram partem"* which requires an administrative official to give the other party a hearing before a decision is made.

[23] Another issue which the Industrial Court did not decide was the effect of the failure by the Environmental Authority to give notice of termination within six months of termination as required by the contract of employment. In particular the contract provides the following:[13]

> **"4. The employment period in terms of this contract shall be for a period of thirty-six months with**

[13] Paragraphs 4 and 5 of the contract

effect from 21st August, 2013 and will persist until 21st August 2016, at the end of this period the contract will automatically terminate and the term of office of the employee will thus terminate. The employer shall notify the employee of such termination six months prior to the termination date.

5. This contract may be renewed at termination thereof for a further period not exceeding thirty six months on terms and conditions to be agreed upon between employer and employee."

[24] The notice of termination is mandatory and failure to comply with this contractual provision constitutes a breach of contract. It was incumbent upon the employer to adhere to the notice of termination as provided in the contract so that the employee could take the necessary steps to secure the renewal of his contract of employment prior to the date of termination. Paragraph 5 of the contract gives the employee the right to negotiate the renewal of the contract of employment upon such terms and conditions to be agreed between the parties.

[25] It is common cause that the Industrial Court referred to the Full Bench of the High Court the issue of the unilateral decision of the Minister not renewing the first respondent's contract of employment without affording him the right to be heard in terms of section 33 of the Constitution for determination in accordance with section 35(3) of the Constitution. However, the pleadings as well as the judgment of the Full Bench of the High Court indicate that the High Court dealt with the matter as a fresh application. To that extent the *court a quo*, with due respect, committed a grave error of law.

[26] The Full Bench of the High Court was correct in its finding that the matter could be decided without invoking section 33 of the Constitution on the basis of the rules of natural justice and in particular the principle of *"audi alteram partem"*. The first respondent had the right to be heard by the Minister before the adverse decision was taken not to renew his contract of employment. In particular the Minister's letter dated 23rd November, 2016 addressed to the Chairman of the Board detailed reasons for non-renewal. In the letter the Minister accused the first respondent of having committed fraud, dishonesty and misleading the Board with regard to his evaluation of appraisal.

[27] The full bench of the High Court was legally bound to refer the matter back to the Industrial Court after its finding that the matter could be determined without invoking section 33 of the Constitution. It was not open to the *court a quo* to decide the matter on the merits particularly the non-renewal of the first respondent's contract of employment; hence, the judgment of the *court a quo* is with respect misconceived and cannot stand.

[28] The *court a quo* issued the following order: Firstly, that the first respondent's contract of employment is tacitly renewed, and that the interdict restraining the recruitment of a new Chief Executive Officer is discharged. Secondly, that the decision of the Minister with regard to the reasons for the non-renewal of the contract of employment as reflected in the letter dated 23rd November, 2016 is set aside. Thirdly, that the Swaziland Environment Authority as well as the Minister are ordered to pay costs of suit.

[29] The reasoning behind the Court Order issued by the *court a quo* was that the employer had breached the contract of employment by failing

to give the notice of termination to the first respondent six months before the termination as stipulated in the contract; hence, the tacit renewal of the contract. Furthermore, the court felt that the application should succeed by reason of the failure by the Minister to give the employee a hearing before making the adverse decision of non-renewal.

[30] It is important to emphasise that the substantive matter before the Industrial Court relates to the contract of employment between the Minister who is the first respondent who is an employer and an employee, and the cause of action is the non-renewal of the first respondent's contract of employment; hence, the Court with the proper jurisdiction to deal with the matter is the Industrial Court. Accordingly, the *court a quo* misdirected itself in pronouncing judgment beyond the alleged constitutional issue referred by the Industrial Court under section 35(3) of the Constitution. Similarly, the *court a quo* misdirected itself in granting the substantive relief of tacit renewal of the contract of employment when it had no jurisdiction to determine the matter.

[31] The *court a quo* also dealt extensively with the contract of employment between the first and second respondents allegedly as between employer and employee. However, the contract of employment cannot be read in isolation with the exclusion of the Public Enterprises (Control and Monitoring) Act and the Environment Management Act. According to the Public Enterprises Act, the Chief Executive Officer is nominated by the Board and appointed, re-instated or dismissed by the Minister responsible acting in consultation with the Cabinet Standing Committee. In terms of the Environment Management Act the Chief Executive Officer is appointed by the Minister in consultation with the Board.

