IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 275/2022

In the matter between:

GABRIEL SITHOLE Applicant

And

ESWATINI SUGAR ASSOCIATION 1st Respondent

CONCILIATION MEDIATION & ARBITRATION COMMISSION (CMAC) 2nd Respondent

THE ATTORNEY GENERAL 3rd Respondent

In re:

GABRIEL SITHOLE Applicant

And

ESWATINI SUGAR ASSOCIATION 1st Respondent

Neutral Citation: Gabriel Sithole vs. Eswatini Sugar Association and Two Others *in re:* Gabriel Sithole vs. Eswatini Sugar Association (275/2022) [2023] SZIC129 (12 December 2023)

Coram: **V.Z. Dlamini – Judge**
(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango – Nominated Members of the Court)

LAST HEARD: 14 July 2023

DELIVERED: 12 December 2023

SUMMARY: ***Statutory Interpretation – Repeal of Statute –Implied Repeal – when applicable.***

Condonation – late filing of dispute in terms of Industrial Relations Act – Court lacks power to condone late filing of dispute under Industrial Relations Act – not applicable where dispute reported in terms of section 41 of Employment Act.

JUDGMENT

INTRODUCTION

[1] The Applicant, a liSwati male adult of Matsetsa area in the district of Lubombo was employed on the 1st May 2007 as a Warehouse Superintendent by the 1st Respondent, a company duly incorporated and registered in terms of the Company laws of Eswatini.

BACKGROUND FACTS

[2] The 1st Respondent dismissed the Applicant for misconduct on the 6th August 2009. Prior to his dismissal, criminal charges were preferred against the Applicant in respect of the same incident for which he was dismissed. The Applicant was acquitted and discharged of the criminal charges on the 1st August 2017 and subsequently attempted to report a dispute for unfair dismissal to the 2nd Respondent, but was advised that the dispute had

prescribed as it had been reported more than eighteen (18) months after the issue giving rise to it arose. In **April 2019**, the Applicant reported a complaint in respect of his dismissal to the Commissioner of Labour in terms of **section 41** of the **Employment Act, 1980**. The Commissioner of Labour entertained the dispute and subsequently issued a conciliation report to the court in terms of **section 41 (3)** of the **Employment Act.**

[3] On the 9th September 2022, the Applicant filed an application for condonation for late reporting of a dispute to the 2nd Respondent. The 1st Respondent opposed the application on the basis that in terms of **section 76 (2)** of the **Industrial Relations Act, 2000 (as amended) (IRA 2000)**, the dispute was time-barred and **section 41** of the **Employment Act** could not assist the Applicant because it was repealed by implication through the enactment of **section 76 (2)**.

[4] The main application was argued on the 29th March 2023 and in the process of writing the judgment the court observed that in 2005, Parliament enacted **section 77 (3)** and **(4)** which appear to have been a re-enactment of **Section 41** of the **Employment Act**. In our view, this observation warranted further argument not only involving the main parties, but also the 2nd and 3rd Respondents to guide the court to determine if indeed there was a re-enactment and if so, whether there was a conflict between **Section 41** of the **Employment Act** and **section 76 (2)** of the **Industrial Relations Act 2000**, and if so how to resolve it. To that extent, on the 18th April 2023 the court ordered the joinder of the 2nd and 3rd Respondents and further directed all parties to file heads of argument to address the question that had be raised.

[5] The 2nd Respondent is a body corporate established in terms of **section 62** of the **Industrial Relations Act 2000** and whose principal function is to attempt to resolve all labour disputes reported in terms of the **Industrial Relations Act**, through conciliation and to arbitrate disputes that remain unresolved, if the **Industrial Relations Act** requires arbitration.

[6] The 3rd Respondent is the principal legal adviser to all departments of the Government of the Kingdom of Eswatini including the Department of Labour, whose head is the Commissioner of Labour.

ARGUMENTS

[7] Counsel and representatives for the parties filed comprehensive heads of argument and advanced spirited and persuasive oral arguments for which the court is indebted.

3rd RESPONDENT

[8] Mr. M. Vilakati submitted that the resolution of the question whether there is a conflict between **section 41** of the **Employment Act** and **Sections 76 (2)** and **77 (3)** of the **Industrial Relations Act 2000** turned on an interpretation of the statutes and the principles of legislative drafting. Counsel proceeded to argue that it was trite law that where two conflicting statutes deal with the same subject matter and the two cannot be reconciled, the later statute is deemed to have impliedly repealed or amended the earlier legislation.

[9] Mr. Vilakati referred to a decision of the court in **Commercial and Allied Workers Union of Swaziland v The Mall Spar (Pty) Ltd [2008] SZIC 61)** and a recent decision of the Supreme Court in **Swaziland Lottery Trust (Pty) Ltd v Swaziland Revenue Authority (CIVI 65/2021) [2022] SZSC 11 (13 May 2022)** as authorities for the principles he espoused.