[32] The *court a quo* misdirected itself in its finding that the Public Enterprises (Control and Monitoring) Act conflicts with the Environment Management Act with regard to the appointment of the Chief Executive Officer. Similarly, it is legally incorrect that the Environment Management Act of 2002 supersedes the Public Enterprises (Control and Monitoring) Act of 1989 on the basis that it was enacted recently in 2002 and is of a special nature as opposed to the Public Enterprises Act which is of a general nature. Generally

speaking it is a principle of legislative interpretation that where two legislative provisions are in conflict with each other, the recently enacted legislative provision supersedes and prevails over the other particularly when the earlier provision is contained in an enactment that is of a general nature and is inconsistent with the latter provision that is contained in an enactment of a special nature.

Beck JA delivering a unanimous judgment of this Court in Elias Dlamini v. Principal Secretary, Ministry of Agriculture and Another[14] had this to say:

> **" . . . it is an accepted principle of statutory interpretation that where there is a conflict between two statutes dealing with the same subject . . . the general rule is that the latter statutory provision should prevail . . . . . This is more particularly so when the earlier provisions are contained in an enactment that is of general nature and are inconsistent with later provisions that are contained in an enactment of a special nature."**

[14] Supra footnote 4

[33] The principle reflected in the Elias Dlamini case[15] is not applicable where one of the statutes is clothed with supremacy by the Legislature. In the present matter the Public Enterprises (Control and Monitoring) Act is clothed with supremacy. In the circumstances the provisions of the Public Enterprises (Control and Monitoring) Act prevail and supersede the Environment Management Act with regard to the appointment of the Chief Executive Officer. He is nominated by the Board and appointed by the Minister responsible acting in consultation with the Cabinet Standing Committee.

The Public Enterprises (Control and Monitoring) Act provides the following:[16]

> **"14. (1) The provisions of this Act shall apply to the Public Enterprises specified in the Schedule to this Act notwithstanding the provisions of any law to the contrary in force**

[15] Supra footnote 4

[16] Section 14

before or after the commencement of this Act.

(2) Any law in force before or after the commencement of this Act shall to the extent that it is inconsistent with any of the provisions of this Act be deemed to have been amended."

[34] The appellants having lost the case in the *court a quo* lodged an appeal against the judgment of the *court a quo* on the following grounds: Firstly, that the High Court erred in pronouncing judgment on matters which are outside the constitutional issue referred by the Industrial Court under section 35(3) of the Constitution. Secondly, that the *court a quo* erred in holding that the Environment Management Act No. 5 of 2002 prevails over the Public Enterprises (Control and Monitoring) Act No. 8 of 1989. Thirdly, that the *court a quo* misdirected itself in granting the first respondent the substantive relief of tacit renewal of his contract of employment which he had not prayed for.

[35] The jurisdiction of the Industrial Court is elaborate and covers all labour disputes arising between an employer and an employee during the course of employment. The Industrial Relations Act[17] provides the following:

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

[17] Section 8 of Act No.1 of 2000 as amended

association and a trade union, or staff association or between an employees' association, a trade union, a staff association, a federation and a member thereof:

(2) (a) An application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, staff association, an employers' association, an employees' association, a federation, the Commissioner of Labour or the Minister.

(b) The Court may consolidate claims for the purpose of hearing witnesses, as appropriate.

(3) In the discharge of its functions under this Act, the Court shall have all the powers of the

High Court, including the power to grant injunctive relief.

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

(5) Any decision or order by the Court shall have the same force and effect as a judgment of the High Court and a certificate signed by the Registrar shall be conclusive evidence of the existence of such decision or order.

(6) Any matter of law arising for decision at a sitting of the Court and any question as to whether a matter for decision is a matter of law or a matter of fact shall be decided by the presiding judge of the Court provided that on all other issues, the decision

of the majority of the members shall be the decision of the Court.

(7) In the exercise of its powers under this Act, the Court shall take into consideration any guidelines relating to wage and salary levels and other related or relevant industries or enterprises.

(8) Notwithstanding the provisions of section 85(2), the President of the Court may direct that any dispute referred to it in terms of this or any other Act be determined by arbitration under the auspices of the Commission. (Added A.3/2005).”

[36] When the Industrial Court executes its mandate in accordance with its jurisdiction as reflected in the Industrial Relations Act, it does not sit in a review capacity but as a court of first instance determining a labour dispute between an employer and employee. The present appeal arises

from a labour dispute between an employer and employee; and, the basis of the dispute is that the employer failed to comply with the procedure to renew the contract of employment in accordance with section 8(1) of the Public Enterprises (Control and Monitoring) Act. The employer is the Minister and not the second respondent who merely makes a recommendation to the Minister. It is the Minister who makes the decision whether or not to appoint, dismiss or re-instate the Chief Executive Officer. In the circumstances the decision of the Minister cannot be said to be administrative and falling outside the purview of labour matters. When the first respondent challenges the decision of the Minister, he is not reviewing that decision under the Common law.

[37] During the hearing the Industrial Court placed emphasis on the decision of the Constitutional Court in Alfred Maia v. The Chairman of the Civil Service Commission and concluded that the dispute constitutes review proceedings and that the Court lacks such jurisdiction. The time has come for the judgment in the Alfred Maia case to be set aside as having been wrongly decided. When the Industrial Court determines a labour dispute between an employer and employee it does so within the ambit of its jurisdiction in terms of

section 8 of the Industrial Relations Act. This does not constitute review proceedings. In determining whether the dispute falls under section 8 of the Industrial Relations Act, the test is whether the dispute between the parties arises solely from a contract of employment between an employer and employee during the course of employment.

[38] The Industrial Relations Act[18] defines a labour dispute as follows:

> **"dispute includes a grievance, a grievance over a practice, and means any dispute over the**:
>
> **(a) entitlement of any person or group of persons to any benefit under an existing collective agreement, Joint Negotiation Council Agreements or Works Council agreements;**

[18] Section 2

(b) existence or non-existence of a collective agreement or Works Council agreements;

(c) disciplinary action, dismissal, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons;

(d) recognition or non-recognition of an organization seeking to represent employees in the determination of their terms and conditions of employment;

(e) application or the interpretation of any law relating to employment; or

(f) terms and conditions of employment of any employee or the physical conditions under which such employees may be required to work.

[39] The definition of a labour dispute in the preceding paragraph lends credence to the fact that the matter under consideration is a labour dispute justiciable in the Industrial Court and of which that Court has exclusive jurisdiction.

[40] The definitions of employee and employer in the Industrial Relations Act[19] constitute further proof that the matter under consideration is a labour dispute arising out of the contract of employment between the parties during the course of employment. The Act provides the following definitions:

> **"employee means a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person;**

[19] Section 2 of the Act

Employer means a person who employs another person as an employee or any person so acting on behalf of an employer."

[41] It would be useful to have a further insight into the definitions of re-engagement and re-instatement. The Industrial Relations Act[20] defines them as follows:

"re-engagement means an action or situation whereby the employee is engaged or re-engaged by the employer in the same or comparable or identical work to that which the employee was engaged in before the termination of the employee's work or service or employment, or such other reasonably suitable work or employment, from such date and on such terms of employment as may be agreed upon by mutual consent or by order of the Court or of an arbitrator;

[20] Section 2 of the Act

re-instatement means an action or situation whereby an employee's services or employment are treated as if the services or employment have never been terminated, including the payment of wages, salary and any remuneration payable by virtue of the service or employment."

[42] From the definition of re-instatement in the Industrial Relations Act[21], it is apparent that a labour dispute between an employer and employee arising from their contract of employment does not constitute review proceedings; hence, the Common law grounds of review are not applicable.

[43] The exclusivity of the jurisdiction of the Industrial Court on labour disputes arising from the contract of employment is subject to sections 17 and 65 of the Industrial Relations Act[22]. Section 17 deals with Arbitration and it provides the following:

[21] Section 2 of the Act

[22] Section 8 of the Act

"17. (1) In hearing and determining any matter referred to arbitration whether by the president of the Court in terms of section 8(8) or any other provisions of this Act, an arbitrator shall have all the remedial powers of the court referred to in section 16.

(2) An arbitration award made under this Act shall be enforceable as if it was an order of the Court.

(3) Subject to any rules promulgated in terms of section 64, the arbitrator shall conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly.

(4) In any arbitration proceedings a party to a dispute may appear in person or be represented by a legal practitioner or person(s) authorised by the party.

(5) Unless a referral to arbitration provides otherwise, the arbitrator shall issue an award with concise reasons signed by the arbitrator within thirty days after the conclusion of the arbitration proceedings.