[10] It was Mr. Vilakati's contention that prior to the enactment of the **Industrial Relations Act, 1996 (IRA 1996)**, the Commissioner of Labour was empowered by **sections 8 (b)** and **41** of the **Employment Act** to conciliate all disputes arising from the employer and employee relationship including dismissal. Moreover, under the **Employment Act,** there was no time frame within which the employee should file a complaint with the Commissioner of Labour. Furthermore, in the case of a dismissal dispute, the Commissioner of Labour has twenty-one days to resolve the dispute and where no settlement is achieved, he or she has to submit a report of an unresolved dispute with this court.

[11] Mr. Vilakati also submitted that the effect of the enactment of the **Industrial Relations Act 1996** was the introduction of a time frame within which disputes may be reported to the Commissioner of Labour; to that extent, **section 57** of the **IRA 1996** amended **section 41** of the **Employment Act** by implication. The **Industrial Relations Act 1996** was subsequently repealed by the **IRA 2000** and the later statute re-enacted the limitation of time within which a dispute may be reported to the Commissioner of Labour.

[12] It was additionally contended by Mr. Vilakati that, **section 77** of the **Industrial Relations Act 2000** had two subsections. **Subsection (1)** concerned the contents of the report of dispute filed with the Commissioner of Labour and **subsection (2)** related to service of the report of dispute to the

other parties cited therein. On the other hand, **Section 78** of the **Industrial Relations Act 2000** regulated the powers of the Commissioner of Labour on a reported dispute. The Commissioner of Labour had to ensure that two jurisdictional requirements had been satisfied; firstly, that the provisions of **section 77** were met and that workplace dispute resolution procedures, where they existed, had been exhausted.

[13] Mr. Vilakati also argued that where the two requirements alluded to above were met, the Commissioner of Labour was enjoined to transmit the dispute to a newly established dispute resolution body known as the Conciliation Mediation and Arbitration Commission (2nd Respondent). **Section 62** of the **2000 2000** created the 2nd Respondent and **section 64** of the same Act conferred the Commission with the power to resolve disputes referred to it by the Commissioner of Labour.

[14] According to Mr. Vilakati, the combined effect of **Sections 62, 64, 76, 77** and **78** of the**2000** was that, a dispute was reported to the Commissioner of Labour who only screened the report of dispute and thereafter referred it the 2nd Respondent for dispute resolution. Counsel emphasized that by conferring the 2nd Respondent with conciliating powers, the **Industrial Relations Act 2000** amended by implication **Section 8 (b)** of the Employment Act and in that regard the Commissioner of Labour was deprived of dispute resolution powers.

[15] Mr. Vilakati's penultimate submission was that in 2005, **Sections 76** and **77** of the principal Act were amended and **Section 78** of the same Act was repealed. The effect of the amendments was that in **Section 76**, the time frame for reporting dispute was increased from six to eighteen months. Regarding

other parties cited therein. On the other hand, **Section 78** of the **Industrial Relations Act 2000** regulated the powers of the Commissioner of Labour on a reported dispute. The Commissioner of Labour had to ensure that two jurisdictional requirements had been satisfied; firstly, that the provisions of **section 77** were met and that workplace dispute resolution procedures, where they existed, had been exhausted.

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[15] Mr. Vilakati's penultimate submission was that in 2005, **Sections 76** and 77 of the principal Act were amended and **Section 78** of the same Act was repealed. The effect of the amendments was that in **Section 76**, the time frame for reporting dispute was increased from six to eighteen months. Regarding

Section 77, two new subsections were added; **Subsections (3)** and **(4)**. The addition of **subsection (3)** concerned disputes reported to the 2nd Respondent by an employee in terms of the **Employment Act**; the subsection enjoins the 2nd Respondent to assist the employee in completing the report and in serving it to the other parties cited therein.

[16] In conclusion, Mr. Vilakati argued that there was no conflict between **section 41** of the **Employment Act** and **Sections 76(2)** and **77(3)** of the **Industrial Relations Act 2000** for the following reasons. Firstly, **Section 41** of the **Employment Act** in so far as it relates to reporting of disputes to the Commissioner of Labour was amended by the **1996 Act**. The original IRA did not re-enact **Section 41** in the 2005 amendment and there was nothing in the language of the **Section 77(3)** that suggests that it is a re-enacting provision.

[17] Secondly, counsel contended that, the proposition that **section 77 (3)** re-enacted **Section 41** stems from failing to read **Section 77(3)** in context of the dispute resolution machinery created by the principal Act. In this machinery **Section 76** and not **77** is the reporting provision. **Section 77** concerns the contents of the report of dispute and is triggered when a dispute has been reported to the 2nd Respondent.

[18] Mr. Vilakati proceeded to argue that the third reason he suggests that there was no conflict between the aforesaid sections is that, the contention in favour of the re-enactment of **Section 41** overlooks the mischief which prompted the

2005 amendments. The mischief was the intermediary role of the Commissioner of Labour; the 2005 amendment removed the intermediary and enabled the aggrieved party to approach the 2nd Respondent directly. It was for that reason that **Section 78** was repealed in its entirety.

1st and 2nd RESPONDENTS

[19] Mr. L. Howe and Mr. N. Thwala for the 2nd and 1st Respondents respectively, aligned themselves fully with Mr. Vilakati's submissions. In addition to the cases cited by Mr. Vilakati on statutory interpretation and principles of legislative drafting, Mr. Howe referred to the case of **Elias V. Dlamini v The Principles Secretary in the Ministry of Agriculture and Cooperatives and Another (12/2000) [2000] SZSC 9 (12 December 2000).**

[20] Mr. Howe also contended that **rule 16** of the court on condonations does not apply against non-compliance with the eighteen months' prescription period for reporting disputes to the 2nd Respondent, because the rule was subordinate to the principal Act, which prescribed the limitation for reporting. Counsel referred to **The Interpretation Act 21 of 1970** as authority for the aforesaid proposition.

[21] On the other hand, Mr. Thwala added to Respondents' submission by arguing that even though historically, the **Employment Act** was promulgated simultaneously or in the same year as the **Industrial Relations Act, 1980 (IRA 1980)**, a prescription period for reporting disputes was only introduced when Parliament enacted the **Industrial Relations Act 1996**, which repealed

the **Industrial Relations Act 1980**. According to counsel, the introduction of a defined prescription period by the **Industrial Relations Act 2000** was an expression of the legislature's will that employment disputes should be speedily resolved. Counsel referred to the case of **Inyatsi Construction Group Holdings Limited v Roberts and Another (19/2020) [2021] SZICA 4 (10 August 2021)** as authority for the aforegoing proposition.

[22] Mr. Thwala cited more cases on top of those already cited by Mr. Vilakati and Mr. Howe in support of the principles on repeal or amendment of a statute by implication; these cases are **Swaziland Government v Mhlanga and Others (423/2017) [2018] SZHC 176 (31 July 2018); Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC); Siza Gangadvu Thwala v Rex Crim. Appeal Case No.41/99; Mabila and Other v Minister of Housing and Urban Development and Others (1366/2016) [2017] SZHC 174; Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 AD.**

[23] On the Applicant's application for condonation, Mr. Thwala submitted that, it did not meet the requirements laid down by the Supreme Court in the cases of **Prime Minister of Swaziland and 3 Others v Thulani Maseko and Others (73/2016) [2018] SZSC 01 (05/03/2018); Maria Ntombi Simelane and Nompumelelo Prudence Dlamini and Three Others Civil Appeal 42/2015** and **O.K.H. Farms (Proprietary) Limited v Cecil John Littler N.O. and Others SZSC Case No. 56/2008.**

[24] The principles laid down by the Supreme Court are *inter alia* that: the applicant must file an application for condonation as soon as he or she becomes aware of the issue requiring condonation; the applicant must give a reasonable explanation for the omission or commission; and the applicant must demonstrate that he or she has prospects of success.

APPLICANT

[25] The Applicant's representative, Mr. V. Magagula conceded to the general principles advanced by the Respondents' counsel on interpretation of statutes and legislative drafting, in particular on implied repeal or amendment of an earlier statute by a later one. Nevertheless, Mr. Magagula argued that in the absence an express repeal or amendment of **Section 41** of the **Employment Act**, the section remains in force and where a conflict exists between **Section 41** and **Section 76** of the **Industrial Relations Act 2000**, it is for the court to harmonize these provisions in order to preserve and give effect to the will of Parliament.

ADJUDICATION

[26] When this court in its ruling dated **18th April 2023** directed that the Attorney General and CMAC be joined as 2nd and 3rd Respondents in the proceedings in order to obtain their views following its *prima facie* view that **Section 77 (3)** of the **Industrial Relations Act 2000** re-enacted (revived) **Section 41** of the **Employment Act** and consequently, a conflict ensued between **Sections 76 (2)** and **77 (3)** of **Industrial Relations Act 2000**, the court had assumed without having considered whether the provisions of **Section 41** of the

Employment were indeed repealed or amended by implication by the **Industrial Relations Act 1996** and **Industrial Relations Act 2000.** Having now considered the parties' arguments, it will be seen in the course of this judgement that the question of the implied repeal or amendment of **section 41** by the **Industrial Relations Act 1996** and **Industrial Relations Act 2000** is **not** settled.

Law on Repeal of Statute by Implication

[27] The legal principles on implied repeal or amendment of an earlier statute by a later one, was eloquently articulated by Vilakati AJA in a recent decision of the Supreme Court in the case of **Swaziland Lottery Trust (Pty) Ltd v Swaziland Revenue Authority** (above) at **para 29 - 32** as follows:

> *"One of the maxims of the interpretation of statutes is "generalia specialibus non derogant." Craies on Statute Law (7ed. 1971) says the following about the maxim at page 377:*
>
> *'The general rule, that prior statutes are held to be repealed by implication by subsequent statutes if the two are repugnant, is said not to apply, if the prior enactment is special and the subsequent enactment is general, the rule of law being, as stated by Lord Selbourne in Seward v Vera Cruz [1884] 10 AC 59 at 68:*
>
> *'Now if anything is certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and*

special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.'