(6) An arbitrator who has made an award may vary or rescind the award if:

(a) it was erroneously sought or erroneously made in the absence of any party affected by the award;

(b) it is ambiguous or contains an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

(c) it was made as a result of a mistake common to the parties to the proceedings."

[44] Section 65 of the Act provides the following:

"65. (1) There shall be a Governing body of the Commission which shall be tripartite but may have, in addition, independent persons.

(2) The Governing body shall exercise the powers and perform the functions vested in the Commission under this Act.

(3) The Governing body shall consist of:

(a) a Chairperson and eight (8) other members, appointed in accordance with subsection (4) to

hold office for a period not exceeding three years; and

(b) the Executive Director of the Commission, who shall not vote at meetings of the governing body.

(4) The Labour Advisory Board shall nominate for appointment by the Minister to the Governing Board:

(a) one independent person for the person of Chairperson;

(b) two persons proposed by those voting members of the Labour Advisory Board who represent organized labour;

(c) two persons proposed by those voting members of the Labour Advisory Board who represent organised business;

(d) two persons proposed by those voting members of the Labour Advisory Board who represent Government; and

(e) two persons proposed by the Labour Advisory Board with special skills or knowledge relevant for the purpose of this Act."

[45] The Industrial Relations Act applies equally to all contracts of employment whether in the public or private sector. It provides the following:[23]

[23] Section 3 of the Act

"3. This Act shall apply to employment by or under the Government in the same way and to the same extent as if the Government were a private person but shall not apply to:

(a) any person serving the Umbutfo ESwatini Defence Force established by the Umbutfo Defence Force Order, 1977;

(b) the Royal ESwatini Police Force; and

(c) His Majesty's Correctional Services established by Prison Act No. 40 of 1964."

[46] Generally, the Constitution entrenches the exclusivity of the jurisdiction of the Industrial Court over labour matters arising from contracts of Employment. The Constitution provides the following:-[24]

> **"15. (1) The High Court has –**
>
> **(a) unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution;**
>
> **(b) such appellate jurisdiction as may be prescribed by or under this Constitution or any law for the time being in force in ESwatini;**
>
> **(c) such revisional jurisdiction as the High Court possesses at the**

[24] Section 15 of the Constitution

date of commencement of this Constitution; and

(d) such additional revisional jurisdiction as may be prescribed by or under any law for the time being in force in ESwatini.

(2) Without derogating from the generality of subsection (1) the High Court has jurisdiction –

(a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution; and

(b) to hear and determine any matter of a constitutional nature.

(3) Notwithstanding the provisions of subsection (1) the High Court –

(a) has no original or appellate jurisdiction in any matter in which the Industrial Court has exclusive jurisdiction;

(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force."

[47] The Alfred Maia case was dealing with substantive and procedural fairness in the dismissal of the applicant. A subsidiary issue was the alleged failure by the Civil Service Commission to give the applicant a hearing before dismissal. In that case the applicant had been invited by the Commission to show cause why he should not be suspended on

half-pay pursuant to a charge of theft from his employer preferred against him. When he appeared before the Commission with his Attorney, he was not given the opportunity to substantiate his defence why he should not be suspended. The Commission merely asked whether he was aware of the criminal charge of theft of Government property worth E20, 000.00 (Twenty Thousand Emalangeni) preferred against him to which he responded in the affirmative.

[48] It is not disputed that Alfred Maia was further invited by the Commission to show cause in writing why he should not be dismissed from work pursuant to the charge of theft preferred against him notwithstanding that criminal proceedings were still pending in court and he had not been convicted of the offence. He appeared before the Commission with a prepared written response on why he should not be dismissed. However, he was not allowed to address the Court but was eventually dismissed for dishonesty in terms of section 36(b) of the Employment Act of 1980.

[49] An analysis of the evidence in the Alfred Maia case and the present case shows that the essence of the complaint in both cases is that the

employees were not given the right of hearing in accordance with the rules of natural justice and in particular the principle of *audi alteram partem.* Such a dispute is not competent to be referred to the High Court as a constitutional issue under section 35(3) of the Constitution. The Industrial Court has the necessary jurisdiction and competence to deal with a dispute arising from the failure by an employer to observe the rules of natural justice.

[50] The Industrial Court is bound by the Constitution to determine whether the alleged contravention of the Bill of Rights under Chapter Three of the Constitution is genuine and not merely frivolous or vexatious. The remedy of referral under section 35(3) of the Constitution is not automatic. A mere allegation of such contravention does not suffice.