Commercial and Allied Workers Union of Swaziland v The Mall Spar (Pty) Ltd [2008] SZIC 61 ("CAWUSWA".) concerned the legality of deducting, without consent, agency fees from the wages of workers who were not members of a representative trade union. Section 56 of the Employment Act, 1980 ("Employment Act") only permitted an employer to deduct union dues from union members with their written consent. Furthermore section 64 made it a criminal offence for an employer to deduct union subscriptions from an employee without the employee's written consent. Section 44 of the Industrial Relations Act ("IRA") permits a representative trade union to conclude an agency shop agreement requiring the employer to deduct agency fees from the wages of workers who are not members of the union. In relation to each other section 44 of the IRA and sections 56 and 64 of the Employment Act were special enactments in that they all dealt with permissible trade union deductions from the salary of an employee. Therefore the maxim specialibus generalia non derogant was inapplicable to the facts of the case. The court held that in enacting section 44 of IRA the legislature clearly intended to allow the deduction of union dues from the wages of a non-unionised worker without his or her consent. Consequently section 44 of the IRA had impliedly amended the Employment Act. The upshot of

CAWUSWA is that where an earlier enactment and a subsequent enactment are special the earlier enactment is held to be repealed or amended by the later enactment."

[28] The Supreme Court in **Swaziland Lottery Trust** (above) at **para 33** continued to enunciate more principles of statutory interpretation as follows:

"Both parties in case at hand place reliance on Khumalo v Director General of Co-operation and Development And Others 1991 (1) SA 158 (A) a judgment of the then Appellate Division of the Supreme Court of South Africa. In that case legislation enacted in 1962 permitted oral contracts for the sale of immovable property situated in Black townships. In 1969 Parliament passed a law which required contracts for the sale of land countrywide to be in writing. One of the issues for determination was whether the 1969 legislation had impliedly repealed the 1962 law. The Court said at 164-165:

"It is of course true that in general an earlier enactment is to be regarded as impliedly repealed by a later one if there is an irreconcilable conflict between the provisions of the two enactments. There is, however, an exception to this general rule... [T]he exception applies where the earlier enactment is a special one, because it should not be presumed that the Legislature intended to repeal the special enactment if it did not make it clear that such was indeed its intention. In such a case... the later general enactment and the earlier special one should be equated with a rule and an exception thereto.

The true import of the exception therefore appears to be that, in the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. This presumption falls away, however, if there are clear indications that the legislature nonetheless intended to repeal the earlier enactment. This is the case when it is evidence that the later enactment was meant to cover, without exception, the whole field or subject to which it relates." [Our emphasis].

[29] It has been contended not only by counsel in these proceedings, but was also the opinion of the Industrial Court of Appeal (ICA) in **Usuthu Pulp Company (Pty) Ltd v Jacob Seyama & 4 Others (SZICA Case No. 01/2004)**, a decision considered to be a *locus classicus* on the subject and has been followed by the court in previous decisions, that **section 41** of the **Employment Act** being an earlier provision governing the procedure for reporting an unfair termination dispute and having no time limit for reporting such disputes, was impliedly amended by **sections 57 (3)** of the **IRA 1996 and 76 (2) of IRA 2000**, which for the first time introduced a timeframe for reporting all employment disputes.

[30] In our view, the aforegoing opinion has been a blind spot that has ignored the significance of the provisions of the repealed **Industrial Relations Act 1980** to the legislative history of labour statutes in this country. In his submissions, Mr. Thwala does mention the **Industrial Relations Act 1980** when recounting the legislative history of employment laws, but falls short of interrogating the impact of its provisions to the question vexing the court.

Decision of the ICA on the question

[31] Although it was not the first time that the provisions of **section 41** of the **Employment Act** were interpreted and read with the provisions of the **IRA** on the procedure for reporting disputes, the ICA in 2004 in the case of **Usuthu Pulp Company (Pty) Ltd v Jacob Seyama & 4 Others** (above) upheld the argument that **section 76 (2)** of the **IRA 2000** had impliedly amended **section 41**. Although the ICA did not expressly employ the underlined phrase in its judgment, the *ratio* and final order had the same effect.

[32] **Seyama** (above) was an appeal against a ruling of the court, which had held that *section 41 of the Employment Act had left a clear window for latecomers to circumvent the provisions of section 76 of the Industrial Relations Act.* Notwithstanding its holding, the court did observe that there was a need for Parliament to amend or repeal **Section 41** *'to remove the apparent contradiction in the two labour statutes and until that is done, the court could not be asked to repeal it indirectly by denying parties who have reported their disputes in terms of the Employment Act access'*. Seyama and others had reported a complaint in terms of **Section 41** eighteen years after their dismissal.

[33] Even though in the ICA, the court did not expressly hold that **section 41** was impliedly repealed by **section 76**, it held that the latter section cured the *lacuna* presented by the absence of a general Act regulating prescription. The ruling of this court was set aside by the ICA. Both this court and the ICA in the respective **Seyama** decisions did not discuss the principles of legislative

drafting and legislative history as tools to interpret the sections under review, to determine if **section 41** was indeed impliedly repealed by **section 76**.

[34] The principle stated by the ICA in **Seyama** has been applied by the court in a number of cases, including **Fanana Bongani Simon Bhembe v Ubombo Sugar Ltd (IC Case No. 423/2010); Muzi Africa Vilakati v Civil Service Commission (106/2014) SZIC 21 (April 30 2015); Thomas Themba Motsa v Usuthu Pulp Company (IC Case No. 337/2005); Tokyo P.N. Ntshangase v Swaziland National Provident Fund (195/06) [2012] SZIC 2 (March 2012).**

Legislative History of Employment Act and Industrial Relations Act

[35] We agree with Mr. Thwala that the **Employment Act** and the **Industrial Relations Act 1980** were enacted simultaneously. Both statutes received Royal assent on the 26th September 1980. Although different sections of the **Employment Act** became operational on various dates, by July 1982 they were all in force. Unlike the **Employment Act**, the **Industrial Relations Act 1980** does not state its date of operation, but **Prof. Chuks Okpaluba** in his article titled, *Labour Adjudication in Swaziland: The Exclusive Jurisdiction of the Industrial Court.* **JOURNAL OF AFRICAN LAW**, 43: 184-200 at fn 5, notes that: *"Although the Act was enacted in 1980, it did not come into operation until 1982 and the Industrial Court became functional as from July 1983 when its first President, Justice Hassanali, assumed office. See Department of Labour Annual Report 1996 at 45."*

[36] In essence, the **Employment Act** and the **IRA 1980** were promulgated and became operational in the same period. On the one hand, regarding the procedure for reporting an unfair termination complaint by an employee, **section 41** of the **Employment Act**, reads as follows:

> *"(1) Where an employee alleges that his services have been unfairly terminated, or that the conduct of his employer towards him has been such that he can no longer be expected to continue in his employment, the employee may file a complaint with the Labour Commissioner, whereupon the Labour Commissioner, using the powers accorded to him in Part II shall seek to settle the complaint by such means as may appear to be suitable to the circumstances of the case.*
>
> *(2) Where the Labour Commissioner succeeds in achieving a settlement of the complaint, the terms of the settlement shall be recorded in writing, signed by the employer and by the employee and witnessed by the Labour Commissioner: one copy of the settlement shall be given to the employer, one copy shall be given to the employee and the original shall be retained by the Labour Commissioner.*
>
> *(3) If the Labour Commissioner is unable to achieve a settlement of the complaint within twenty-one days of it being filed with him, the complaint shall be treated as an unresolved dispute and the Labour Commissioner shall forthwith submit a full report thereon to the Industrial Court which will then proceed to deal with the matter in accordance with the Industrial Relations Act."* [Underling added].

[37] On the other hand, with respect to procedures for reporting of disputes in general including dismissals, **section 50** of the **IRA 1980** read as follows:

> *"Reporting of disputes.*
>
> *(1) Subject to this section, a dispute may be reported to the Labour Commissioner only by-*
>
> *(a) an employer;*
>
> *(b) an organisation which has been recognised in accordance with section 36;*
>
> *(c) a member of the works council;*
>
> *(d) a member of a joint industrial council;*
>
> *(e) where no organisation has been recognised in terms of section 36, any other organisation active in the undertaking concerned in the dispute;*
>
> *(f) where no organisation is active in the undertaking concerned in the dispute, by any employee in the undertaking.*
>
> *(2) The Labour Commissioner shall acknowledge the receipt of any report made to him under subsection (1).*
>
> *(3) **A dispute may not be reported to the Labour Commissioner if more than six months have elapsed since the issue giving rise to the dispute first arose**, save that the Labour Commissioner may, in any case where he considers, it just, and with the written approval of the Minister, extend the time during which a dispute may be so reported to him.*

(4) For the purpose of the exercise of his approval to extend the time during which a dispute may be reported to him under subsection (3), the Minister may refer to the Court any question arising on the exercise of such approval for its recommendation and advise." [Emphasis added].

[38] For the sake of completeness, **section 2** (interpretation section) of the **IRA 1980** defined the term, *"dispute"* as:-

"dispute" includes a grievance, a trade dispute and means any dispute over —

(a) the entitlement of any person or group of persons to any benefit under an existing collective agreement or work council agreement;

(b) the existence or non-existence of a collective agreement or works council agreement;

*(c) **the dismissal**, employment, suspension from employment, re-employment or re-instatement of any person or group of persons;*

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

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

(f) the terms and conditions of employment of any employee or the physical conditions under which such employee may be required to work." [Underlining added].

[39] Furthermore, **section 57** of the **IRA 1996** read:

"Reporting of disputes.

(1) A dispute may only be reported to the Commissioner of Labour by —

(a) an employer;

(b) an organisation which has been recognised in accordance with section 43;

(c) a member of a Works Council;

(d) a member of a Joint Industrial Council;

(e) any other organisation active in the undertaking concerned in the dispute where no organisation has been recognised in terms of section 43;

(f)any employee in the undertaking where no organisation is active in the undertaking concerned in the dispute.

(2) The Commissioner of Labour shall acknowledge receipt of any report made to him under subsection (1).

(3) A dispute may not be reported to the Commissioner of Labour if more than six months have elapsed since the issue giving rise to the dispute first arose, but the Commissioner of Labour may, in any case where justice requires, and with the written approval of the Minister, extend the time during which a dispute may be reported.

(4) For the purpose of the exercise of approval to extend the time during which a dispute may be reported under subsection (3), the Minister may refer to the Court any question arising on the exercise of such approval for its recommendation and advice."