[51] The principle of constitutional avoidance is well-settled in our law that where it is possible to decide any cause, civil or criminal without reaching a constitutional issue, that course should be followed.[25]

[25] Emmanuel Dumisani Hleta v. S. R. A. and Two Others Civil Case No. 109/15 at para 15; Lillian Zwane v. Judicial Service Commission and Two Others Civil Case No. 421/15 (B) at para 14; S. V. Mhlanga 1995 (3) SA

[52] The *ratio decidendi* of the Alfred Maia case is that the Industrial Court has no jurisdiction to entertain review proceedings brought on the basis of the Common law for an alleged contravention of an employee's right to administrative justice under section 33(1) of the Constitution. As stated in the preceding paragraphs, generally the Industrial Court has exclusive jurisdiction to deal with all labour disputes arising from contracts of employment between an employer and employee during the course of employment. When discharging its mandate the Industrial Court is not exercising review proceedings. In addition the Constitution provides for a referral by the Industrial Court to the High Court of any contravention of Chapter Three of the Constitution dealing with fundamental human rights; however, the alleged contravention should not be frivolous or vexatious. The High Court is bound by the Constitution to determine the alleged contravention and refer the matter back to the Industrial Court to deal with the substance of the labour dispute.[26]

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867 CC at 895 per Kentridge AJ

[26] Section 35 (4) of the Constitution

[53] Notwithstanding the dispute procedure provided in Chapter VIII of the Industrial Relations Act establishing the Conciliation Mediation and Arbitration Commission, the Industrial Court Rules[27] provide for urgent applications as well as applications brought on notice of motion. During the hearing of the matter before this Court, the appellants' Attorney indicated that the first respondent was bound to follow the procedure laid down in Chapter VIII of the Industrial Relations Act. This contention cannot be sustained in law. In addition the Industrial Court Rules provide for the application of the High Court Rules where the Industrial Court Rules do not make provision for the procedure to be followed.[28] The Industrial Court Rules provide as follows:

> **"28. Subject to the Act and these Rules –**
>
> **(a) Where these Rules do not make provision for the procedure to be followed in any matter before the Court, the High court Rules shall apply to proceedings**

[27] Rules 7, 14 and 15 of 2007

[28] Rule 28

before the Court with such qualifications and adaptations as the presiding Judge may determine; and

(b) Where, in the opinion of the presiding Judge, the High Court Rules cannot be applied, in the manner provided for in paragraph (a), the Court may determine its own procedures."

[54] Accordingly, this Court makes the following order:

(a) The first respondent's application for condonation for the late filing of heads of argument and bundle of authorities is hereby granted.

(b) The appellants' application for the re-instatement of the appeal is granted.

(c) The order of the High Court is set aside and substituted with the following order:

(i) The matter is referred back to the Industrial Court to deal with the substance of the labour dispute in accordance with section 35(4) of the Constitution.

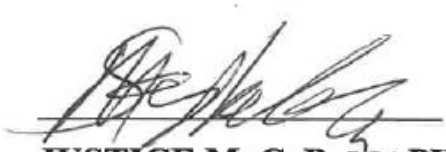
(ii) The interim order interdicting and restraining the first appellant from recruiting and filling the position of the Chief Executive Officer of the second respondent is revived and given effect in law pending finalization of the matter.

(d) No order as to costs.

For Appellants : Principal Crown Counsel Ndabenhle Dlamini

For First respondent : Attorney Derrick Jele

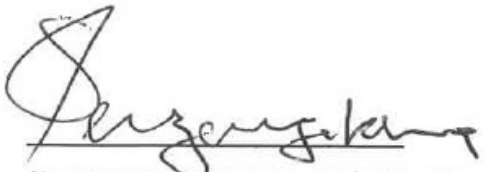
For Second respondent : Attorney Nkosinathi S. Manzini



JUSTICE M. C. B. MAPHALALA

CHIEF JUSTICE

I agree



JUSTICE S. P. DLAMINI, JA

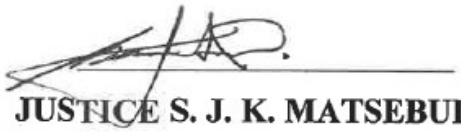
I agree

JUSTICE M. J. DLAMINI, JA

I agree

JUSTICE J. P. ANNANDALE, JA

I agree



JUSTICE S. J. K. MATSEBULA, AJA