[40] It is clear from reading the above provisions of the **Employment Act**, the **IRA 1980** and **IRA 1996** that, contrary to the opinion espoused in contemporary case law, the prescription period for reporting disputes was not enacted for the first time in the **IRA 1996**; in fact, **section 57** of the **IRA 1996**, which governed reporting of disputes, was a re-enactment of **section 50** of the **IRA 1980.** It is apparent therefore that it was the will of Parliament as far back as 1982 that unfair dismissal disputes could be reported either under the **Employment Act** or **the IRA 1980**.

Earlier Court Decisions on the Dichotomy

[41] In the case of **Zeth Mfanzile Dlamini v Swaziland Liquor Distributors and Commissioner of Labour (IC Case No. 19/97)**, the respondent raised a point *in limine* that the dispute had not been lawfully reported in terms of **Part VIII** of the **IRA 1996**, as the applicant had reported a complaint in terms of **section 41** of the **Employment Act** outside of the prescribed period stipulated by **section 57** of the **IRA 1996**. Apparently, the dispute was reported in terms of **section 41** some twenty-one months after it arose.

[42] At pages **3 – 5** of the **Zeth Mfanzile Dlamini** case (above), Parker J said the following:

"Mr. Dunseith submitted in argument that it couldn't have been the intention of the legislature to provide for two mutually exclusive procedures in the reporting of disputes, one under the Industrial Relations Act and the other under the Employment Act. Such a situation, he argued, would be intolerable to the Commissioner of Labour and the Industrial Court. With

respect I cannot accept Mr. Dunseith's contention. He is wrong as far as the reporting procedure is concerned as I shall endeavour to show shortly. And I cannot see the kind of difficulty Mr. Dunseith alludes to.

As I said in Eric Khumalo v Usuthu Pulp Company Limited, Industrial Court Case No. 70/96 at p. 7, under the present industrial relations or labour law of Swaziland, either a complaint is filed by a dissatisfied employee with the Commissioner of Labour under Section 41 of the Employment Act, or a dispute is reported by a dissatisfied employee to the Commissioner of Labour under sections 57 and 58 of the Industrial Relations Act.....My view is buttressed by what the learned Acting President of the Industrial Court said in John Mdluli v Big Bend Sugar Estates, Industrial Court Case No. 29/97, at p.6- "....the procedure as contemplated in section 41 of the Employment Act, 1980 is the more appropriate dispute reporting procedure available to an applicant who does not wish to use the dispute reporting procedure which is provided for in section 57 (1) (f) of the Industrial Relations Act, 1996"

For instance, a unionized employee who does not want to be represented by an industry union and who wishes to avoid the stipulations in paragraph (b) and (f) of section 57 (1) of the Industrial Relations Act is entitled to avail himself or herself of the reporting procedure provided by section 41 of the Employment Act. (see Mdluli).

A further example is a domestic worker who is not one of a class so specified in section 57 (1) of the Industrial Relations Act which may report a dispute in terms of that section (see Thoko Shongwe v Allen Murray, Industrial Court of Appeal Case No. 10/96), and therefore cannot report a dispute under the Industrial Relations Act. Such an employee can avail himself or herself of the reporting procedure provided by section 41 of the Employment Act. I hasten to added that an employee's right to take advantage of the

in terms of that section (see Thoko Shongwe v Allen Murray, Industrial Court of Appeal Case No. 10/96), and therefore cannot report a dispute under the Industrial Relations Act. Such an employee can avail himself or herself of the reporting procedure provided by section 41 of the Employment Act. I hasten to added that an employee's right to take advantage of the reporting procedure under the Employment Act is however confined to the following instances, namely (a) where the services of the employee are unfairly terminated, and (b) where the conduct of his or her employer towards him or her has been such that he or she can no longer be expected to continue in that employer's employment.

I therefore respectfully agree with Mr. Shabangu that the law provides for two separate reporting procedures- one under the Industrial Relations Act and the other under the Employment Act

Indeed the procedure in the Employment Act has not been superseded by that in the Industrial Relations Act. The reason being that "(A) Court will not find that a statute or any provision thereof has been implicitly repealed by later legislation, unless the implication is inescapable. The intention of the legislature must be clear, and the intention to repeal must be the only possible interpretation." [Underlining appears in the original text].

[43] In addition to the decisions cited by Parker J in **Zeth Mfanzile Dlamini** (above), the following cases also applied the reasoning of Parker J with approval to determine similar points of law: **Sipho Dlamini v The Royal Swaziland Sugar Corporation (IC Case No. 52/96)**; **Paulos Tsabedze v Guard Alert Security (IC Case No. 118/99);** and **Ann Malay v Swaziland Railway (IC Case No. 32/2000).**

Sapire JP in **Thoko Shongwe v Allen Murray, (ICA Case No. 10/96)**, as opposed to the judgment of Ebersohn JA in **Jacob Seyama** (above) and those that followed that decision. We set out our reasons for doing so below.

[45] We have alluded to the fact that in arriving at the finding that **section 76** of the **IRA 2000** had created a prescription period for reporting of labour dispute, **Jacob Seyama** never considered that the provisions of **section 41** of the **Employment Act** were enacted by the Parliament during the same period as the provisions of **section 50** of the **IRA 1980**, quoted in full in paragraph 37 of this judgment.

[46] The ICA also never considered and distinguished its earlier decision in **Thoko Shongwe** and that of the court in **Zeth Mfanzile Dlamini**. It is trite law that a court is not bound by a judgment of a higher court decided *per incuriam* (where the court failed to apply a relevant provision or ignored a binding precedent) or *sub silentio* (without notice being taken or without making a particular point of the matter in question). See: **Siza Knowledge Dlamini v Eswatini Parking Recon Transportation Solution (Pty) Ltd and Another [2021] (04/2021) SZICA 157 (27 October 2021).**

[47] When the legislature simultaneously enacted both **section 50** of the **IRA 1980** (which prescribed the time limit for reporting disputes, including unfair dismissals) and **section 41** of the **Employment Act** (which did not prescribe any time restriction for reporting unfair termination and constructive dismissal complaints), it was aware of the apparent dichotomy of both provisions, but left them intact in the statute books. The principle that an earlier statute that conflicts with or is repugnant to a later one on a

specific subject is deemed to have been implied repealed by the later law does not apply where the statutes were enacted more or less simultaneously.

[48] In that regard, the Cape Provincial Division of the High Court of South Africa in the case of **Rates Action Group v City of Cape Town 2004 (5) SA 545 (C)** at para 37-39, said the following:

> "……*Secondly, the statement in the New Modderfontein case that a later statute is taken to have repealed an earlier statute which is inconsistent with or repugnant to it, is not a mechanical rule of interpretation. It is an approach which is derived from the fundamental purpose of interpretation, namely, to seek to give effect to the intentions of the Legislature. When the Legislature passes an Act which is inconsistent with or repugnant to an earlier Act, one can generally draw the inference that the Legislature intended to reverse or repeal the earlier statute. That logic does not apply to two Acts which are enacted more or less simultaneously. Under those circumstances, the inference of an intention to repeal or amend simply can not arise, except where it appears very clearly from the language used……It seems to me that, when Parliament, at about the same time, enacts two pieces of legislation which deal with a similar or related matter, it must be taken to have intended both of them to have effect, unless the contrary indication clearly appears……If one asks the real question, which is what the intention of the Legislature was, one is driven to the conclusion that it was that both of these laws should have effect."* [Emphasis added].

[49] In the context of the present matter, the exception presented by the **Rates Action Group** case (above) did not evaporate with the repeal of the **Industrial Relations Act 1980** by the **Industrial Relations Act 1996** or the subsequent promulgation of the **IRA 2000** because the prescription provisions – **Section 57 (3)** of the **Industrial Relations Act 1996** and **Section 76 (2)** of the **Industrial Relations Act 2000** – were not new provisions, they were re- enactments of the original provision – **Section 50 (3)** of the **Industrial Relations Act 1980**. For that reason, it is impossible to infer that Parliament intended to amend **Section 41**.

[50] It is immaterial that the powers of the Commissioner of Labour to conciliate labour disputes were subsequently removed from that office and conferred upon the 2nd Respondent in 2005. That change was internal in the sense that it only affected disputes reported **in terms** of the **Industrial Relations Act 2000**. There is nothing in the **IRA 2000** or the 2005 amendments that provides that all labour disputes without exception shall be reported in terms of the **Industrial Relations Act**.

[51] The contention that **section 41** of the **Employment Act** (an earlier statute) must have been impliedly repealed because the dispute reporting provisions under **Industrial Relations Act 2000** (a later law) are special provisions covering the whole field or subject to which they relate, is without merit. Once again, our view is that, the dispute reporting procedures under the **Industrial Relations Act 2000** are not new; they may have been enhanced to improve efficiency, but in substance they are similar to those of the **Industrial Relations Act 1980.** Of importance is that, save for minor additions, the definition of the term *'dispute'* under the interpretation section

covering the whole field or subject to which they relate, is without merit. Once again, our view is that, the dispute reporting procedures under the **Industrial Relations Act 2000** are not new; they may have been enhanced to improve efficiency, but in substance they are similar to those of the **Industrial Relations Act 1980.** Of importance is that, save for minor additions, the definition of the term *'dispute'* under the interpretation section of the **Industrial Relations Act 2000** is similar to that of the **Industrial Relations Act 1980.**

[52] While it is correct that the dispute reporting provisions under the **IRA** apply to all disputes generally, **section 41** appears to be the special provision because it is only in the **Employment Act** that the concept of *unfair termination* and the remedies thereto are comprehensively outlined. **Sections 35, 36** and **37** and **42** of the **Employment Act,** which specially enacted for the protection of employment remain intact; they were never transposed to the **IRA 2000.**

[53] To that extent, **Prof. Okpaluba** *op cit* writes:

> "……*The Act* [Employment Act] *guarantees employees a right not to have their services unfairly terminated. It defines the circumstances which would make a dismissal unfair as well as those that may constitute, at least on the face of it, a fair dismissal. It goes further to state that the employer must show that he/she acted "reasonably" in treating those reasons therein stated as sufficient to dismiss the employee in the circumstances of the case.~ The jurisdiction of the Industrial Court is not conferred by express enactment under the Employment Act; it can only be construed through the circuitous route*

a complaint with the Commissioner of Labour." It is from this point that the complaint under the Employment Act comes within the ambit of the machinery of dispute settlement established by the Industrial Relations Act......"

[54] We agree with the reasoning of Parker J in **Zeth Mfanzile Dlamini** (above) and all those decisions of this court and the Industrial Court of Appeal aligned to the same reasoning that, by simultaneously enacting two reporting procedures for unfair termination of services and constructive dismissal, with the one prescribing a time limit within which to report the dispute and the other having none, Parliament accorded employees a choice. The contention that the two systems are irreconcilable and give a certain class of employees an unfair advantage over another is therefore unmeritorious. Parliament is not to blame if an employee elects to report a dispute under the provisions of the **Industrial Relations Act 2000** with the full knowledge that his or her dispute contravenes the provisions of **section 76 (2)**.

[55] We would also add that, by enacting **section 41** of the **Employment Act**, Parliament put a **premium** on unfair termination of services of employees, especially those who are more vulnerable. This is clearly deduced from the long title of the **Employment Act**, which *inter alia* states that the purpose of the legislation is *to introduce new provisions designed to improve the status of employees in Swaziland* [Eswatini]. It is therefore not for the court to question the will of Parliament, but its duty is to give effect to it.

[56] That said, we agree with counsel for the Respondents, but for different reasons, that **Section 77 (3)** of the **IRA 2000 (as amended)** was not a re-enactment of **Section 41**. In the first place, **Section 41** was never impliedly repealed or amended by the **I Industrial Relations Act 1996** or its successor, the **Industrial Relations Act 2000**; there can be no discussion of re-enactment of a statute if there was never a repeal of same.

[57] Secondly, **Sections 41(3)** of the **Employment Act** and **77 (3)** of the **Industrial Relations Act 2000** are irreconcilable. **Section 41** enjoins the Commissioner of Labour to conciliate the complaint reported to him or her by the employee and if the dispute is not settled, the Commissioner of Labour is required to file a full report with this court for determination of the dispute in terms of the **Industrial Relations Act**.

[58] But **section 77 (3)** enjoins the 2nd Respondent to assist an employee who has reported a dispute with 2nd Respondent in terms of the **Industrial Relations Act** to fill in the report, and whose complaint is the violation of the provisions of the **Employment Act** covering his or her terms and conditions of employment. A dispute related to unlawful suspension (**Section 39** of the **Employment Act**) or unpaid wages or leave owed (**Sections 46** and **121** respectively) come to mind. To that extent, we totally agree with counsel for the Respondents' proposition on the import of **Section 77 (3)**.

Prospects of Condonation Application

[59] We agree with Mr. Howe that an application for condonation for late filing of a report of dispute in terms of **Section 76** of the **Industrial Relations Act**

2000 lacks prospects of success because it is premised on a rule of court, yet it is trite law that subordinate legislation cannot prevail over principal legislation. That said, for the above reasons, we are of the view that the Applicant's application for condonation for late filing of the dispute with the 2nd Respondent in terms of the **Industrial Relations Act** is misconceived.

[60] In our view, after the Commissioner of Labour deemed the dispute to be unresolved and issued a full report in terms of **Section 41 (3)**, the Applicant was entitled to urge the Commissioner of Labour to file that report with the court for determination of the dispute in terms of provisions of the **Industrial Relations Act.** There was no need for the Applicant to traverse to the other dispute reporting procedure provided by the **Industrial Relations Act.**

CONCLUSION

[61] Based on the reasons that appear in paragraphs **27 – 58** of the judgment, this court holds that the provisions of **Sections 8 (b)** and **41** of the **Employment Act** were not impliedly repealed or amended by **Sections 57** of the **Industrial Relations Act 1996** and/ or subsequently by **Sections 62, 64, 76, 77** and **78** of the **Industrial Relations Act 2000. C**onsequently, to this day **Section 8 (b)** read together with **Section 41** have force of law. Accordingly, we agree with Mr Magagula that, in the absence of an express repeal or amendment of the provisions of **Section 41**, the Applicant's matter enjoys the protection of the provisions of **Section 41 (3)** of the **Employment Act.**

[62] In the premise, the court orders as follows:

[a] The Application for condonation for late reporting of the dispute to the Commission (CMAC) is refused.

[b] The Applicant is directed to approach the Commissioner of Labour within seven (7) days to request him to submit a full report of the complaint and/ or the outcome its conciliation with the court for determination of the matter in terms of the **Industrial Relations Act 2000 (as amended)**.

[c] Should the need arise for the Applicant to give effect to order [b], leave is granted to him to approach the court.

[d] There is no order for costs.

The Members agree.

V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT	:	Mr. V. Magagula (Labour Consultant)
FOR 1ST RESPONDENT	:	Mr. N. Thwala (Thwala & Associates)
FOR 2ND RESPONDENT	:	Mr. L. Howe (Howe Masuku Attorneys)
FOR 3RD RESPONDENT	:	Mr. M. Vilakati (Attorney General's Chambers)